

ROSCOE'S DIGEST
OF THE
LAW OF EVIDENCE

ON THE TRIAL OF
Actions at Nisi Prius.

ELEVENTH EDITION.

BY

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ADVERTISEMENT TO THE ELEVENTH EDITION.

THE merits of this work, at originally published by Mr. ROSCOE, cannot now be doubted. The opinion of the profession has been clearly shown by the extraordinary rapidity with which successive editions have been demanded.

But this demand has rendered the task of editor extremely difficult. The time available for preparing each successive edition for publication has been far too short ; and the number of different hands through which the work has necessarily passed has rendered it impossible to preserve uniformity of plan.

Added to this, the bulk and variety of the law which has been created since the first edition in 1827 is unprecedented ; and the difficulty of arranging and digesting the law has been greatly increased by the crude and unscientific form in which it has frequently been enunciated.

Most of the cases decided down to the end of Trinity Vacation in the present year are inserted in the body of the work : the remainder, together with a few cases of Michaelmas Term, will be found in the Addenda.

December, 1865.

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ADDENDA ET CORRIGENDA.

Page 21, line 5 from top, add, "See also *Burgess v. Wickham*, 33 L. J. (Q. B.) 17; 3 B. & S. 669; *Clapham v. Langton*, 34 L. J. (Q. B.) 46."

Page 26, line 9 from bottom, add, "In *Lindley v. Lacey*, 34 L. J. (C. P.) 7, the plaintiff, by a written agreement, was authorised to settle another action; and it was held that he might show that, by a contemporaneous oral agreement, it was made an absolute condition of the written agreement being performed, that the plaintiff should settle the other action."

Page 31, line 28 from top, add, "*Lindley v. Lacey*, 34 L. J. (C. P.) 7."

Page 56, line 20 from bottom, for "*Godbold*," read "*Godbolt*."

Page 65, after line 2 from top, insert, "In an action against a railway company for detention of goods delivered to them to be carried, the admissions of a servant of the company's as to the cause of the detention have been rejected; *Great Western Railway Co. v. Willis*, 18 C. B. N. S. 748; 34 L. J. (C. P.) 195."

Page 75, before line 8 from bottom, insert the following paragraph:—

"*Court Rolls*.—In order to prove the title of a copyholder, the court rolls may be produced without producing the stamped copy; *Doe v. Hall*, 16 East, 208; or they may be proved by examined copies; *Doe v. Mee*, 4 B. & Ad. 617; *Breeze v. Hawker*, 14 Sim. 350; or by the stamped copy delivered and signed by the steward; *Littlet*, s. 75; 1 *Scriven*, Copyh. 590; *Peake*, *Evid.* 94. And where an admittance is more than thirty years old, proof of the signature of the steward is unnecessary; *Dean and Chapter of Ely v. Stewart*, 2 Atk. 45; *Rowe v. Brenton*, 3 M. & R. 296; but see *Duke of Somerset v. France*, *Fortescue*, 43. Whether court rolls of a manor may be proved by a copy certified by the steward having them in his custody, under s. 14 of Act 14 & 15 Vict. c. 29, is open to question. A surrender and presentment may be proved by the draft of an entry, produced from the muniments of the manor, and the parol testimony of the foreman of the homage jury who made the presentment: *Doe v. Calloway*, 6 B. & C. 484. And such a draft is admissible though there may have been a subsequent regular enrolment; *Ibid.* 495. And if the original roll is put in, it may be shown to be incorrect by producing the minute of the steward, or by other evidence; *Ibid.* 494; 1 *Scriven*, 253. Where a surrender was made in 1774, and there was no record of it on the court rolls, the books of the manor containing a record of the admission, which recited the surrender, were received as evidence of the surrender; *R. v. Thruscross*, 1 Ad. & E. 126. As to the use of a copy where the original rolls are lost, see *Green v. Proude*, 1 Ventr. 257. A presentment in a manor book will not be rejected because part of it has been cut off, there being no ground for supposing the mutilation to be fraudulent; *Evans v. Rees*, 10 Ad. & E. 151.

"By the Stamp Act, 55 Geo. 3, c. 184, court rolls need not be stamped; but surrenders and admittances out of court, and copies of surrenders and admittances made in court, must be duly stamped as in the schedule of the act: or since 10th October, 1850, the schedule of 13 & 14 Vict. c. 97, unless it be a surrender to the use of a will. A surrender out of court may be proved by an unstamped copy; *Doe v. Mee*, 4 B. & Ad. 617. A mere examined copy, proved in evidence, requires no stamp; for the 'copy' mentioned in the schedule means the copy delivered by the steward under sect. 33 of the act; *Doe v. Freeman*, 12 M. & W. 844. As between surrenderer

and surrenderee, the court rolls, containing a presentment of a surrender out of court, appear to be primary evidence of the surrender, without producing the original stamped surrender; *Doe v. O'ley*, 12 *Ad. & E.* 481.

Page 81, line 9 from top, for "161," read "16."

Page 130, line 6 from top, add, "The indorsee, without notice, of a post-dated cheque payable to bearer, and stamped with a penny stamp, may sue the maker; *Austin v. Bunyard*, 34 *L. J. (Q. B.)* 217."

Page 167, line 26 from bottom, after 181, add, "In *Mortimer v. Bell*, Mich. T. 1865, 14 *W. R.* 68, Cranworth, C., held that the bidding by two persons for the vendee vitiated the sale, and observed that there had been no decision of a court of appeal in Chancery upholding the practice of puffing even by a single bidder."

Page 157, line 20 from bottom, after "contract," add, "There no principal was disclosed, and the Court differing in opinion, no absolute judgment was pronounced. See the judgment in *Mamprice v. Westley*, 34 *L. J. (Q. B.)* 229; in which it was held that though the sale was advertised as without reserve, the auctioneer was not liable, as a reference was made by name to the solicitor of the mortgagee by whose direction the sale was represented to be made."

Page 175, last line, after "94," add, "*McCall v. Taylor*, 34 *L. J. (C. P.)* 365; 19 *C. B. (N. S.)* 301."

Page 178, line 29 from top, after "partners," add, "See also, *ex parte Darlington Banking Company*, 34 *L. J. (Bank.)* 10."

Page 206, line 27 from top, after "took the bill," add, "That case was commented upon in *Hogg v. Skeen*, 34 *L. J. (C. P.)* 153; 18 *C. B. (N. S.)* 426, in which it was held that, on a traverse of the acceptance by the defendants, upon proof that the partner accepting had done so in fraud of the firm, and had no authority to accept in the name of the firm, it lay on the plaintiff to prove that he gave value for the bill."

Page 208, line 20 from bottom, after "consideration," add, "and see the Bankruptcy Statutes 12 & 13 Vic. c. 103, s. 202, and 24 & 25 Vic. c. 134, s. 166, and cases *post*, p. 730."

Page 213, line 6 from top, after "the note," add, "And see *Bailey v. Edwards*, 34 *L. J. (Q. B.)* 41; 4 *B. & S.* 761."

Page 214, at bottom, add, "In *Miller v. Biddle*, Mich. T. 1865, 14 *W. R.* 110, the majority of the Court of Exchequer held a note payable to the payee (without order, and therefore not negotiable) by instalments, with a condition that the whole should become payable in default in payment of any instalment, was within the Statute of Anue, and that the maker was therefore entitled to the days of grace; on the authority of *Smith v. Kendal*, 6 *T. R.* 123; *Oridge v. Sherborne*, 11 *M. & W.*, 374; and *Carlton v. Kenealy*, 12 *M. & W.* 139; Pollock, C. B., dissenting."

Page 217, line 23 from bottom, after "248," add, "And this decision was followed in favour of an innocent holder as to a cheque payable to bearer on demand, in *Austin v. Bunyard*, 34 *L. J. (Q. B.)* 217."

Page 234, line 6 from top, for "3 *H. & C.* 176," read "3 *H. & C.* 209."

Page 234, line 12 from top, after "283," add, "In *Farnworth v. Hyde*, 34 *L. J. (C. P.)* 207; 18 *C. B. (N. S.)* 835, where a stranded vessel was in danger of falling to pieces, and the captain sold her cargo, consisting of timber, the expense of forwarding it to its destination being greater than its value when forwarded, the assured was held entitled to recover for a total loss without notice of abandonment."

Page 234, line 19 from top, after 593, add, "In *Kemp v. Halliday*, 34 *L. J. (Q. B.)* 233, Blackburn, J., held (Shree, J., dissenting), that where a ship had been sunk in deep water with cargo on board, so that it could not be got out without raising the ship, the cost of raising was general average to which the cargo must contribute; and in such a case, in order to ascertain whether a ship is a constructive total loss, the sum to be contributed by the cargo as general average must be taken into account; and if, after deducting that sum, the remaining cost of raising, together with the cost of repairs of the ship, is less than her value when repaired, the ship is not a total loss. This case is now pending in the Exchequer Chamber."

Page 234, line 16 from bottom, after "225," add, "And see *Farnworth v. Hyde*, 34 *L. J. (C. P.)* 207; 18 *C. B. (N. S.)* 835."

Page 237, line 24 from bottom, after "651," add, "A similar principle was adopted in *Tobin v. Harford*, 32 *L. J. (C. P.)* 134; affirmed in *Ex. Ch.*, 34 *L. J. (C. P.)* 37; 18 *C. B. (N. S.)* 528."

Page 240, line 7 from bottom, after "408," add, "If the master load contrary to the statute without the knowledge of his owner, the owner may recover on an insurance of freight; *Wilson v. Rankin*, 34 *L. J. (Q. B.)* 62; affirmed in *Ex. Ch.* after *Mich. T.* 1865."

Page 241, line 10 from bottom, after "204," add, "34 *L. J. (Q. B.)* 21."

Page 244, line 20 from top, after "77," add, "As to the construction of a policy against injury from external violence, see *Fitton v. Accidental Death Insurance Co.*, 34 *L. J. (C. P.)* 28; 17 *C. B. (N. S.)* 122."

Page 245, line 19 from bottom, after "note," add, "A damage sustained by atmospheric concussion caused by an explosion of gunpowder at a distance, is not a damage insured against in a policy against loss occasioned by fire; *Everett v. London Assurance Co.*, 34 *L. J. (C. P.)* 299."

Page 254, line 13 from bottom, after "*Commission*," add, "So decided in *Backhouse v. Hall*, 34 *L. J. (Q. B.)* 141. Three persons carried on the business of shipbuilders under the names of 'G. W. and W. J. Hall.' No person of that name had been in the partnership for some time, and the plaintiff and defendant being both aware of the constitution of the partnership, the defendant gave the plaintiff the following guarantee,—'In consideration that you have at my request consented to open an account with the firm of G. W. and W. J. Hall, shipbuilders, I hereby guarantee the payment to you of the monies that at any time may become due not exceeding £5000.' Held, that the guarantee ceased on the death of one of the partners, as a contrary intention did not appear by necessary implication, or from the nature of the firm; *S. C.*"

Page 256, line 13 from bottom, after "96," add "34 *L. J. (C. P.)* 105; 17 *C. B. (N. S.)* 708."

Page 264, line 12 from top, after "337," add, "15 *C. B. (N. S.)* 173."

Page 274, line 11 from bottom, after "74," add, "*Prestwich v. Poley*, 34 *L. J. (C. P.)* 189; 18 *C. B. (N. S.)* 806. See, however, *Green v. Crockett*, 34 *L. J. (Ch.)* 606."

Page 288, line 21 from bottom, after "299," add, "In *Kershaw v. Ogden*, 34 *L. J. (Ex.)* 159; 3 *H. & C.* 717, the defendants agreed to purchase of the plaintiffs four specific stacks of cotton waste at so much per lb. They sent their own packer with their sacks and their own carts to fetch it; their packer packed the waste in 81 sacks; 21 were weighed, and loaded in the defendants' carts, and taken to the defendants' premises; the other sacks were not weighed. On arrival of the 21 sacks, the defendants refused to accept any of the waste, on the ground it was of inferior quality to that purchased; and it was held that there was evidence of an acceptance and receipt."

Page 289, line 26 from bottom, after "765," add, "See *Smith v. Hudson*, 34 *L. J. (Q. B.)* 145."

Page 291, line 17 from top, after "843," add, "The letter referring to the terms of the contract need not be to the other party to the sale. Thus when the defendant's agent bought for him a mare of the plaintiff, and the agent wrote to the defendant telling him the purchase he had made of the plaintiff (naming him), and the price, and the defendant wrote back saying he would send the agent a cheque for the mare 'which you have purchased for me,' these letters were held a sufficient memorandum; *Gibson v. Holland*, *C. P.*, *Mich. T.* 1865; 14 *W. R.* 86."

Page 303, line 26 from top, after "*damages*," add, "See *Borries v. Hutchinson*, 34 *L. J. (C. P.)* 169; 18 *C. B. (N. S.)*, 445. On a contract to sell cotton of a certain quality at a certain price, to be delivered at a future time, the measure of damages for non-delivery is the difference between the contract price and the market price at the time limited for delivery; and the buyer cannot recover for his loss of profit which he would have made by car-

rying out a re-sale, at a higher price, made in the interval between the contract and the time for delivery; *Williams v. Reynolds*, 34 *L. J. (Q. B.)* 221."

Page 311, line 10 from top, after "*supra*," add, "By stat. 23 & 29 Vict. c. 86, s. 1, a loan, with a stipulation for interest varying with the profits of the business of the borrower, is not to make the lender a partner, or make him responsible as such. By s. 2, a contract for remuneration of a servant or agent by a share in the profits of the employer's business is not to make the servant or agent responsible as a partner, nor give him the rights of a partner. By sect. 3, the widow or child of a deceased partner, receiving as an annuity a portion of the profits of the business, is not to be deemed a partner, or subject to liabilities incurred by the partnership. And, by sect. 4, a person, selling the goodwill of a business, and receiving in return an annuity out of the profits, is not to be deemed a partner, nor subject to the liabilities of the person carrying on the business."

Page 312, line 24 from top, after "timber," add, "See *Bullen v. Sharp*, 34 *L. J. (C. P.)* 174; 18 *C. B. (N. S.)* 614."

Page 314, line 17 from top, after "110," add, "See *Collingwood v. Berkeley*, 15 *C. B., N. S.*, 145."

Page 315, line 3 from top, after "Part III.," add, "and *Ornamental Wood-work Co. v. Brown*, 2 *H. & C.* 63."

Page 315, line 18 from top, after "627," add, "*Harrison v. Grady*, *C. P.*, Mich. T. 1865."

Page 318, line 5 from top, after "42," add, "*Harrison v. Grady*, *C. P.*, Mich. T. 1865."

Page 327, line 23 from top, after "230," add, "and *Clarke v. Watson*, 34 *L. J. (C. P.)* 148; 18 *C. B. (N. S.)* 278."

Page 339, line 9 from top, after "926," add, "and if the vendor demand the money of the solicitor before the question as to the title is settled, the solicitor is bound to hand it over; and if he do not, interest may be recovered against him from the demand; *Edgell v. Day*, *C. P.*, Mich. T. 1865; 14 *W. R.* 87."

Page 341, line 27 from top, after "724," add, "The defendant, a broker, received £800 from the plaintiffs to purchase a certain number of bales of cotton, and he made a contract in his own name for a larger number; it was held that the plaintiff could recover the money back, as money had and received, as the consideration had wholly failed, the defendant not having made a contract upon which the plaintiffs could sue; *Bostock v. Jardine*, 34 *L. J. (Ex.)* 142; 3 *H. & C.* 700."

Page 355, line 19 from bottom, after "72," add, "A letter of application for a loan till a day certain, not showing on the face of it an obligation to repay, is not an instrument by virtue of which the debt is payable at a certain time; *Taylor v. Holt*, 34 *L. J. (Ex.)* 1; 3 *H. & C.* 452."

Page 365, line 15 from bottom, after "package," add, "As to any parcel delivered after 30 Sept. 1865, the word 'lace' in the section is not to extend to machine-made lace; 28 & 29 Vict. c. 94."

Page 366, line 22 from top, after "owner," insert, "Where a carrier makes one contract to carry by land and sea, and goods are lost on the land journey, the carrier is within the protection of the Act; *Le Conteur v. London and South-Western Railway Co.* (*Q. B.*), Mich. T. 1865; 14 *W. R.* 30."

Page 371, line 8 from bottom, add, "*Hodgman v. Midland Railway Co.*; affirmed in *Ex. Ch.*; East. T. 1865; 13 *W. R.* 758."

Page 373, line 6 from bottom, after "96," add, "*Rice v. Bazendale* was much discussed in *O'Hanlan v. Great Western Railway Co.*, 34 *L. J. (Q. B.)* 154. In which it was held that, in an action against a carrier for the loss of a parcel of goods, the measure of damages is in general the market value of the goods at the place and time at which they ought to have been delivered; and if there is no market for the sale of such goods at the place, the jury must ascertain their value by taking their price at the place of manufacture, together with the cost of carriage, and allowing a reasonable sum for importer's profits."

Page 375, line 11 from bottom, after "308," add, "*Le Conteur v. London and South-Western Railway Co. (Q. B.)*, Mich. T., 1865; 14 *W. R.* 80."

Page 376, line 23 from bottom, after "385," add, "Nor are title deeds and money for use in certain causes in which the plaintiff was engaged as an attorney; *Phelps v. London and North-Western Railway Co.*, 34 *L. J. (C. P.)* 259."

Page 382, line 14 from top, add, "As to accord and satisfaction in actions for defamation, see *infra*, p. 525."

Page 385, add, after the reference to the case of *Lee v. Jones*, "Affirmed in *Ex. Ch.*, 17 *C. B. (N. S.)* 482; 34 *L. J. (C. P.)* 131."

Page 389, line 23 from bottom, add, "A female infant, who has no property of her own to settle, may contract with a solicitor for the expenses of marriage settlement; *Helps v. Clayton*, 34 *L. J. (C. P.)* 1."

Page 396, line 2 from top, add, "But there is no authority for the rule which has been sometimes laid down, that an executor may bring an action after the time limited by the statute, even although the testator has not commenced an action, if he bring it within a reasonable time; *Penny v. Brice*, 18 *C. B., N. S.*, 397."

Page 396, line 6 from top, add, "The accommodation acceptor of a bill of exchange was sued upon it by the holder, whereupon he paid it, and sued the person for whose accommodation he accepted for money paid to his use. It was held, that he might do this within six years after payment of the bill, though more than six years after the bill became due; *Angrove v. Tippet*, 11 *L. T., N. S.*, 708."

Page 414, line 8 from bottom, insert, "See as to the operation of a composition deed under the Bankruptcy Acts as a release, *infra*, p. 738."

Page 436, at bottom, "Defendant was lessee of a house, and plaintiff reversioner. Before the end of the lease the plaintiff arranged with a third person, by an agreement which was not binding, that he should have a lease at the end of term, upon condition that he pulled down and rebuilt the premises. In an action by the plaintiff on the covenant to repair, it was held that this arrangement ought not to be considered by the jury, and that the judge was not bound to direct them to give only nominal damages; *Rawlings v. Morgan*, 34 *L. J. (C. P.)* 184."

Page 439, line 21 from top, add, "The defendant, with power only to grant leases in possession, granted to the plaintiff a reversionary lease. The plaintiff obtained a fresh lease from the person having good title, and sued the defendant on the covenant for quiet enjoyment. The defendant pleaded that the plaintiff did not enter into possession under the lease, and that the person entitled did not claim the premises or threaten to oust the plaintiff. It was held that the first of these pleas afforded no defence, and that the plaintiff was entitled to judgment on the other, and that in estimating the damages, the plaintiff was entitled to the difference in the expenses and value of the void and of the valid lease; *Lock v. Furze*, 34 *L. J. (C. P.)* 201."

Page 462, line 12 from bottom, "A footpath entered by swing gates, crossed a railway on a curve at a short distance from a bridge which partially obstructed the view of trains. The plaintiff, who was deaf of one ear, was injured by a down train while his attention was attracted by the passing of an up train. It was held that there was evidence of negligence by the company, although there were no statutory provisions for the safety of foot passengers such as the plaintiff; *Bilbee v. The London & Brighton Railway*, 18 *C. B. (N. S.)* 584; 34 *L. J. (C. P.)* 182. But see *Stapley v. The London and Brighton Railway*, 14 *W. R.* 132."

Page 468, line 6 from bottom, "But in *Lee v. Riley*, 18 *C. B. (N. S.)* 722; 34 *L. J. (C. P.)* 212, where, through the defect of a gate which the defendant was bound to repair, the defendant's horse strayed into a field belonging to the plaintiff, and kicked the plaintiff's horse: it was held that the plaintiff was entitled to recover, as the damage resulted from a trespass for which the defendant was responsible."

Page 472, line 11 from top, "Where the level crossing between the platforms of a railway station was blocked by the train in which the plaintiff arrived, and

the plaintiff, following a practice assented to by the company, crossed the lines round the end of the train, and in doing so, stumbled over a hamper and was injured : it was held that there was evidence of negligence on the part of the company ; *Nicholson v. The Lancashire and Yorkshire Railway*, 34 *L. J. (Ex.)* 84."

Page 472, line 20 from top, "The defendant sent cotton bales to a warehouse, where they were insecurely piled under the directions of the warehouse-keeper, so that the plaintiff, a servant of the owner of the warehouse, was injured. It was held that there was no evidence of negligence on the part of the defendant, although those who piled the cotton were in his employment ; *Murphy v. Caralli*, 3 *H. & C.* 462 ; 34 *L. J. (Ex.)* 14."

Page 475, line 21 from top, "The traveller of a brewer, while journeying as a passenger by the railway of the defendants, was injured by their negligence. It was held that the brewer, not being a party to the contract of carriage, could maintain no action against the defendants for the loss of service ; *Alton v. The Midland Railway*, 19 *C. B. (N. S.)* 213 ; 34 *L. J. (C. P.)* 292."

Page 477, line 7 from top, "So it was held that a person in the employment of a railway company, engaged in painting a shed on their premises, was the fellow-servant of a person who was employed to turn carriages on a turn-table ; *Morgan v. The Vale of Neath Railway*, 33 *L. J. (Q. B.)* 260 ; affirmed in *Ex. Ch., Mich. T.* 1865."

Page 477, line 8 from top, "Plaintiff, a stonemason in the defendant's mill, which had been built a year before under the superintendence of their clerk, was injured by an accident owing to the weakness of its foundations. It was held that there was no evidence of negligence by the defendants ; *Brown v. The Accrington Cotton Spinning Company*, 3 *H. & C.* 511 ; 34 *L. J. (Ex.)* 208."

Page 522, line 11 from top, "But in *Cowles v. Potts*, 34 *L. J. (Q. B.)* 247 ; the plaintiff, trustee of a charity and a farm bailiff, requested C. to obtain signatures protesting against plaintiff being compelled to resign the trust. Defendant, when requested by C. to sign, said that he would not keep a big rogue like the plaintiff in the trust. Pressed to give his reasons, he said in the course of the same discussion, that the plaintiff had left the parish under discreditable circumstances, without settling with his creditors. The jury having found that there was no malice, it was held that the words were spoken on a privileged occasion."

Page 525, line 27 from top, "Where a railway company stated in a notice that the plaintiff had been fined, with an alternative of three weeks' imprisonment, when the period was really fourteen days : it was held that it was a question for the jury whether the libel was substantially true ; *Alexander v. The North Eastern Railway*, 34 *L. J. (Q. B.)* 152."

Page 559, line 20 from top, after "entry," add, "So of an assignee of a term ; *Ryan v. Chapman*, 14 *Q. B.* 73 ; 18 *L. J. (Q. B.)* 270 ; *Harrison v. Blackburn*, 34 *L. J. (C. P.)* 109."

Page 564, line 23 from top, "See *Lee v. Riley*, 34 *L. J. (C. P.)* 212."

Page 585, line 34 from top, "A cattle dealer, by bill of sale, assigned to the defendant all his effects then being or thereafter to be upon or about his dwelling house. The bill of sale also contained a power for the defendant, if a sum of money were not paid by the assignor, on demand, to enter the house and distrain the goods there found. It was held that a demand on the wife of the assignor was not sufficient to justify the defendant in distraining goods brought into the house after the bill of sale ; *Balding v. Read*, 34 *L. J. (Ex.)* 212."

Page 614, line 7 from bottom, after "346," add, "Where a man enclosed waste land, and died after he had been in possession less than twenty years, the heir of the person to whom he had devised it, was held entitled to maintain ejectment against a person who had entered upon the land, and could not show title or possession prior to the testator ; *Asher v. Whitlock*, *Q. B., Mich. T.* 1865 ; 14 *W. R.* 26."

Page 733, line 6 from top, after "189," add, "34 *L. J. (Bank.)* 46."

Page 733, line 16 from bottom, after "*Turquand v. Moss*," add, "*Whitaker v. Lowe* was affirmed in *Ex. Ch., after Mich. T.* 1865."

Page 738, line 4 from top, after "361," add, "34 *L. J. (Ex.)* 217."

Page 738, line 24 from top, after "844," add, "34 L. J. (Ex.) 193."

Page 739, line 12 from bottom, after "258," add, "To an action by the trustees under a deed of composition, it was held no answer that, before notice of the deed, the defendant had paid the amount of the debt under a garnishee order, if the deed was registered before the payment; *Wood v. Dunn*, Q. B., Mich. T. 1865; 14 W. R. 84. So to action by the trustees, the defendant may plead a set-off for rent accrued due before registration, though after execution of the deed; *Stranger v. Miller, Ex.*, Mich. T. 1865; 14 W. R. 108."

In addition to the cases cited on composition deeds, the following cases may be added as decided in the Q. B., Mich. T. 1865:—*Buvelot v. Mills*, 14 W. R., 98; *Haselgrove v. House*, 14 W. R. 128; *Bond v. Weston*, *European Central Railway Co. v. Westall*, not yet reported.

DIGEST
OF THE
LAW OF EVIDENCE
ON THE TRIAL OF
Actions at Nisi Prius.

A DIGEST, &c.

PART I.

EVIDENCE IN GENERAL.

PRODUCTION OF DOCUMENTS.

When necessary.] It is a general rule of evidence that the contents of a written document cannot be proved in any other manner than by the production of the written document itself.

There exist certain cases of a special character, in which the application of the rule is dispensed with, which will be noticed presently; otherwise, the application of it is extremely strict.

It is necessary to notice some of the decisions in order to show the class of cases which falls within the rule and the exceptions to it.

In trover to recover a written instrument the general nature of it, so far as is necessary to prove its existence and identity, may be shown, without producing it; *Bucher v. Jarratt*, 3 B. & P. 143; *How v. Hall*, 14 East, 275; the particular terms of the instrument not being in dispute. So payment of money is constantly proved orally, though a receipt has been given; *Rambert v. Cohen*, 4 Esp. 213. So where the fact to be proved was, that a certain person occupied land so as to gain a settlement under the 13 & 14 Car. 2, c. 12, it was held that, although there was a written demise, the mere fact of occupation might be proved by parol; *R. v. Holy Trinity*, 7 B. & C. 611; 1 M. & R. 444. But the parties to the lease, the amount of rent, and the terms of the tenancy, can only be shown by the writing; *Ib.*; *Strother v. Barr*, 5 Bing. 136; *R. v. Merthyr Tydvil*, 1 B. & Ad. 29. So the landlord cannot prove the amount of rent due without producing the written lease, if there is one; *Augustien v. Challis*, 1 Ex. 279. Nor can he, under similar circumstances, prove that he was the person who let the tenant into possession; *Doe v. Harvey*, 8 Bing. 239. Where a written demand to deliver up certain goods was served on the defendant, and he was at the same time orally required to do the same thing, it was held by Lord Ellenborough at Nisi Prius, that, in order to prove conversion, the oral demand might be relied on, and that the written one need not be produced; *Smith v. Young*, 1 Camp. 439. In *Alderson v. Clay*, 1 Stark. 405, the defendant was proved to have acted on several occasions as chairman of the meetings of the G. and F. Waterworks Co., the members of which were associated under a private deed of partnership, and a witness

also stated that the defendant was a proprietor; Lord Ellenborough held that, to establish the fact of the defendant being a member of the society, the deed of association need not be produced. Where it is necessary to prove a marriage, the entry in the parish register is not the only evidence, but the fact may be proved by the testimony of persons who were present and witnessed the ceremony, or, in some cases, by reputation; *Evans v. Morgan*, 2 C. & J. 453. On an indictment for an unlawful assembly it was held that the resolutions passed at a meeting might be proved by parol, although they were read to the meeting from a paper; *R. v. Hunt*, 3 B. & A. 566.

The counterpart of a deed is primary and not secondary evidence; *Burleigh v. Stibbs*, 5 T. R. 465; *Houghton v. Kæmig*, 18 C. B. 235.

A memorandum not intended to be final will not in any way prevent the introduction of parol evidence of a contract; *Doe v. Cartwright*, 3 B. & A. 326; and see *Hawkins v. Warre*, 3 B. & C. 698. Where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent for the purpose of assisting his recollection, but is not signed by the vendee, the contract may be proved by parol; *Dalison v. Stark*, 4 Esp. 163. The defendant gave a verbal warranty of a horse, which the plaintiff thereupon bought and paid for. The defendant then gave him the following memorandum:—"Bought of G. P. a horse for the sum of £7 2s. 6d.—G. P." It was held that the plaintiff might give evidence of the verbal warranty, apparently on the ground that this document was only an informal receipt, and was not intended by either party as a memorandum of his obligations; *Allen v. Pink*, 4 M. & W. 140.

In the case of *Whitford v. Tutin*, 10 Bing. 395, it was held that a person who accepted an engagement as secretary, under a society, on the terms contained in a resolution entered in the society's book, was bound to produce the book in an action for his salary, though not a party to the resolution. There it is evident that the hiring was expressly upon the written terms, though the writing was not in itself a contract.

The general proposition established by the cases seems to be that a mere proposal, memorandum, private minute, or unauthorised entry of one of the parties, will not exclude oral proof. But where a contract expressly incorporates, or refers to, a written paper as part of its terms, that paper ought to be produced, because then the contents of it are in dispute. See *Hill v. Nuttall*, C. P., *Hil.* 1864.

If, in an action for work and labour, it appears that the claim is for extras on a written contract, the written contract must be produced; *Vincent v. Cole*, *Mood. & M.* 257; *Buxton v. Cornish*, 12 M. & W. 426. But if an entirely separate order be given for the extras, then production of the written contract is not necessary; *Reid v. Batta*, *Mood. & M.* 413.

A declaration stated that the defendant agreed to transfer a farm held by him under S. to the plaintiff, upon the terms and conditions under which the same was held by the defendant, and alleged as a breach that the defendant did not transfer. The defendant pleaded non-assumpsit. It was held that the lease from S. to the defendant need not be produced; *Wallis v. Littell*, 31 L. J. (C. P.) 100; 11 C. B. N. S. 369.

If oral evidence of an agreement is offered at a trial, the party desirous of excluding it may interpose, and ask the witness whether it was not in writing; and may inquire as to the contents of the

writing, so far as may be necessary, to show that it is such as to render parol evidence inadmissible; *Curtis v. Greated*, 1 *Ad. & E.* 167.

The proper evidence of all judicial proceedings is the production of the proceedings themselves; *Thellusson v. Shedden*, 2 *N. R.* 228; or some specially authenticated copy of them. It has even been held that parol evidence is not admissible of the day on which a cause came on to be tried; as the proper proof is the postea; *Thomas v. Ansley*, 6 *Esp.* 80. But, if the particular day on which a trial takes place is material, the record, from which it would appear that the whole assizes took place on one day, is not conclusive; *Roe d. Wrangham v. Hersey*, 8 *Wils.* 274; *Whitaker v. Wisbey*, 12 *C. B.* 52, 21 *L. J. (C. P.)* 116; and perhaps it may be doubtful, therefore, whether the alleged decision in *Thomas v. Ansley* would be adhered to, as it seems hardly worth while to insist on the production of a document which can give no information on the point at issue. Where, to prove that the plaintiff had been discharged under the Insolvent Act, it was proposed to give in evidence his admission to that effect, Lord Ellenborough held it insufficient; *Scott v. Clare*, 3 *Camp.* 236; but see the cases cited *post*, tit., "*Admissions*." Parol evidence is not admissible to prove the taking of oaths required by the Toleration Act, which must appear by the records of the court where the oaths were taken; *R. v. Hube, Peake, N. P. Ca.* 132.

Where the deposition of a witness in a case of misdemeanor was taken under 7 *Geo. 4*, c. 64, s. 3, and the plaintiff in an action against the witness offered parol evidence of an admission made by him in such deposition, the court held such evidence to have been rightly rejected; *Leach v. Simpson*, 5 *M. & W.* 309. See, as to how far the return of the magistrate is conclusive, *Rosc. Cr. Ev.* 6th ed. p. 64.

It does not necessarily follow that, because the written memorandum is the exclusive evidence of a contract between the parties to it, that it should be so, if for any reason it becomes necessary to inquire into its nature in a dispute between other persons, as for instance between two parishes in a settlement case as to the terms of a purchase, or a deed of apprenticeship. This is a question which deserves to be, but has not yet been thoroughly examined.

How procured.] The production of written documents is procured by serving the person in whose possession or control the documents are with a writ, ordering him to appear and produce the documents, called a *subpœna duces tecum*; or, if he be a party to the cause, with a simple notice to produce them. The consequences of a party disobeying a writ of *subpœna duces tecum* are precisely the same as those of disobedience to a writ of *subpœna ad testificandum*. The consequences of disobeying a notice to produce are of a very special kind, and very special rules have, consequently, been made as to the service of that notice, which will be considered, *infra*, p. 11, when we come to consider what those consequences are.

When dispensed with—loss or destruction of document.] The most obvious exception to the rule which requires the production of a written instrument, is where the document is lost, or has ceased to exist, and therefore cannot be produced.

Where secondary evidence is offered in consequence of the loss or destruction of a written instrument, it must be shown to the satis-

faction of the judge that diligent search has been made in those quarters in which the primary evidence was likely to be procured.

Where a licence to trade had been returned to the secretary of the governor who had granted it, and the secretary swore that it was his custom to destroy, or put aside such licences as waste paper, and that he supposed that he had dealt with the licence in question in the same manner as other licences; that he had searched for it, but had not found it; the court held the loss sufficiently proved; *Kensington v. Inglis*, 8 East, 278.

"It is a very different thing whether the subject of inquiry be a useless paper, which may reasonably be supposed to be lost, or whether it be an important document, which the party might have an interest in keeping;" *per* Abbot, C. J., in *Brewster v. Sewell*, 3 B. & A. 296. That was the case of a policy of insurance against fire which had been effected about seven years before, and which became useless on account of a second policy afterwards effected. All the judges (Bayley, Holroyd, and Best, JJ.) affirmed the same principle as that stated by the Lord Chief Justice. See *R. v. East Farleigh*, 6 Dow. & Ry. 153; *Gully v. Bishop of Exeter*, 4 Bing. 298.

In a question of settlement it was proved by the respondents that the pauper was apprenticed thirty years previously to one F., by a deed of only one part, which when executed was carried away by F. The pauper served F. about a year, when the latter failed and gave up business, and passed the remaining years of his life in a lodging with his wife. At the time of F.'s failure one S., an attorney, had the management of his affairs, and the custody of all his books and papers. Inquiry was made of S., who said he had searched soon after the failure, and had found no indenture. It did not appear that he had the custody of the papers at the time of the inquiry. F. himself was dead, but no inquiry was made of his widow, or any other person. Lord Tenterden said that it was useless to inquire of the widow, but no formal judgment was given on this point, the order of sessions being quashed on another ground; *R. v. Piddlehinton*, 3 B. & Ad. 460. If this is to be taken as a decision, it is rather a strong one.

In *R. v. Rawden*, 2 Ad. & E. 156, a pauper was called, who stated that a short time before her husband died, and during the illness which terminated in his death, she had some conversation with him about his indentures, and that he said he had got them away from his master after the end of his apprenticeship, and had carried them in his breeches pocket till they were all to pieces. There was no evidence of any further inquiry. This was held insufficient, but it is not quite clear how far the court were influenced by an objection taken that the conversation was inadmissible; though that objection appears not now to be tenable. *Infrà*, p. 5. In *R. v. Stourbridge*, 8 B. & C. 96, it was proved by the mother of the pauper that about twenty-four years ago she received some money from the overseers of the respondent parish to put her son out apprentice, and that she accordingly apprenticed him to one C. of the parish of B., who was her brother-in-law; that the indenture was signed by her, by the pauper, by the master, and by the man who filled it up; and that she gave the indenture to one N., the wife of a market gardener who attended the market held in the respondent parish, in order that she might deliver it to the overseers there; and that it was directed to the overseers: N. and her husband were both dead, but inquiry had been made of the executor of N.'s husband, who said that no such paper

had come into his hands ; and it was also proved that search had been made in the parish chest of the respondent's parish, and that it was not there. It was held that secondary evidence was admissible. See also *R. v. Hinchley*, 32 *L. J. (M. C.)* 158.

In another case it was proved that, in cases of misdemeanor, on depositions being taken before a magistrate, it was the practice to deliver them to the clerk of the peace or his deputy. It was also proved that in the case in question the grand jury had thrown out the bill, and that in such a case it was the practice to throw the depositions away or destroy them as useless. Very slight evidence of search by the clerk of the peace himself was given, and his deputy was not called. But the court held that, taking the practice into consideration, sufficient appeared to render parol evidence of the contents of the depositions admissible, and that it was not necessary to call the deputy, as it was his duty, if he had received the depositions, to deliver them to his principal ; *Freeman v. Arkell*, 2 *B. & C.* 495.

When the person to whose possession the instrument is traced, is alive, it has in some cases been held that he ought to be called, and that answers to inquiries made of him are not admissible ; *R. v. Denio*, 7 *B. & C.* 620 ; *R. v. Castleton*, 6 *T. R.* 236. But all the recent decisions are in favor of the admissibility of such answers, in order to satisfy the judge whether the search has been sufficient ; *R. v. Kenilworth*, 7 *Q. B.* 642 ; *R. v. Saffron Hill*, 1 *E. & B.* 93 ; *R. v. Baintree*, 28 *L. J. (M. C.)* 1 ; 1 *E. & E.* 51.

A constable, who levied under a warrant of distress issued by the defendant, said that after levy he had deposited the warrant in his office ; he did not know what had become of it ; that he was unable upon search to find it ; and that the town-clerk had access to his office. It was held that secondary evidence of it was admissible ; *Fernley v. Worthington*, 1 *M. & G.* 491.

A cheque drawn on account of a parish was delivered to the defendant, who was then paying clerk of the parish ; it was shown that the bankers of the parish, on the same day, paid the cheque, and that their custom was to return the paid cheques to the paying clerk, who deposited them in an apartment in the workhouse ; the defendant was no longer in office as paying clerk, and his successor was not called ; a witness stated that he had made application to him for an inspection of the cheques, and that he had handed him several bundles, which the witness looked through without finding the cheque in question ; it was held that secondary evidence of the contents of the cheque was admissible ; *M'Gahey v. Alston*, 2 *M. & W.* 206. In *Pardee v. Price*, 13 *M. & W.* 267, a search for a security given to one K. in an attorney's office, where the papers of K. and of his executrix were deposited, was held to be sufficient to let in the secondary evidence.

If there are several places of probable deposit, all should be searched. Where a conveyance of freeholds and leaseholds in trust was alleged to be lost, and one of the trustees and the heir of another, deceased, negatived possession of it, it was held insufficient, and that inquiry ought also to have been made of the executor of the deceased trustee as to who had taken possession of his papers ; *Doe v. Lewis*, 11 *C. B.* 1035 ; 20 *L. J. (C. P.)* 177. And where there were duplicate instruments executed, a search for both is necessary ; *R. v. Castleton*, 6 *T. R.* 236.

. In *Doe d. Phillips v. Morris*, 3 *Ad. & E.* 46, a witness who had been

called by the defendant was cross-examined by counsel for the plaintiff, as to whether he had not prepared a will for a certain person. He said he had, and that the testator had signed it, and that he had witnessed it; and that after the testator's death it was delivered to his widow whom the defendant had married. The counsel for the plaintiff then proposed to ask questions as to the circumstances attending the execution, but they were not allowed, on the ground that the will itself ought to be produced, or its absence accounted for. No notice to produce the will had been given, and it does not appear from the report that any evidence to show that the will was lost or destroyed was actually tendered, although subsequently, upon argument in the court above, counsel stated that the plaintiff was prepared with such evidence, and the case was argued on the assumption that such evidence could have been given. The point decided was that the ruling at the trial that the proposed questions could not be put was right; but the judgments of the court also affirm as a general proposition, that in all cases, whatever be the circumstances, where a document is traced into the hands of the adverse party, notice to produce it must be given, before secondary evidence of it is admissible.

The objection to the admission of secondary evidence, on the ground that there has not been due search for the original, must, like all other objections to the admissibility of evidence, be distinctly made at the trial; otherwise the court will not entertain it on a motion for a new trial; *Williams v. Wilcor*, 8 *Ad. & E.* 314.

When dispensed with—document held by a privileged person.] If the person who holds the document has any privilege which enables him to refuse to produce the document in evidence, and he does refuse to do so, then the result is the same as if the document were lost or not in existence; *Doe d. Gilbert v. Rees*, 7 *M. & W.* 102. As to the cases in which the privilege exists, see *post*, tit. *Privilege*, p. 103.

When dispensed with—production physically inconvenient.] If from physical causes it be impossible, or highly inconvenient to produce a writing, the production may be dispensed with. Thus, on an indictment for an unlawful assembly, it was held that the devices and inscriptions on the banners carried might be proved by parol; *R. v. Hunt*, 3 *B. & A.* 566. So the inscription on a monument may be proved by parol; *Doe v. Cole*, 6 *C. & P.* 359; *Sayer v. Glossop*, 2 *Ex.* 409; *Mortimer v. M'Cullan*, 6 *M. & W.* 68; *Bartholomew v. Stephens*, 8 *C. & P.* 728. Where a notice was suspended by a nail to the wall of an office, it was held that it must be produced; *Jones v. Tarleton*, 9 *M. & W.* 675.

When dispensed with—documents of a public character.] There are certain documents of a public nature, of which, for reasons of general convenience, it is thought desirable not to require the production in private litigation. The production of documents of this nature has been specially dispensed with by numerous acts of parliament, and in some cases it is dispensed with by the common law. These are so numerous, that they will be noticed in a separate heading. See *post*, tit. *Proof of Documents*, p. 68.

There is a peculiarity with regard to this class of cases in which production of the original is dispensed with. The matter is not left to the ordinary rules which govern the production of secondary evidence, when that species of evidence is admissible (see p. 9), but

a special kind of substituted evidence is required in all cases by the provision or rule of law which dispenses with the production of the instrument itself. This will also be noticed under the heading already referred to.

When dispensed with—contents admitted.] The oral admission of a party to the suit of the contents of a written document may be made at any time, and proved by any person who heard the admission, and such evidence may be taken as proof of the contents of the written document without production of the original.

This is a somewhat lax modification of the rule as to the production of written documents, and was for a long time doubted, but the cases to the contrary must be considered as over-ruled by *Slatterie v. Pooley*, 6 M. & W. 664. See *post*, tit. *Admissions*, p. 58.

In *Henman v. Lester*, 31 L. J. (C. P.) 366, 12 C. B. N. S. 781, it was held by Willes and Keating, JJ., against Byles, J., that a plaintiff might be asked on cross-examination the contents of the record of a judgment in the county court. There seems to have been some confusion at first as to what passed at the trial, but it ultimately turned out that Pollock, C.B., admitted the question, on the broad ground that the contents of any written document whatever might be proved by the admission of a party to the cause, whether in, or out of the witness-box; the counsel for the plaintiff, however, were under the impression that the Chief Baron held that the witness was *compelled* to answer the question, but he did not so hold, and Willes, J., in delivering the judgment of the Court of Common Pleas, says that such a notion was not sanctioned by any members of the court. The judgment of the majority of the court, however, does not proceed at all upon the ground taken by Pollock, C.B., but upon this ground:—that, *in order to test a witness's credit*, as was the case here, whether he be a party to the cause or not, he may be asked on cross-examination the contents of a written document. The document itself is, it is there remarked, *ex hypothesi* inadmissible, before the question is put; and, whichever way the answer of the witness may be, it is inadmissible after that also; because, by a well-known rule of law, the answer of the witness is conclusive; for what purpose, therefore, it is asked, should the document be produced? The answer of Byles, J., to this reasoning is, that where the inquiry is as to the act or default of the witness tending to discredit him, and the law excludes parol testimony because there is a writing, then *hac ratione* the writing is admissible, the law not being so absurd as first to require better evidence and then to refuse it. It is remarkable that Byles, J., considered the case of *Macdonnell v. Evans*, 11 C. B. 930, 21 L. J. (C. P.) 141, decisive in favour of his view of the law, whereas the other two judges dispose of that case, apparently, by the observation, that there the precise terms and language of the document were necessary to be referred to, in order to answer the question. But the reasoning on which those two learned judges rely in the principal case would equally apply, whether the precise terms, or whether the general purport only of the written document were required to be known.

On the whole this decision will not probably settle the law upon the question which it discusses, and which, it is further to be observed, was not necessary to be decided in order to dispose of the application for a new trial. And upon the general principle of law laid down by the Chief Baron, and which seems a perfectly logical

deduction from the decision in *Slatterie v. Pooley*, it decides absolutely nothing.

A witness not a party cannot be asked, on cross-examination, the contents of a letter in order to test his credit; *Macdonnell v. Evans*, *ubi supra*; *The Queen's Case*, 2 B. & B. 286; or, *per* Cresswell, J., whether he has been convicted, for the record ought to be produced; *Macdonnell v. Evans*: see, however, the remarks on this dictum in *Henman v. Lester*, and the Common Law Procedure Act of 1854, s. 24, *infra*, tit. *Cross-Examination*, p. 112.

It is very common, by express arrangement, for the parties to admit, for the purposes of a cause, that copies of documents are to be taken as authentic. This is done in order to save the expense of producing the originals. Of course copies so admitted are in every respect equally satisfactory, as evidence, as the original documents themselves.

When dispensed with—document in possession of a person out of the jurisdiction.] In *Boyle v. Wiseman*, 11 Ex. 360, 24 L. J. (Ex.) 160, the majority of the Court of Exchequer expressed an opinion that where a document was in the hands of a person who was out of the jurisdiction, and it was distinctly proved that all reasonable attempts to produce the letter had been made and failed, that secondary evidence might be given of its contents. See *Brown v. Thornton*, 6 Ad. & E. 185; *infra*; *Quilter v. Jorss*, 14 C. B. N. S. 747.

When dispensed with—on failure to comply with notice to produce.] If a party to the cause has received notice to produce a document which is in his possession, or under his control, and he fails to do so, then secondary evidence is admissible of the contents of the document.

In order to render secondary evidence admissible on this ground, it must be proved that the document in question is in the possession, or under the control of the person designated, and that sufficient notice to produce it has been given to him. The form and other requisites of a notice to produce will be considered separately; *post*, tit. *Notice to Produce*.

The evidence which is necessary to show that the document is in the possession of the person designated, or under his control, will depend much on the nature of the instrument. Where it belongs exclusively to the party, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where a solicitor proved that he had been employed by the defendant to solicit his certificate, and that, looking at his entry of charges, he had no doubt the certificate was allowed, this was held to be presumptive proof of the certificate having come to the defendant's hands; *Henry v. Leigh*, 3 Camp. 502. In an action against the owner of a vessel for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods, which had been handed over by him to the captain, was held to be sufficient; *Baldney v. Ritchie*, 1 Stark. 338. So, in an action against the sheriff, a notice to him to produce a warrant which has been returned to the under-sheriff while the defendant was in office, is sufficient; and it has been held to make no difference that the notice was served after the defendant's year of office had expired; *Taplin v. Atty*, 3 Bing. 164; *Suter v. Burrell*, 27 L. J. (Ex.) 193; 2 H. & N. 867. So also notice to a defendant to produce a cheque drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the

cheque may remain in the banker's hands; *Partridge v. Coates, Ry. & Mood.* 156. If the instrument was in possession of the party at the time of the service of the notice, he cannot afterwards voluntarily part with it, so as to get rid of the effect of the notice; *Sinclair v. Stevenson*, 1 C. & P. 585, *per* Best, C. J. But where the plaintiff was nonsuited in a cause in which he had given defendant notice to produce a lease, and afterwards defendant assigned the lease, and on a second trial plaintiff again gave defendant's attorney notice to produce it, and was then told by him of the assignment, it was held that secondary evidence was inadmissible; *Knight v. Martin, Gow*, 103. Where a paper had been delivered to a third person, under whom the defendant justified in an action of trespass, and by whose directions he acted, a notice to produce the paper, served upon the defendant, was held not sufficient to authorise the admission of secondary evidence of it; *Evans v. Sweet, Ry. & Mood.* 83. But see *Pritchard v. Symonds, B. N. P.* 254. Where a document is in the hands of a person who holds it as stakeholder between the defendant and a third party, a notice to produce given to the defendant is not sufficient to let in secondary evidence; *Parry v. May*, 1 *Mood. & Rob.* 279; for, though it need not be shown that the document is in the actual possession of the party, it must be in the hands of some one who is bound to give up possession to him; *Ibid.* It is said, in *B. N. P.* 254, that "if it were proved that the deed came into the hands of the defendant's brother, under whom the defendant claims, a copy ought to be read, even though the defendant have sworn in an answer in Chancery that he has not got the judgment." For this the learned author refers to *Thurston v. Delahay, Hereford Ass.* 1744; *Pritchard v. Symonds, Hereford*, 1744; *Bartlett v. Gawler*, 14 *Geo.* 2, *K. B.* But the statement is rather loose.

The question whether there is sufficient proof of possession in the opposite party is solely for the judge; and where the notice to produce has been given by the plaintiff, the defendant may interpose with evidence to disprove possession; and such evidence, being only for the information of the judge, gives the plaintiff no reply to the jury; *Harvey v. Mitchell*, 2 *Mood. & Rob.* 366.

SECONDARY EVIDENCE OF DOCUMENTS.

[*General nature of secondary evidence.*] It is commonly said that there are no degrees of secondary evidence; that means, that if the production of the original document is dispensed with, its contents may be proved by the same evidence as any other fact is capable of being proved, and that no other restriction is laid upon the party producing the evidence, as to the kind of evidence which he shall produce for this purpose, except that which arises from the risk of having it treated as unsatisfactory by the jury. This is what a jury would very probably do, and might possibly by a judge be advised to do, if it was patent that more satisfactory evidence was available to the party than that which he had thought fit to produce; *Doe d. Gilbert v. Ross*, 7 *M. & W.* 102.

The only exception is where, as in the case of public documents already noticed, p. 6, a special kind of secondary evidence is substituted for the original. But even in this case, if good reason can be shown, why neither the original evidence, nor the substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible; *Tayl. Ev.* s. 454; *Thurston v. Slatford*, 1 *Salk.* 284; *McDougall v. Young, Ry. & Mood.* 392; *Anon.* 1 *Vent.* 257.

Proof of documents by copies.] It is a general custom, especially of persons in business, to keep copies of all the more important documents relating to the matters in which they are engaged. And there is no doubt that a well authenticated copy is by far the most satisfactory substitute for the original document.

But, of course, no copy whatever is admissible in evidence, unless its accuracy be sworn to, or there be some presumption attached to it from which its accuracy may be inferred; *Fisher v. Samuda*, 1 *Camp.* 190. It is not necessary to call the very person who wrote the copy; any person who can testify on oath to the accuracy of it is sufficient; *Everingham v. Roundell*, 2 *Mood. & Rob.* 138.

Among instances in which copies, though not verified by oath, are admissible, are the following:—A very old instrument, purporting to be a copy or abstract of a conveyance, and which for many years had gone along with the possession of the land, was admitted in evidence without proving it to be a true copy; *B. N. P.* 254. A copy of an old decree in chancery, establishing certain customs as against the lord of the manor, found among the muniments of his successor, was held to be admissible, and presumed to be correct, against the successor, on account of its place of deposit; *Price v. Woodhouse*, 3 *Ex.* 616.

But in *Doe d. Padwick v. Whitcomb*, 20 *L. J. (Ex.)* 297, 6 *Ex.* 601, it was held that a book more than 200 years old, compiled by the then steward of the manor, and purporting to contain memoranda only of the terms of certain leases and deeds relating to lands within the manor, could not be presumed to be correct. An old ledger or cartulary of an abbey, containing amongst other things an account of the several endowments, and found in the possession of the person who had succeeded to part of the abbey estates, was admitted as secondary evidence of the endowment, search having been made for the original endowment; *Bullen v. Michel*, 2 *Price* 399; 4 *Dow. Parl. Ca.* 297. So also in *Williams v. Wilcox*, 8 *Ad. & E.* 314, a copy of a grant in an old cartulary seems to have been held admissible as secondary evidence. The memorial of a registered conveyance is presumed to be correct against those who claim through the person who registered the deed; *Wollaston v. Hakewill*, 3 *M. & G.* 297. An entry by the plaintiff's deceased clerk in a letter book, purporting to be a copy of a letter from the plaintiff to the defendant, is presumed to be correct, proof being given that, according to the course of business, letters of business written by the plaintiff were copied by this clerk; *Pritt v. Fairclough*, 3 *Camp.* 305; *Hagedorn v. Reid*, 3 *Camp.* 377. A copy of a letter taken by a copying machine, though still only a copy, will be presumed to be a correct copy; *Nodin v. Murray*, 3 *Camp.* 228; *R. v. Watson*, 2 *Stark.* 129; *Simpson v. Thoreton*, 2 *Mood. & Rob.* 433. Where the plaintiff gave the defendant notice to produce certain letters written by the defendant to a third party, and a letter book containing copies thereof, and the defendant consented to admit the copies and produce the book; held that the copies when produced must be presumed to be correct; *Sturge v. Buchanan*, 10 *Ad. & E.* 598. Where there are two parts of a written agreement proved to be executed at the same time, the one stamped and the other unstamped, the unstamped part, if properly verified, is admissible as secondary evidence of the contents of the stamped part; *Waller v. Horsfall*, 1 *Camp.* 501; *Munn v. Godbold*, 3 *Bing.* 292; *Braythwaite v. Hitchcock*, 10 *M. & W.* 494.

Secondary evidence where the original has been attested.] It has been sometimes contended that, if the original document has been attested, the attesting witnesses must be called. But where the plaintiff declared on a deed which he averred to be in the possession of the defendant, who pleaded *non est factum*, and at the trial the deed was proved to be in the hands of the defendant, who had been served with notice to produce: it was held, that on the nonproduction of the deed, the plaintiff might give parol evidence of the contents without calling the subscribing witness, although his name was known to the plaintiff, and he was actually in court; *Cooke v. Tanswell*, 8 Taunt. 450. So in debt by the landlord for double value; plea "no demand;" the plaintiff, having given notice to produce, offered to prove the original demand by a copy in which an attestation had been also copied, and to show that the original was signed by him: held, that the production of the attesting witness (though known to the plaintiff) was unnecessary; *Poole v. Warren*, 8 Ad. & E. 583. So where notice was given to produce a deed in the defendant's possession, and the defendant at the trial refused to do so, the plaintiff was allowed to prove it by a copy without calling any attesting witness; and it was held, that the defendant could not put the plaintiff to a strict proof by afterwards producing the attested original; *Jackson v. Allen*, 3 Stark. 74; *Edmonds v. Challis*, 7 C. B. 413. Where the plaintiff declared on a lost deed, and a witness stated that there were subscribing witnesses, but he did not know their names, it was ruled by Lord Kenyon, that the plaintiff might recover without calling them; *Keeling v. Ball, Peake Ev. App.* 82. But he said that "had it appeared who they were, the plaintiff must certainly have called them;" *Ibid.* See *post*, tit. *Proof of Deeds*, p. 77.

In an action against an executor, after notice to produce the probate, the original will, produced by the officer of the ecclesiastical court and indorsed as the instrument on which probate was granted to defendant, with the value of the effects sworn to, is admissible evidence, secondary if not original, of the contents of the will. *Gorton v. Dyson*, 1 B. & B. 219; *Waite v. Gale*, 2 Dowl. & L. 925. See *Proof of Wills*, *post*, p. 81. So, where, on an avowry for a freehold rent-charge under a will, the avowant could not produce the will under which he claimed, that belonging to the devisee of the land, but he produced the Ordinary's register of the will; it was held, that this was sufficient *secondary* evidence against the plaintiff, who was himself the devisee of the land charged; *B. N. P.* 246.

NOTICE TO PRODUCE.

Form of it.] The rule formerly was that a notice to produce might be by parol; but now by *R. G. Hil.* 1853, r. 161, all notices "required by the practice of the court" must be in writing; and it should seem that a notice to produce is within this rule, at least when served on attorneys. It is not easy to say precisely to what extent the notice to produce a document ought to define it. Several documents are generally required, and the practice is to include them all in one notice. It is also usual to give some particular description of the documents required, but it is better to give a general description than to risk giving an erroneous one. A notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action" has been held sufficient, *per* Patteson, J.; *Jacob v. Lee*, 2 Mood. & Rob. 33. So a

notice to produce "all letters written to, and received by plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf, and all books, papers, &c., relating to the subject-matter of this cause," has been held sufficient to let in secondary evidence of a particular letter not otherwise specified; *Morris v. Hauser*, 2 *Mood. & Rob.* 392, *per* Lord Denman. In *France v. Lucy*, *Ry. & Mood.* 341, it was held by Best, C. J., that a notice to produce "all letters, papers and documents touching or concerning the bill of exchange mentioned in the declaration, and the bill sought to be recovered," did not sufficiently describe a notice of dishonour sent by the plaintiff to the defendant. But this decision is hardly consistent with the more recent one of *Rogers v. Custance*, 2 *Mood. & Rob.* 179, where a notice to produce "all accounts, papers, and writings in any way relating to the matters in question in this case" was held sufficiently to particularise a written account of the work done by the plaintiff, delivered to the defendant and admitted by him to be correct; and on moving for a new trial, the court of Queen's Bench confirmed the ruling. In one case where the title of the cause was misdescribed in the notice, it was held bad; *Harvey v. Morgan*, 2 *Stark.* 19. But there were other grounds of decision in that case; and in a later case, where the notice was entitled in a wrong court, the Court of Exchequer seemed to think that it was not on that account necessarily insufficient; *Lawrence v. Clark*, 14 *M. & W.* 250.

Service of—on whom.] In general it is sufficient to serve the notice to produce a document on the attorney or agent of the opposite party; *Cates v. Winter*, 3 *T. R.* 306. Indeed it seems more proper to do so where there is an attorney; *Houseman v. Roberts*, 5 *C. & P.* 394. But notice served on the party is sufficient; *Hughes v. Budd*, 8 *Dowl. P. C.* 315. Where the attorney has been changed, a notice to produce served on the first attorney before the change will entitle the party to call for production of the paper; *Doe v. Martin*, 1 *Mood. & Rob.* 242. It is sufficient to leave the notice with the servant of the party at his dwelling-house; *Evans v. Sweet*, *Ry. & Mood.* 83, *per* Best, C. J.

Service of—when and where.] The proper time and place of service of a notice to produce will depend on the circumstances of the case. The notice must be such as to satisfy the judge that the party called upon to produce the document might by using reasonable diligence have done so. Service of the notice upon the wife of the defendant's attorney in a town cause late in the evening before the trial was held insufficient; *Doe v. Grey*, 1 *Stark.* 283. So was service by dropping the notice in the attorney's office letter-box late overnight; *Lawrence v. Clark*, 14 *M. & W.* 250. But notice to produce a letter served on the attorney of the party on the evening next but one before the trial was ruled to be sufficient, though the party was out of England; the presumption being that, on going abroad, the party had left with his attorney the papers necessary for the conduct of the trial; *Bryan v. Wagstaff*, *Ry. & Mood.* 327. See also *Aftalo v. Fourdrinier*, *Mood. & M.* 335 (n). A notice served on the 10th of April, the trial being on the 14th, was ruled to be sufficient to let in secondary evidence of letters written eighteen years back, and addressed to the defendant, a foreigner, at his residence abroad; *Drabble v. Donner*, *Ry. & Mood.* 47. A notice to produce certain deeds was served on an attorney in

Essex on Saturday, Monday being the commission day: he went to London and fetched them: on Monday evening notice was given to produce another deed: the attorney said it was in London, but should be fetched if the party would pay the expense of the journey: no offer to pay was made, and the trial came on on Thursday: it was held that the party could not give secondary evidence of the deed; *Doe v. Spitty*, 3 B. & Ad. 182. Notice served on the attorney at his office on the evening before the trial, at half-past seven, was held insufficient to let in secondary evidence of a letter in his client's possession; *Byrne v. Harvey*, 2 Mood. & Rob. 89. By R. G. Hil. 1853, r. 164, amended by R. G. East. 1853, services of notices shall be made before seven o'clock, p.m., on every day but Saturday, when it must be before two, p.m., otherwise it will be deemed service on the following day, or on the Monday, respectively. *Sed quære*, if this applies to such notices as the above given at assizes or sittings at Nisi Prius? In a town case, both party and attorney living there, service at seven, overnight, was held sufficient by Alderson, B.; *Leap v. Butt*, Car. & M. 451; *Meyrick v. Woods*, Id. 452.

Notice to produce must in general be served before the commission day when parties are living away from the assize town; *Trist v. Johnson*, 1 Mood. & Rob. 259; *R. v. Ellicombe*, *ib.* But there seems to be no inflexible rule as to time. Where both attorney and client lived in the assize town, a notice served two days before trial, though after the commission day, has been held sufficient; *Firkin v. Edwards*, 9 C. & P. 478; and where a paper might be expected to be in the attorney's hands, a notice on him at his office the day before the trial of a town cause, may be good; *Gibbons v. Powell*, 9 C. & P. 634. A three days' notice was held sufficient in the case of letters written by defendant to a person in New South Wales, where long litigation on the subject of them made it presumable that they had been remitted to him in this country; *Sturge v. Buchanan*, 10 Ad. & E. 598. But a notice served on a defendant shortly before assizes to produce a letter written to his firm at Bombay, where their only place of business was, was held insufficient; *Ehrensperger v. Anderson*, 3 Ex. 148. Service of a notice on Sunday is probably bad; or, at all events, will only operate as service on the next day; *Hughes v. Budd*, 8 Dowl. P. C. 315. The notice may be served even after the trial has commenced, if there be time to produce before the adjournment day; *Sturm v. Jeffree*, 2 C. & K. 442.

All the cases prior to *Dwyer v. Collins*, 7 Ex. 639, ought now to be considered with reference to that case. It had formerly been sometimes thought that the object of a notice to produce a document was to inform the opposite party of the intention to use it, but this notion was entirely repudiated in that case after full consideration. And it was there held that the object of the notice to produce was merely to give the party holding the document an opportunity to produce it, if he wished, and, in default of his doing so, to enable the party giving the notice to give secondary evidence of its contents. And on this ground the Court held that the attorney of one of the parties present in court and having the document with him, could be called upon, then and there, to produce it, and if he did not do so that secondary evidence was admissible.

After a new trial is ordered it is not necessary to serve fresh notices to produce, those served on the former trial being available; *Hope v. Beadon*, 17 Q. B. 209.

Effect of refusal to produce after.] The principal effect of refusing to produce a document after notice, is that secondary evidence of it is thereby rendered admissible. But the refusal also has the effect of preventing the party refusing from himself using the document to contradict the secondary proof; *Doe v. Hodgson*, 12 *Ad. & E.* 135; or to show that there are attesting witnesses who ought to be called; *Edmonds v. Challis*, 7 *C. B.* 413; or to refresh the memory of a witness; *per Wilde*, *C. J.*, *Till v. Ainsworth*, 1847, *MS.*

When secondary evidence is admissible without.] There are some cases, even where the document is in existence, and where there is no difficulty about its production, in which secondary evidence may be given of its contents, without a notice to produce; but these are very few. The best known class is that of written notices. It is usual in business to make two copies of them, and to serve one and retain the other; indorsing on the one retained the time and mode of service. There can be no doubt that in this case the notice served is, strictly speaking, the only *primary* evidence. But a custom, and not an unreasonable one, of admitting the copy, which is almost a duplicate original, has obtained. There is some little doubt as to what are the notices to which the rule extends. It clearly extends to a notice to produce documents; it has also been held to extend to a notice to quit, *Doe v. Somerton*, 7 *Q. B.* 58; to a notice of dishonour, *Swain v. Lewis*, 2 *C. M. & R.* 261; *Kine v. Beaumont*, 3 *B. & B.* 288; and to a notice of demand of a copy of the warrant pursuant to the 24 Geo. 2, c. 44, s. 6; *Jory v. Orchard*, 2 *B. & P.* 39.

In order to prove the delivery of an attorney's signed bill of costs, it is not necessary to give notice to produce the bill delivered, which is itself a notice; *Colling v. Trewick*, 6 *B. & C.* 394. See also the 6 & 7 Vict. c. 73, s. 37.

By the 17 & 18 Vict. c. 104, s. 164, a merchant seaman may prove the contents of his agreement with the master of the ship without notice to produce the original. See *Bowman v. Manzelman*, 2 *Camp.* 315. As to the cases in which the production is dispensed with, see *suprà*, pp. 6—9.

How proved.] The proof of service of a notice to produce is facilitated by s. 119 of the Common Law Procedure Act, 1852, which provides that "an affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served."

ORAL EVIDENCE TO EXPLAIN OR ADD TO DOCUMENTS.

It is not intended here to attempt the arduous task of reducing to accurate principles the decisions upon the admissibility of evidence where a written memorandum exists relating to the same transaction, but only to tabulate those decisions so as to render them easy of reference.

The rule of law is clear that, where a contract is reduced into writing, it is presumed that the writing contains all the terms of it, and evidence will not be admitted of any previous, or contemporaneous oral agreement which would have the effect of adding to, or varying it in any way.

This is a rule of evidence at common law. The statute of frauds also requires that certain contracts should be in writing, and therefore, by implication, evidence relating to such contracts which is not in writing is excluded. In other cases it is the duty of certain officers to record, in a manner more or less solemn, what is said or done; as in the case of records of courts of law, or depositions taken before magistrates on a criminal charge. How far such authentic memorials are conclusive is not very well settled, but they are certainly so in some cases. It is obvious that evidence might frequently be objected to as infringing more than one of these rules, and where several objections might be good, it is not always easy to see which of the two in a particular case forms the *ratio decidendi*. The cases which we are about to consider are those where the decisions have been founded, or seem likely to have been founded, on the common law rule now under consideration.

Another remark which appears to be useful is this: that although the principles upon which the admissibility of evidence in these cases depends would appear to be general as regards all written instruments, they have not been applied in a precisely similar manner to all classes of cases. But perhaps this may be partly explained in the following manner. Inasmuch as the question is, whether the written memorandum *by its terms* excludes the oral evidence, the admissibility of the latter is in all cases, to a certain extent, and in some exclusively so, a question of *interpretation* of the written document. And inasmuch as, in analogy to the use of technical terms, language, by being constantly used for the same purpose, almost always acquires conventional meaning, such (corresponding) groups of cases as have been mentioned naturally arise. In fact there are two questions of interpretation to be solved, whenever oral evidence is objected to on the ground that it contradicts a written instrument. First, the interpretation of the written contract as it stands; secondly, the interpretation of the clause which it is proposed to insert by way of addition or explanation, for that is really what is done; and this explains how it is that the same question as that which is raised upon the admissibility of evidence is sometimes raised upon demurrer.

Under a system of law, like our own, in which there are scarcely any canons of interpretation, and in a country where contracts, especially mercantile contracts, are very loosely drawn, a decision as to the meaning of one contract is rarely an authority as to the meaning of another.

Bearing these remarks in mind, it will be found that the apparent conflict between many of the cases may be reconciled. A good example of the truth of this remark will be found in the cases of *Spartali v. Benecke*, and *Field v. Lelean*, *infra*, p. 21.

The arrangement of the following abstract of decisions is partly founded on such groups as are above mentioned. The arrangement of each group is also nearly chronological.

To explain technical language—when admissible.] When terms are used in a written contract which are not known in ordinary language, parol evidence is clearly admissible to explain them.

But this is comparatively rare; the more frequent case is of ordinary words used in a special sense. And it is a clear rule that where, by the custom of a trade, or in a particular locality, words have acquired a special sense, parol evidence may be given to show what

that special sense is. The following are instances in which such evidence has been admitted.

Chaurand v. Angerstein, Peake, N. P. Cu. 43, is not a very clear case. According to the report, a letter of the plaintiff's was shown to the underwriter, wherein it was said that the ship was to sail from St. Domingo to Nantes in the month of October. She sailed on the 11th of that month, but evidence was offered and received by Lord Kenyon that the expression, "in the month of October," was understood to mean at least not earlier than the 15th; and that if it had been known that the ship was to sail earlier, the premium would have been much higher. It appeared that there was, at the time the insurance was effected, a letter in the possession of the plaintiff from the captain, in which he announced his intention of sailing between the 5th and the 10th. The question left to the jury was whether there had not been such a suppression of facts as to avoid the policy. The jury found for the defendant, and it is said that a rule for a new trial was obtained by the plaintiff, and was discharged.

In *Cochran v. Retberg*, 3 *Esp.* 121, Lord Eldon allowed the words, "to be discharged in fourteen days," to be explained to mean working days, not running days. In *Uhde v. Walters*, 3 *Camp.* 16, the action was on a policy of insurance from London to any port within the Baltic: it was held that evidence was admissible to show that by mercantile usage, this was considered to include the Gulf of Finland. In *Robertson v. Money, Ry. & Mood.* 75, the action was on a policy of insurance on a ship "at and from the termination of her outward voyage at New South Wales and Van Diemen's Land to her port or ports of discharge and loading in India and the East India Islands." The claim was on the freight of a cargo loaded at the Mauritius. Lord Gifford held that evidence to show that the Mauritius was an East India Island within the meaning of the policy, was admissible. In *Taylor v. Briggs*, 2 *C. & P.* 525, Abbott, C. J., admitted evidence to show that the word, "bale," in the cotton trade, signified a compressed bale. In *Studdy v. Sanders*, 5 *B. & C.* 628, it was held that a contract for the sale of cyder might be explained to mean the juice as soon as it is expressed from the apple, and not cyder in the ordinary sense. In *Smith v. Wilson*, 3 *B. & Ad.* 728, evidence was held admissible to show that, in an agreement to pay for rabbits at the rate of 60*l.* per "thousand," a thousand by local usage meant 1200. In *Clayton v. Gregson*, 5 *Ad. & E.* 302, evidence was held admissible to show that the word "level," in a mining lease, was not used in the ordinary sense of a horizontal plane, but in a sense particular to mines. In *R. v. Mashiter*, 6 *Ad. & E.* 153, it was held that the words "inhabitants," in an ancient charter, might be explained by local usage; and this decision is recognised in *R. v. Davie*, *id.* 386. In *Spicer v. Cooper*, 1 *Q. B.* 424, eighteen pockets of hops were sold "at 100*s.*" It was doubtful whether this was to be read "at 100*s.* per pocket," or without reference to the word "pocket." But the Court of Queen's Bench, after taking time to consider, thought that in either case evidence was admissible to show that 100*s.* per cwt. was meant. The parol evidence was that in the trade such a contract was understood to mean 100*s.* per cwt. But no evidence was offered that by the usage of the trade 100*s.* per pocket would mean 100*s.* per cwt., and the question whether evidence to that effect would have been admissible was, therefore, not properly before the court.

In *Evans v. Pratt*, 3 *M. & G.* 759, it was held that a person who had

agreed to ride "across a country" for a wager was bound to ride over all obstructions, and was not permitted to take advantage of an open gate, and that it might be shown that such was the meaning of the words "across a country" in sporting language. In *Grant v. Maddox*, 15 M. & W. 737, it was held that under an engagement for "three years at a salary of five, six, and seven pounds per week in those years respectively," it might be shown that the person engaged was entitled to be paid during the theatrical season only, and not during the whole year. Though the word "month" primarily imports a lunar month, it may be shown by usage to mean a calendar month; *Simpson v. Margetson*, 11 Q. B. 23. In a contract for the purchase of "1170 bales of gambier," it was held that it might be shown that by the usage of that trade a "bale" meant a compressed package, weighing about two cwt.; *Gorrissen v. Perrin*, 2 C. B. N. S. 681; 27 L. J. (C. P.) 29.

Lethulier's case, Sulk. 443, was one in which the court took judicial notice, that by the usage of merchants, "warranted to depart with convoy," meant to depart, not from the port of loading with convoy, but from such place as convoys are usually taken at. This case seems to stand almost alone; the particular usage must generally be shown by evidence. See *post*, *tit. Judicial Notice*, p. 72.

To explain technical language—when not admissible.] It may perhaps be said with safety that evidence is never, strictly speaking, inadmissible to show that words have acquired a special meaning in a particular trade or locality; the doubt rather being whether the instrument does not itself exclude the special meaning suggested, or whether the usage is sufficiently established. The case of *Cross v. Eglin*, 2 B. & Ad. 106, is a peculiar one. The plaintiffs entered into an agreement for the sale of "about 300 qrs. (more or less) of foreign rye of good merchantable quality, shipped on board the Ann Elizabeth." The vessel arrived with 345 qrs. on board, but the plaintiffs refused to receive more than 300. The defendant refused to deliver less than 345 qrs., and the plaintiffs thereupon gave notice that they abandoned the contract, and brought an action to recover the price of the rye, which they had already paid. Evidence was given by the plaintiffs that, by the usage of the trade, the words "more or less" in contracts for grain would not include so large an excess as 45 qrs. over 300. The jury found for the plaintiffs; and a new trial was moved for, on the ground that the evidence was improperly received. But it became immaterial to decide that question, because the court thought that, if the evidence had been received, still it would have been for the judge alone to say what was the meaning of the words, and that they could not properly bear the meaning which the defendants sought to put upon them.

Many of the cases, which are frequently cited to show that evidence of this kind is not admissible, are rather cases where the evidence does not on examination turn out really to belong to this class at all. Thus, in *Lewis v. Marshall*, 7 M. & G. 729, the question was as to the meaning of the words "freight" and "cargo," and evidence as to the meaning of these words in a particular trade was given at the trial. After hearing it, Tindal, C.J., declined to lay it before the jury. The court, which by agreement was to decide all questions of law and fact, afterwards held that the contract itself excluded the meaning which was suggested by that evidence, not expressing any opinion as to how the judge ought to have dealt with

it. They also express doubts whether the evidence amounted in reality to anything more than an expression of opinion by the witnesses as to the meaning of the words, such opinion not being founded on any usage of trade, in which case they say that it was inadmissible. In *Robertson v. Jackson*, 2 C. B. 412, the question was as to the meaning of the words, "in time to deliver," in a charter-party. The defendant offered evidence to show that by mercantile usage these words had acquired a particular meaning. The evidence was admitted, but wholly failed to establish the usage.

To explain technical language—weights and measures.] Certain weights and measures have been fixed by act of parliament, generally prohibiting the use of others under a penalty. The point does not seem to have been yet expressly raised whether evidence to show that the words were used in any other sense than that assigned to them by the legislature, would be inadmissible. In *Hockin v. Cooke*, 4 T. R. 314, evidence was received that the contract was made according to a local custom by which the bushel contained eight and a half gallons instead of eight gallons. The objection taken was that there was a variance between the contract, as proved, and the statement in the declaration, which was "at 1s. 6d. per bushel." The court thought the objection valid. It does not appear whether the contract was in writing. It may possibly be, therefore, that the evidence is receivable, though the effect of it would frequently be to render the contract illegal.

Some acts of parliament, as the 6 Will. 4, c. 63, s. 11, define certain weights and measures, without imposing a penalty on the use of them in any other sense, and not rendering a contract in which they were used in any other sense illegal; *Jones v. Giles*, 24 L. J. (Ex.) 254; 11 Ex. 393. Whether or no evidence would be admissible in these cases to show that the words were used in any other sense than that given to them by the legislature, has not yet been discussed.

To explain technical language—times and seasons.] A somewhat similar question arises upon the statute, 24 Geo. 2, c. 23, which changes the style. In *Furley d. Mayor, &c., of Canterbury v. Wood*, 1 Esp. 198, *Runnington on Eject.*, 2nd ed., 129, it was held by Lord Kenyon that evidence was admissible to show that by the custom of the country the word "Michaelmas," in a notice to quit, meant "Old Michaelmas." It has been since assumed that this was a parol demise; but as the lands are stated to have been held by lease from a corporation, this was probably not so. In *Doe d. Spicer v. Lea*, 11 East, 312, however, it was held that evidence was rightly received, when offered to show that "the feast of St. Michael," in a lease under seal, meant Old Michaelmas. A few days afterwards *McDonald, C. B.*, held at Chelmsford, that a notice to quit at "Michaelmas" might be shown to mean "Old Michaelmas;" *Doe d. Hinde v. Vince*, 2 Camp. 256; and Lord Campbell adds in a note, "S. P. ruled by Lord Ellenborough in *Doe v. Brookes*, at Hertford, same assizes, *ut audiui*." No allusion is made in Campbell's Reports to the distinction between leases by deed and other leases, nor does it appear which the leases were in the two cases there mentioned. In *Doe d. Hall v. Benson*, 4 B. & A. 588, the distinction between leases under seal, and those not so, was taken by the Court of Queen's Bench, and it was held that on a parol demise it might be shown that "Lady Day" meant "Old Lady Day." In

pleading, it was held that "Martinmas" must mean "New Martinmas," even though followed by the words, "to wit, the 23rd of November," which is the day on which Old Martinmas falls; *Smith v. Walton*, 8 Bing. 235.

Many text-writers have expressed a general opinion that the evidence is admissible, and there can be no doubt that in many parts of the country in letting lands the old style is inveterately retained.

Usage of trades or localities—when admissible.] Somewhat akin to the explanation of technical language is the evidence of the usages of particular trades or localities. But there is this important difference, that whereas the former is only used to put a meaning on the words of the contract, the latter is used to add something to them. The principle on which such evidence is held to be admissible seems to be this. It is considered, reasonably enough, that persons generally contract with reference to the usages of the trade which they follow, and the locality where they carry on their business, and that they intend to be bound by those usages, unless the contract expressly excludes such obligation.

It never seems to have been considered that any difficulty arose out of the statute of frauds with reference to this species of evidence. So far as that statute is concerned, the question, it seems, may be considered in the same light as if the custom were added in a clause at the end of the written document.

In the following cases the evidence has been admitted. In *Johnston v. Usborne*, 11 Ad. & E. 549, a corn-merchant in Ireland sent written instructions to a corn-factor in London to sell corn "on account of A. B.;" it was held that evidence was admissible to show that by the custom of London the factor was warranted in selling the corn in his own name. In *Il. v. Stoke-upon-Trent*, 5 Q. B. 303, A. and others had agreed in writing "to serve B. & Co. from the 11th of November, 1815, to 11th of November, 1817, to lose no time on our own account." It was held that evidence was admissible to show that, by the custom of the particular trade, servants under such a contract were entitled to certain holidays. This question arose between persons who were not parties to the contract to which the evidence applied. In *Syers v. Jonas*, 2 Ex. 111, there was a sale of fifty-one bales of tobacco. The sold note described the goods as "fifty-one bales tobacco, ex Lucretia," without referring to the sample shown at the time of the sale. The tobacco was rejected, because it did not correspond with the sample. In an action for the price of the tobacco the plaintiff denied that he sold by sample, and relied on the note; but the defendant offered evidence to show that, by the established usage of the tobacco trade, all sales were by sample, whether so specified in the contract or not. Wightman, J., rejected the evidence, but the court held that it was admissible. In *Cuthbert v. Cumming*, 24 L. J. (Ex.) 310, 11 Ex. 405, by a charter-party made in London the defendant contracted to load in the plaintiff's ship "a full and complete cargo of sugar, molasses ^{and} other lawful produce." It appeared that Trinidad was the intended port of loading, and that, by the custom of that port, a cargo was full and complete if it consisted of puncheons and hogsheads packed close, though room for smaller casks and packages might be left. Held, that evidence of this custom was admissible to explain what was meant by a full and complete cargo of sugar and molasses. In *Brown v. Byrne*,

3 E. & B. 703, a bill of lading expressed that goods shipped at New Orleans were deliverable at Liverpool to order or assigns, "he or they paying freight for the said goods five-eighths of a penny sterling per pound, with five per cent. *primage* and *average* accustomed." By the usual custom in the trade at Liverpool three months' discount is deducted from freights payable under bills of lading on goods coming from certain ports, including New Orleans. It was held that this custom did not contradict the written contract, and that the ship-owner was bound by it. In *Lucas v. Bristow*, 27 L. J. (Q. B.) 364, the contract was for "fifty tons best palm oil, expected to arrive in Bristol from Africa per the *Chalis*, at 40*l.* 10*s.* per ton usual tare and draft. Wet, dirty, and inferior oil, if any, at a fair allowance." The sellers offered to deliver fifty tons of oil, of which one-fifth only was best palm oil. Evidence was given that the contract was, by the usage of trade, complied with, and that the buyer ought to have accepted the oil. The question left to the jury was whether the sellers had, according to mercantile usage, performed their contract, and the jury found that they had. This was held to be no misdirection, on the ground that the portion of inferior oil being undefined by the contract, it was a proper question for the jury—what was the amount allowable according to mercantile usage? In *Symonds v. Floyd*, 6 C. B., N. S. 691, the plaintiff contracted in writing to do stone and brickwork at the rate of "3*s.* per superficial yard of work nine inches thick, and finding all materials, deducting all lights." Held, that evidence of a custom in the trade to reduce all brickwork for the purpose of measurement to nine inches in thickness, was admissible. In *Myers v. Sarl*, 30 L. J. (Q. B.) 9, there was a contract to do certain work and to deliver "a weekly account of work done." It was held that a usage in the building trade might be proved to show that this clause related not to all the work contracted to be done, but to that part only which was of a particular kind. In *Field v. Lelean*, 30 L. J. (Ex.) 168, 6 H. & N. 627, there was a written contract for the sale of shares at a certain price, "for payment half in two, half in four months." Evidence was held by the Exchequer Chamber to be admissible that the seller was by usage not bound to deliver the shares until the appointed time for payment, unless the buyer chose to pay for them earlier. See the case of *Spartali v. Benecke*, *infra*, and the observations thereon. In *Miller v. Tetherington*, 6 H. & N. 278, 30 L. J. (Ex.) 217, affirmed in the Exchequer Chamber, 7 H. & N. 954; 31 L. J. (Ex.) 363, it was held that a usage of a particular port, that underwriters are not liable for general average in respect of the jettison of timber stowed on the deck, could be annexed to a policy making the underwriter liable for general average without restriction.

In the *Vestry of Shoreditch v. Hughes*, 12 Weekly Rep. 1106, it was held that the time specified in a contract for the completion of a sale of realty was by usage not binding; and judicial notice was taken of the usage. See *Lethulier's case*, *supra*, p. 17.

With reference to the evidence necessary to support an alleged usage, it was said in *Zuggomohun Ghose v. Manickchand*, 7 Moo. Ind. App. 263, 282, that, "there needs not neither the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough, if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."

If the usage exists, and it is not inconsistent with the written contract, it is precisely the same as if it were written in words attached to the contract, and it cannot be got rid of by proof of an oral agreement to waive or vary it; *Faukes v. Lamb*, 31 *L. J. (Q. B.)* 98.

[Usage of trades and localities—when not admissible.] Evidence of usage, like that to explain, is generally rejected on the ground that it conflicts with the written contract. In *Parkinson v. Collier, Park. Ins.* 8th ed. 46, the action was on a policy on ship and goods; on the ship, “till moored at anchor twenty-four hours;” and on the goods, “till discharged and safely landed.” It was held that evidence could not be admitted to show that by the custom of the trade the risk on the goods as well as on the ship expired in twenty-four hours. In *Hodgson v. Davies*, 2 *Camp.* 530, goods were sold by a memorandum, which expressed that they were to be paid for, within a certain time, by bills. Lord Ellenborough rejected evidence that by the custom of merchants this signified such bills as the seller approved without any limitation on his option of rejecting bills.* In *Yates v. Pym*, 6 *Taunt.* 446, the plaintiff brought an action on a written contract for the price of “fifty-eight bales of prime singed bacon.” He had, however, delivered tainted bacon, and it was admitted that this was not a compliance with the contract; nor was there any doubt that when an allowance was intended to be made for taint, it was so expressed in the contract. But the plaintiff sought to succeed by showing a custom that, if the buyer did not examine the bacon within a certain time, and point out the defect within that time, he could never afterwards object to the bacon, but must take it absolutely at the price agreed on. This evidence, however, was held to be inadmissible. The point stated in the marginal note, that “on a warranty of prime singed bacon, evidence of a practice in the bacon trade to receive bacon to a certain degree tainted as prime singed bacon is inadmissible,” was not decided. But the marginal note has been assumed on innumerable occasions to be correct. As to the real decision also, *quere*. In *Blackett v. The Royal Exchange Assurance Company*, 2 *Cr. & J.* 211, the action was brought on a policy of insurance in the usual form on ship and furniture, “free from average under three per cent., unless general.” The defendants having proved the loss of a boat, which with other damage amounted to £3 per cent., the defendants offered evidence of a usage that boats slung upon the outside of a ship on the quarter were not protected by such a policy. It was held that the evidence was inadmissible. In the case of *In re Stroud*, 8 *C. B.* 502, it was held that the lease of a brick field at an annual rent, which specified in no other way the term intended to be granted, must be taken to be a lease for a year; and that evidence to show a usage in the building trade never to take brickfields for a year was inadmissible. In *Spartali v. Benecke*, 19 *L. J. (C. P.)* 293, 10 *C. B.* 212, the note stated that wool was to be paid for by cash in one month less £5 per cent. discount. It was held that evidence was inadmissible to show that, by the usage of the trade, vendors were not in any case bound to deliver wool without payment. This case was a good deal observed upon in *Field v. Lelean*, 30 *L. J. (Ex.)* 170; 6 *H. & N.* 627, *supra*, p. 20, in the Exchequer Chamber, but the difference of opinion is not as to the principle, but as to the meaning of the contract, and the effect of the custom, if annexed. In *Phillips v. Briard*, 25 *L. J. (Ex.)* 233, 1 *H. & N.* 21, the declaration set out a charter-party to load a cargo in London for

Hong-Kong, "the ship to be consigned to the charterer's agents in China, free of commission on that charter." It then averred a custom of London by which in such cases the charterer's agents claimed the right to find the homeward cargo for the vessel, and in case the ship-owners themselves procured a cargo, then a right to be paid by the shipowners the amount of commission which was due under the charter-party for the homeward cargo. It was held on demurrer that this custom contradicted the charter-party.

Usage of trades and localities—farming leases.] There is no class of contracts upon which the question of evidence of usage arises more frequently than farming leases. In the first place, these documents are often very carelessly drawn, even more so than mercantile contracts. Secondly, usages of agriculture are special and well defined, and therefore are peculiarly apt to be tacitly assumed in drawing up farming agreements. The following statement of the law on the subject at that date is taken from the judgment delivered by Parke, B., in the case of *Hutton v. Warren*, 1 M. & W. 466.

"In *Wigglesworth v. Dalison*, Dougl. 201, afterwards affirmed on a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord Mansfield said the custom did not alter or contradict the lease, but only added something to it.

"The question subsequently came under the consideration of the Court of King's Bench, in *Senior v. Armitage*, reported in Mr. Holt's Nisi Prius Cases, p. 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour, under the denomination of tenant-right, Mr. Justice Bayley, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned judge, that though there was a written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract; and that, not only all common law obligations, but those imposed by custom were in full force, where the contract did not vary them. Mr. Holt appears to have stated the case too strongly, when he said that the court held the custom to be operative "unless the agreement in express terms excluded it;" and probably he has not been quite accurate in attributing a similar opinion to the Lord Chief Baron Thompson, who presided on the second trial. It would appear that the court held that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it. On the second trial, the Lord Chief Baron Thompson held that the custom prevailed; although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it, or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenants' right to receive a compensation for seed and labour.

"The next reported case on this subject is *Webb v. Plummer*, 2 B. & A. 750; in which there was a lease of down lands, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the tenancy, to carry out the manure on parts of the fallowed farm,

pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn. The claim was for a customary allowance for foldage (a mode of manuring the ground); but the court held, as there was an express provision for some payment on quitting for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist on that; the language in the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more."

In *Hutton v. Warren*, 1 M. & W. 466, the plaintiff was lessee of certain glebe lands, and also of the tithes of the whole parish. After his tenancy had expired he insisted that his landlord ought to make him certain allowances in respect of the tillage of the spring crops. The landlord refused, and the plaintiff sued him in this action. He relied on a custom of the country, by which landlords were bound to make such payments to outgoing tenants, but it appeared that the defendant held the farm on the terms of a lease in which was a covenant to deliver up the premises at the end of the term in good order and condition to the lessor and his successors, and also to "spend and consume three parts in four of the hay and straw arising from the said glebe land and tithes so demised as aforesaid upon the said glebe land, and spread and bestow the compost or manure arising therefrom or thereby upon the said glebe land, or some part or parts thereof, and should leave such part of such compost or manure as should not be so spread or bestowed on the said premises at the end or other sooner determination of the said term upon the said premises, to and for the use of the said J. W. or his successors, he or his successors paying a reasonable price for the same." The custom proved is not very precisely stated, but it is said to have been "an allowance for labour on the arable lands, the tenant to leave the manure on the land, if the landlord chose to purchase it." The question was whether, from the terms of the lease, it could be collected that the parties intended to exclude the customary obligation to make allowances for seed and labour. It was held that the custom was not excluded. In *Clarke v. Royston*, 13 M. & W. 752, the custom alleged in the declaration was for the landlord, at the expiration of the tenancy, to make an allowance to the outgoing tenant for the manure which he had laid on the farm. The tenant held under an agreement which contained the following clause: "Be it remembered that the above closes of land have only been clipped or mown once, and since manured with eight loads of rotten manure per acre, which the tenant agrees when given up by him to leave it in the same state, or allow a valuation to be made." It was held that the custom was excluded by the written agreement.

To explain ancient documents—when admissible.] Oral evidence of long user may be given to explain an ambiguous act of parliament; *Stewart v. Lawton*, 1 Bing. 377. In the construction of ancient charters, expressed in obscure or general terms, parol evidence has been frequently admitted to prove the continual and immemorial usage under the instrument; 2 Inst. 282; *R. v. Varlo*, Cowp. 248; *Chad v. Tilsed*, 2 B. & B. 406. Thus, in a crown grant of "tithes," contemporaneous leases, proceedings in causes, and parol testimony, may be resorted to in order to show the species of tithes intended to be con-

veyed; *Governors of Lucton School v. Scarlett*, 2 *You. & Jer.* 330. An ancient crown grant of a seigniorship or lordship, as of "terra de Gower," may be shown by modern user to include the sea-shore between high and low water; *Beaufort v. Mayor of Swansea*, 3 *Ex.* 413; although the grant from the crown contains no appropriate words; *Calmady v. Rowe*, 6 *C. B.* 861. Where a private deed of 1656 gave the nomination of a curate to "inhabitants," it was held that the word was properly explained by past usage to mean all housekeepers; *Attorney-General v. Parker*, 3 *Atk.* 576. So where an old charter granted and confirmed certain port-duties, it may be shown by user that the grantee is also entitled to other immemorial port-duties not named in the charter; *Bradley v. Pilots of Newcastle*, 2 *E. & B.* 427.

There seems to be no distinction in this respect between charters and private deeds; *Witnell v. Gartham*, 6 *T. R.* 398. In *Stammers v. Dixon*, 7 *East*, 200, the words "*tres acras prati*" were held to be confined by long user to the *prima tonsura*. In *Doe d. Kinglake v. Bevis*, 7 *C. B.* 456; 18 *L. J. (C. P.)* 128, it appeared that in the most ancient times the words of admission to certain copyhold land were "*pastura bosci et sub-bosci*." In later times the words were "pasture wood and underwood." From time immemorial the tenant under these admissions had held the land itself. In ejectment by the lord of the manor against a tenant holding under the admission in the English form, it was held that the meaning of it might be explained by the user to be, that the land should pass. But evidence of usage, however long, will not be admitted to overturn the clear words of a charter; *R. v. Varlow*, *Cowp.* 248.

Whether in the case of modern deeds, the terms of which are ambiguous, evidence of the acts of the parties is admissible to show their construction of it, may, perhaps, be doubtful; *Clifton v. Walmsley*, 5 *T. R.* 565; *Iggulden v. May*, 9 *Ves.* 333; 2 *N. R.* 449.

[Of prior or contemporaneous verbal expressions.] It is hardly necessary to say that these are inadmissible, either to vary, or to add to the contract. They stand altogether on a different ground from evidence of usage, and, if not rigidly excluded, the rule of evidence under discussion would soon be lost sight of altogether. It would hardly be necessary to state the following cases at length, were it not that they have been, occasionally, not quite accurately understood.

In *Powell v. Edmunds*, 12 *East*, 6, there was a sale by auction of growing timber. Printed conditions and particulars of sale were read by the auctioneer at the time of the sale, in which was specified the number and kind of trees contained in each lot, but nothing was said as to the weight of the timber. The defendant was buyer of one lot, and signed an agreement on the back of the conditions of sale in the following form:—"I agree to become the purchaser of lot the first, at 700*l.*, and agree to fulfil the conditions of sale." Evidence was offered of a parol warranty by the auctioneer before the lot was knocked down that the lot weighed eighty tons. It was held that this evidence was inadmissible. No reference whatever was made in the course of the argument, or the judgment to the statute of frauds; the evidence being rejected on the ground that its effect was to vary the written agreement. In *Greaves v. Ashlin*, 3 *Camp.* 426, the action was for non-delivery of goods sold under the following contract, signed by the defendant's agent:—"Sold to John Greaves fifty quarters of oats, at 45*s.* 6*d.* per quarter, out of 145 quarters." The plaintiff did not remove the oats for some time, and the defendant

accordingly resold them. Afterwards the plaintiff demanded the oats. The defendant offered to prove a parol agreement (apparently contemporaneous with the written contract) that the plaintiff should take away the oats immediately, but Lord Ellenborough rejected it. *Shelton v. Livius*, 2 Cr. & J. 411. is rather a complicated case, but when examined it will be seen that it throws very little light on the present question. At a sale by auction, the lot in question was knocked down to the plaintiff, and the auctioneer's entry was as follows:—"Lot 6. Ten acres of spring wheat on Further Hill. Mr. Shelton, 7l. 15s." And among the printed particulars and conditions attached to this memorandum was the following:—"The keep of all the fields until Old Michaelmas Day will be sold with the crop, except George's Field." The plaintiff resold this lot to the defendant, and, at the request of both, the auctioneer inserted the defendant's name at the end of the above memorandum. The court held that this memorandum constituted a written contract binding as between the plaintiff and defendant, and that evidence to show that it was explained at the time by the auctioneer both to the plaintiff and to the defendant that the wheat in question was not spring wheat, and that the keep of Further Hill would not be sold with the crop, was inadmissible. In *Moseley v. Harford*, 10 B. & C. 729, the action was brought by the assignees in bankruptcy of the payee of a promissory note against the maker. The note was made payable to order on demand. Evidence was given of a contemporaneous oral agreement that the note was only to be paid upon the performance of a certain condition by the bankrupt, but the court thought it ought not to have been admitted. A similar case is *Foster v. Jolly*, 1 C. M. & R. 703; and the same law was recognised in *Adams v. Wordley*, 1 M. & W. 324. In *Flinn v. Calow*, 1 M. & G. 589, the action was brought for money had and received to the use of the plaintiff. It appeared that the defendant was owner of one moiety of certain land and mortgagee of the other moiety. The plaintiff, the mortgagor, thereupon released his equity of redemption to the defendant. The land was let to a tenant for years, and evidence was offered that at the time this release was executed a parol agreement was entered into that the rent for the current quarter should be apportioned between the plaintiff and the defendant, whereas the defendant had received and retained the whole. But it was held that this evidence was rightly rejected; that the legal operation of the deed which vested in the releasee all the interest of the releasor in the rents not then due, could not be controlled by parol agreement. No allusion was made to the statute of frauds. In *Ford v. Yates*, 2 M. & G. 549, the action was brought for the non-delivery of hops according to contract. The declaration alleged a sale of hops to be paid for "at the expiration of a certain credit, to wit, six months." At the trial the following note was produced signed by the defendant's agent:—"Of Edward Yates, thirty-nine pockets of Sussex hops, Springetts, five pockets of Sussex hops, Kenwards, 78s.; Springetts to wait orders." The defendant refused to deliver the hops without payment. Evidence was admitted by Tindal, C.J., to show that the usual course of dealing between the parties had been for the defendant's traveller to call upon the plaintiff twice a year, and that on each occasion the latter paid him for the goods which had been ordered on the previous journey. But Bosanquet and Maule, JJ., thought that the contract was complete, and on its face imported a sale for ready money, and that the parol evidence was inadmissible. Tindal, C.J., was apparently not convinced that

he was wrong in admitting the evidence, and perhaps the case may be doubtful. To prove a clear course of dealing is a very different thing from proving a contemporaneous parol agreement; and though no course of dealing could contradict or vary the express terms of a written agreement, it might well control the usual inference upon a point on which the contract itself is silent. Indeed the inference that present payment is intended in such a case is only an assumption from experience that, where parties sell goods without naming a time for payment, the transaction is intended to be for ready money. This case was a good deal referred to in *Lockett v. Nicklin*, 19 *L. J. (Ex.)* 403, 2 *Ex.* 93, but the latter case was eventually decided on the ground that there was not any complete written contract at all, but only an imperfect memorandum. Parke, B., expresses an opinion that the decision in *Ford v. Yates* ought to have been the other way on the same ground, though on the supposition that there was in that case a complete contract, he does not say the decision was wrong. The case of *Sotilichos v. Kemp*, 3 *Ex.* 105, 26 *L. J. (Ex.)* 36, is a very clear one. The plaintiff contracted to sell to the defendant 1000 quarters of linseed, expected to arrive by a certain ship, to be delivered at Hull at 45s. per quarter, and fourteen days to be allowed for delivery of the seed from the time of the ship's being ready to discharge. The ship arrived, and the defendant immediately demanded the seed. The captain refused to deliver it, but after the expiration of fourteen days tendered it to the defendant, who refused to accept it. In an action against the defendant for not accepting the seed, he offered evidence, not of any usage in the trade to that effect, but that as between him and the plaintiff the meaning of the contract was, that the plaintiff was bound to deliver the seed immediately, and that the fourteen days was for the benefit of the defendant only, to give him that time within which he was bound to accept the seed. This evidence was held to be inadmissible.

In *Harnor v. Groves*, 15 *C. B.* 667, the next day after the making of a bargain for the sale of flour the following note in writing was sent by the defendant, the seller, to the plaintiff, the buyer:—"Sold to Mr. Harnor per Mr. Howard twenty-five sacks whites, X S." The plaintiff accepted the flour, but finding it to be bad, paid for it under protest, and brought an action against the defendant for breach of contract. At the trial it appeared that the flour delivered answered to the description known as X S, but evidence was admitted to show that, when the parol bargain was made, what was agreed as to the quality of the flour was, that it should be of the same quality as that supplied to one M., and it was proved that the flour supplied to M. was of a superior quality, namely X SS. The jury found specially that this was the parol agreement, but the Court held the memorandum conclusive, and that the defendant was only bound to supply flour of the quality therein mentioned.

[To explain or vary the consideration.] The cases as to proof of consideration stand somewhat apart, and it would be dangerous to draw any inference from them with respect to the general law upon the subject under discussion. It is constantly the practice to show that no consideration has been given for a bill or note, although the instrument bears on its face the words "value received," which clearly import a consideration for the promise contained in the instrument. Upon a contract under seal it is not, as in a contract

not under seal, generally necessary to prove that there was any consideration, or the nature of it. But if the consideration comes in question at all, it seems generally to have been permitted to inquire into it, notwithstanding any averment in the deed. Thus in *Filmer v. Gott*, 4 Bro. P. C. 230, where the considerations mentioned in the deed were 10,000*l.*, and natural love and affection, the Lords Commissioners directed an issue to inquire whether natural love and affection formed any part of the consideration, and the propriety of this course was affirmed by the House of Lords. In *R. v. Scammonden*, 3 T. R. 474, the consideration expressed in a deed was 28*l.* The question was as to the settlement of the person who took under the conveyance, and in order to prove that the consideration amounted to 30*l.*, as required by the 9 Geo. 1, c. 7, s. 5, evidence was tendered that when the deed was executed, the vendor insisted on having 30*l.*, which the pauper paid. This evidence was rejected by the Court of Quarter Sessions. The Court of Queen's Bench, however, thought the evidence ought to have been admitted. The case is not a very clear one, but Lord Kenyon, referring to the above case of *Filmer v. Gott*, gives it as his general opinion, that the deed was not conclusive as to the consideration. In *Gale v. Williamson*, 8 M. & W. 405, a father had assigned by deed to his son all his personal estate, in consideration of "natural love and affection." A writ of *fi. fa.* had been sued out against the father, under which the sheriff seized part of the property comprised in the deed. In order to show that the deed was not without valuable consideration, a bond was produced of the same date as the deed, by which it appeared that the son had bound himself to maintain his mother during her life, and his brothers and sisters until they should attain a certain age. The Court of Exchequer thought the bond was rightly admitted. But it may be observed that here the evidence used to contradict the deed was itself under seal; and in both the two last-mentioned cases the inquiry was between persons not parties to the instrument in question.

To show liability.] The following cases are those in which the question has arisen as to what persons are liable on the contract, and it will be seen that the statement of the parties on the face of the contract is always conclusive. In *Jones v. Littleddale*, 6 Ad. & E. 486, the plaintiff bought at an auction, at the auction-rooms of the defendants, a quantity of hemp. After the sale (and apparently some time after) the defendants sent to the plaintiff the following document, which in the judgment is called an invoice, signed by the clerk of the defendants.

"Jones. Bought of J. & H. Littleddale, sixty-four bales of hemp. Payment fourteen days and six months. Received on account 100*l.* October 31. Settled November 26."

It appeared that the plaintiff had paid 100*l.* to the defendants on October 31st, on account of the purchase, and the balance on November 26th. No hemp was delivered, and the action was brought for the non-delivery. At the trial evidence was given that the plaintiff was aware that the sale was by the defendants as agents only, but Patteson, J., refused to submit that evidence to the jury. And the court upheld his ruling, on the ground that, though evidence is admissible to charge persons not mentioned in the contract, it cannot be received to exonerate the person named in the contract as the contracting party. In *Magee v. Atkinson*, 2 M. & W. 440, the action was brought against brokers, for not completing a sale

of shares. The defendants had sent to the plaintiff's broker a note, as of a sale to him from themselves. At the trial evidence was offered by the defendants that they had sold the shares on account of one J., and that it was the custom in Liverpool to send in broker's notes without disclosing the principal's name. But Patteson, J., held that the evidence was inadmissible to show that the defendants were not liable, as by the note they appeared to be; and the ruling was upheld.

In *Truman v. Loder*, 11 *Ad. & E.* 589, there was a written contract, which was on the face of it a sale of tallow to the plaintiffs by a broker, for H., a person residing in London. H. frequently acted as agent for the defendant, a merchant at St. Petersburg, and this action was brought against the defendant for the non-delivery of the tallow. The defendant repudiated the authority of H., but the jury found that it existed. The defendant also offered evidence to show that, where the contract did not disclose the real principal, the buyer might look to the broker for the completion of the contract. What use the defendant could make of such evidence is not very clear, unless it was to be followed by evidence that the plaintiff had elected to take that course, and that having once elected to hold the broker liable, he could not now sue the principal. However, Lord Denman delivered an elaborate judgment of the Court of Queen's Bench upon the general question, whether such a custom contradicted the written instrument, and held that it did. The case, therefore, decides that, if a party contract in writing *as agent*, a custom to show that he, and not the principal, is liable on such a contract cannot be proved. In *Humble v. Hunter*, 12 *Q. B.* 310, an agent entered into a charter-party in his own name, describing himself as owner. It was held that the plaintiff, his principal, could not sue upon the contract. In *Holding v. Elliot*, 29 *L. J. (Ex.)* 134, 5 *H. & N.* 117, the plaintiffs sued the defendant for the non-delivery, according to contract, of ale and other goods. The plaintiffs put in an invoice made out by the defendant and delivered to them by him, in which all the goods were included, and they also proved that they paid the defendant for the whole of the goods. The defendant, however, offered evidence that, before the sale, he had told the plaintiffs he did not deal in ale, and that the ale was not in fact bought of him, and only included in his invoice at the special request of the plaintiffs for their convenience. This evidence was held to be admissible, though objected to on the ground that it contradicted the invoice; because the court thought that the invoice was not such a written memorandum of a contract as excluded parol evidence. In *Jenkins v. Hutchinson*, 13 *Q. B.* 744, 18 *L. J. (Q. B.)* 274, it was held that, where an instrument professed to be made between A. and B., and was signed by C. as agent for A., C. was not liable on the contract, if it should turn out that he had no authority to bind A. The contrary notion which seemed formerly to have prevailed in such cases is now exploded; but the agent who undertakes to execute a contract in the name of another may, if his authority be repudiated, be sued for a breach of an implied undertaking that he was furnished with authority; *Collen v. Wright*, 8 *E. & B.* 647, 27 *L. J. (Q. B.)* 215.

To show to what the contract applies.] One would think that, where the written contract itself describes to what it applies, the description ought to be as strictly adhered to as any other part of it.

But some very loose expressions have been used with reference to this matter, which do not leave the law in a very clear state. Thus it has been said that in a conveyance, "parcel or no parcel is a question for the jury," and that "*fulsa demonstratio non nocet*," though what this maxim means, as commonly used, is not very clear.

The following cases refer to this subject. In *Doe d. Freeland v. Burt*, 1 T. R. 701, the lessor of the plaintiff had demised to the defendant one room on the ground floor of a messuage in a populous district in London, with a vault contiguous and adjoining thereto, together with the ground whereon the same stood, and also a piece of ground on the north side, particularly describing it, with an exception of a right of way; and the whole premises were described to have been late in the occupation of one J. H. The defendant had taken possession of a vault under the piece of ground on the north side, which was not the same vault as that described in the lease, claiming it on the principle that *cujus est solum ejus est usque ad cælum et ad inferos*. The plaintiff gave evidence that at the time of the demise the vault in dispute was in the occupation of one B., and had not been in the occupation of A., and that it was not intended to pass by the demise. It was held that this evidence was rightly admitted, and that, under the circumstances of the locality, it did not contradict the description in the deed. The case of *Paddock v. Fradley*, 1 C. & J. 90, though not very intelligible, certainly seems a strong one. It was an action of trespass brought to try the title to certain brickworks. The brickworks were copyhold, and the defendant, to establish his title, proved an agreement to surrender to his use for the term of fourteen years "all those brickworks being copyhold of inheritance within the said manor, situate at Shelton, then in the possession of the said Paddock, and also full right, &c., to get marl, &c., as well for making bricks as for sale." It appeared that there were two closes, one called Little Brian's Wood, and the other Big Brian's Wood, in each of which there were brickworks. Big Brian's Wood was the close in dispute, and it appears from the statement of counsel and a passage in the judgment of Vaughan, B., that this close was *not* in the possession of the plaintiff at the date of the agreement. The defendant, however, called a witness at the trial to prove declarations made by the plaintiff, when the agreement was entered into, defining the land which was to be held under it, and which included Big Brian's Wood. Littledale, J., received the evidence, and Garrow, Vaughan, and Bolland, B. B., confirmed the ruling.

In *Doe d. Norton v. Webster*, 12 Ad. & E. 442, messuages were conveyed "with small gardens and appurtenances thereto." It was held that the conditions of sale signed by the vendee at the time of the sale could not be used for the purpose of showing that a garden usually occupied with one of the tenements was not intended to pass by the conveyance. In a previous case of *Murty v. M'Dermott*, 8 Ad. & E. 138, the conveyance to the plaintiff, to which the defendant was a party, was of "all that messuage and dwelling-house, with the garden, workshop, and buildings behind the same, situate in, &c., many years heretofore in the possession of &c., and now in the occupation of George Stowe as tenant thereof, together with all houses, outhouses, edifices, buildings, ways, paths, passages, &c., thereto belonging or appertaining, or accepted, reputed, deemed, taken, or known to be part or parcel of the same." The defendant owned the adjoining premises, and the dispute was to whom a wall

belonged which divided the premises, each party claiming the whole. The defendant purchased his property at the same time as the plaintiff, of the same person, to whom the whole property had formerly belonged, and he put in the conveyance to himself, which was in the same terms as that to the plaintiff, except as to the names of the occupiers. He also put in a hand-bill circulated at the time of the sale, which showed that he was entitled to the wall. This last piece of evidence was objected to, but Bosanquet, J., received it, and the court held that it was admissible. It is to be observed that this document bore no signature as in the last case, and it is difficult to distinguish it in principle from *Boydell v. Drummond*, 11 East, 152, in which it was held that parol evidence could not be given to connect two written documents; or from a very similar case, *Hinde v. Whitehouse*, 7 East, 558. See *Blackburn on Contracts of Sale*, p. 47, and *Peek v. The North Staffordshire Railway Company*, 29 L. J. (Q. B.) 97; *E. B. & E.* 958. It is true that these cases turned upon the exclusion of the evidence created by the statute of frauds; but the rule of common law, which excludes parol evidence where there is a written contract, is equally strict.

In *Mucedonald v. Longbottom*, 28 L. J. (Q. B.) 293, 1 E. & E. 977, the defendant had contracted to buy and the plaintiff to sell a quantity of wool, which was simply described as "your wool," at a certain rate per pound. The plaintiff tendered to the defendant a quantity of wool, which was partly the produce of his own flock and partly that of the flocks of other farmers, which he had purchased. The defendant refused the wool on the ground that he had only contracted to purchase the plaintiff's own wool. Evidence was received by Byles, J., of a conversation between the plaintiff and the defendant prior to the sale, from which it appeared that the defendant intended to bargain for all that the plaintiff tendered; and the court held that the evidence was admissible. The case was affirmed by the Exchequer Chamber, 29 L. J. (Q. B.) 286.

In *Mumford v. Gething*, 29 L. J. (C. P.) 105, 7 C. B. N. S. 305, the defendant entered into the following contract with the plaintiffs:—"In consideration of my entering upon your employ at a salary, to commence with, at 50*l.* a year, I hereby agree to do so; with the understanding that in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50*l.*" It was held that parol evidence was admissible to show that this was a contract to enter the service of the plaintiffs as their traveller over a district known as "the Midland journey."

In *Price v. Monet*, 11 C. B. N. S. 508, the plaintiff was engaged by the defendant for three years "to give the whole of his services." The defendant dismissed the plaintiff for not obeying his orders. Held, in an action for wrongful dismissal, that the plaintiff might show by parol evidence that it was only intended that he should serve in a certain capacity, and that the orders given were not such as he was bound to obey. Williams, J., however, thought that it was not necessary to decide the point. See also *Chadwick v. Burnley*, 12 Week. Rep. 1077.

To prove fraud, illegality, or error.] Where fraud is imputed, any fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction; *B. N. P.* 173, *Paxton v. Popham*, 9 East, 421; for fraud, it is said, is a

matter extrinsic and collateral, which vitiates all transactions, even the most solemn. Thus, in order to set aside a will, parol evidence may be given of what passed at the signing, and what the testator said, to show that his signature was obtained by fraud; *Doe v. Allen*, 8 T. R. 147. And, in general, matter which in law avoids an instrument, whether it be fraud, forgery, duress, illegality, &c., may be proved by parol, however contradictory to its tenor, provided the pleadings be adapted to such evidence; see *Doe v. Ford*, 3 Ad. & E. 649.

To show that the agreement was not intended to take effect.] As a deed does not take effect until it is delivered, parol evidence will often be admissible to show that such has, or has not been the case, though a deed found out of the hands of the person who executed it will generally be presumed to be delivered. A deed may also be delivered conditionally, as what is called an escrow. And it seems that whatever be the ceremony gone through at the time of execution, the question is entirely one of fact for the jury, whether the deed was intended to take effect immediately, or only after the lapse of a certain time or upon the performance of some condition; *Murray v. The Earl of Stair*, 2 B. & C. 82; *Gudgen v. Basset*, 26 L. J. (Q. B.) 36. See *post*, tit. *Execution of Deeds*.

For a document not under seal there is no ceremony analogous to delivery, it being signed only. But a signature is not necessarily absolute, and it may be shown by parol evidence not to be so, and that the agreement was not intended to take effect till after the lapse of a certain time, or the performance of some condition; *Davis v. Jones*, 17 C. B. 625; 25 L. J. (C. P.) 91; *Pym v. Campbell*, 6 E. & B. 370; 25 L. J. (Q. B.) 277; *Wallis v. Littell*, 31 L. J. (C. P.) 100; 11 C. B. N. S. 364; *Rogers v. Hadley*, 32 L. J. (Ex.) 241.

To show that a written contract has been discharged.] A deed cannot in any case be discharged except by an instrument which is itself under seal, but a written contract not under seal may be discharged by oral arrangement, either wholly, *Milton v. Edgworth*, 6 Bro. P. C. 587, or in part, *Goss v. Lord Nugent*, 5 B. & Ad. 58, if it is not within the statute of frauds. Indeed this comes within the wider principle that a written contract not within the statute of frauds may be varied without limit by subsequent oral arrangement.

It seems settled that a contract within the statute of frauds cannot be partially discharged by a subsequent oral arrangement; *Goss v. Lord Nugent*, *ibi supra*; *Stowell v. Robinson*, 3 N. C. 928.

Whether or no a contract within the statute of frauds can be wholly discharged by parol seems to be doubtful. In *Goman v. Salisbury*, 1 Vern. 240, the Lord Keeper Guilford held that it could. And in *Goss v. Lord Nugent*, *supra*, the Court of Queen's Bench inclined to the same opinion. In *Harrey v. Grabham*, 5 Ad. & E. 61, three years later in the same Court, Lord Denman, who delivered both judgments, speaks doubtfully upon the point.

Patent and latent ambiguities.] It is doubtful whether the obscure and difficult rules upon the subject of patent and latent ambiguities have any application to written memoranda of contracts, not within the statute of frauds, because it seems to be admitted, as to these, that if the written instrument fails, from being imperfect, to convey the intention of the parties, then the whole matter is at large, and parol evidence may be resorted to.

Upon wills these rules have an important bearing, but this is considered a subject more suitable for a special treatise than for a work like the present.

PRESUMPTIVE EVIDENCE.

General nature of presumptive evidence.] Presumptive evidence, or evidence which leads to a presumption, may perhaps be described as evidence, not directly of the fact itself, but of those circumstances which, according to common experience, are co-existent with the fact, and from the existence of which, therefore, the existence of the fact may be inferred.

It is evident that upon the trial of every cause numberless presumptions are made by the jury, many of which are so obvious that we are scarcely conscious of them.

It is not entirely left to the experience of juries to say what presumptions they shall, and what they shall not make; there are some which it is the duty of the judge to inform the jury that they ought to make; and between these and the class of cases in which the proof affords what is in law *no evidence* of the fact sought to be inferred, there is every conceivable variety of cases in which judges, without positively directing juries as to what inference they ought to draw, advise them what to do, in terms more or less strong. Of course there is considerable difference between directing and advising a jury, and again between advising a jury to act upon evidence and merely leaving evidence to them without any advice at all, or advising them not to act upon it. But it is not always easy to measure exactly the force of the language attributed by reporters to judges in this respect.

Presumptions which juries ought, or are permitted to make.] One presumption that juries are always told that they are bound to make is, that bills of exchange and promissory notes are founded on a good consideration. Another is, that a person in the absolute possession of land is seised in fee; and that deeds thirty years old have been duly executed. They have also been directed to presume that every place is within some parish; *R. v. St. Margaret's*, 7 Q. B. 569. And they certainly may presume, and perhaps ought to be directed to presume, that a letter was written on the day it bears date; *Hunt v. Massey*, 5 B. & Ad. 902; and that indorsements on a promissory note were made at the date they bear, *Smith v. Battens*, 1 Mood. & Rob. 341. A bill of exchange is presumed to be signed on the day it bears date; *Owen v. Waters*, 2 M. & W. 91; *Anderson v. Weston*, 6 N. C. 296; *Potez v. Glossop*, 2 Ex. 191; *Malpas v. Clements*, 19 L. J. (Q. B.) 435. The Court, in the last case, said that there was an exception to this, where the object was to prove a petitioning creditor's debt to support a proceeding in bankruptcy; but the existence of this exception is doubted in *Potez v. Glossop*.

A person dealing with a registered company is presumed to know the contents of the deed of settlement; *Balfour v. Ernest*, 5 C. B. N. S. 600; 28 L. J. (C. P.) 170.

A river is presumed to be navigable as far as the tide flows; *Miles v. Rose*, 5 Taunt. 705; *R. v. Montague*, 4 B. & C. 602.

Cujus est solum ejus est usque ad cælum et ad inferos, is a barbarous expression of a well-known presumption which juries are directed to make.

Juries are also usually directed to presume that persons acting in a public capacity have been duly appointed. As, for instance, a surrogate; *R. v. Verelst*, 3 Camp. 432; justices of the peace, constables, &c.; *Berryman v. Wise*, 4 T. R. 366; *Doe v. Haddon*, 3 Doug. 310; *Marshall v. Lamb*, 5 Q. B. 115; a vestry clerk, *McGahey v. Alston*, 2 M. & W. 206; an attorney, *Berryman v. Wise*, *ubi supra*; an overseer, *Cannell v. Curtis*, 2 Bing. N. C. 228; *Doe v. Barnes*, 8 Q. B. 1037; a parson, *Radford v. McIntosh*, 3 T. R. 635; a commissioner of one of the superior courts for taking affidavits; *R. v. Howard*, 1 Mood. & Rob. 187.

If a person is shown to have filled an office at some period prior to the date in question, the jury may presume that he continues to do so down to the latter date; *R. v. Budd*, 5 Esp. 230; *Steward v. Dunn*, 12 M. & W. 655; *Doe v. Young*, 8 Q. B. 63. Though of course this inference will depend a good deal upon the nature of the office.

The maxim, *omnia presumuntur rite esse acta*, expresses a presumption which juries are generally directed to make. Instances of it are that feoffment was accompanied with livery of seisin; *Biden v. Loveday*, cited 1 Vern. 196; *Doe v. Wainwright*, 5 Ad. & E. 520; that a theatre has been duly licensed; *Rodwell v. Redge*, 1 C. & P. 220; that a soldier employed in recruiting is duly attested; *Wolton v. Garin*, 16 Q. B. 48; *R. v. Hawkins*, 10 East, 211.

An instrument lost, or not produced after notice is presumed to be duly stamped; *R. v. Long Buckby*, 7 East, 45; *Crisp v. Anderson*, 1 Stark. 35.

A fact may be presumed from the regular course of a public office; thus, where it was proved that the officers at the custom-house would not permit an entry to be made, unless there had been a particular indorsement on a licence, it was held, that the licence must be presumed to bear the required indorsement; *Butler v. Allnutt*, 1 Stark. 222.

The jury ought to be told to presume legitimacy, *Banbury Peerage case*, 1 Sim. & St. 153; and marriage from cohabitation, except in prosecutions for bigamy, and actions for criminal conversation; *Doe d. Fleming v. Fleming*, 4 Bing. 266.

A presumption which juries ought to make is that males under fourteen are incapable of sexual intercourse. The period of gestation is also presumed to be about nine calendar months. The exact limits of variation of this period are not very clearly settled; so that if there were any circumstances from which an unusually short or long period of gestation might be inferred, or if it were necessary to ascertain the period with nicety, special medical testimony would be required. The subject was elaborately discussed in the *Gardiner Peerage case*, which is reported separately by Le Marchant. In ordinary cases juries would be directed that fruitful intercourse and parturition are separated by a period not varying more than a week either way from that above-mentioned.

There is a presumption generally made with reference to postmarks which is strongly recommended by convenience, and which may perhaps be put on the ground, that it is a statement made by a person which it is his public duty to make correctly. It is that the letter was in the post-office at the place and on the day specified by the stamp; *Abbey v. Lill*, 5 Bing. 299; *Kent v. Lowen*, 1 Camp. 178; *Stocken v. Collin*, 7 M. & W. 515. Whether or no the postmark ought also to be presumed to be genuine, seems doubtful. Best, C.J., in *Abbey*

v. *Lill*, seemed to think it ought; but Gaselee, J., refused to express an opinion on it, and the case was decided on another ground. In *Woodcock v. Houldsworth*, 16 M. & W. 124, Pollock, C.B., at Nisi Prius, seems to have thought the presumption of genuineness ought to be made; the verdict was afterwards set aside, but no opinion was expressed on this point. It is always presumed that a posted letter reaches its destination at the time when, in due course, it ought to reach it; but either a person from the post-office, or a person otherwise well acquainted with it, must be called to prove the course of the post; *Abbley v. Lill*; *Woodcock v. Houldsworth*, *supra*.

An act done with the knowledge of a person who would have a right to object to it may be presumed to be done by his licence. Thus where an enclosure had been made from a waste twelve or fourteen years, and seen by the steward of the lord from time to time, without objection, it was left to the jury to say whether the enclosure was made by the lord's licence; *Doe d. Foley v. Wilson*, 11 East, 56. An entry in a merchant's book, purporting to be a copy of a letter addressed by him to his partner abroad, is evidence, as against the writer, that it was also sent; *Sturge v. Buchanan*, 10 Ad. & E. 598. In *Morgan v. Whitmore*, 6 Ex. 716, in which the *bona fides* of a sale to the plaintiff by a bankrupt was disputed by the assignees, the plaintiff, to prove the date of the sale, put in evidence a receipt and delivery order for the goods, dated at the time of the alleged sale, but not delivered to the witness who produced them till after the sale and bankruptcy; and the court, *dubitante* Pollock, C.B., held them to be admissible as confirmatory evidence of the date of the sale.

Before Lord Tenterden's Act, 9 Geo. 4, c. 14, indorsements were frequently used for the purpose of taking the instrument on which they were made out of the statute of limitations, and there was considerable doubt whether the payment was to be presumed to be made at the time the indorsement bore date. Now by the above act, s. 3, indorsements "on any bill of exchange, promissory note, or other writing," cannot be used for that purpose. But there is a doubt whether this applies to instruments under seal. The question, therefore, as to what the presumption is in such cases, may again be raised. It will be found fully discussed in *Tayl. Ev.* ss. 625, *seqq.*

It is not permitted to the parties to prove every fact which would lead to a presumption in some measure bearing on the question in issue. If there were no limits to this, it is obvious that a trial might be unduly lengthened; and it is clear that a judge may refuse to receive evidence which only leads to a very weak presumption. Thus in the case of *Hollingham v. Head*, 27 L. J. (C. P.) 241, 2 C. B. N. S. 388, in an action for the price of goods sold and delivered, the question was raised whether the goods were sold subject to a certain condition. The plaintiff denied the existence of the condition, and the defendant, in order to show that it existed, offered evidence that the plaintiff had sold similar goods to other persons, subject to the alleged condition. It was held that this evidence was rightly rejected. *Holcombe v. Henson*, 2 Camp. 391, was an action by a brewer upon an agreement by the defendant to take all his beer from the plaintiff. The defence set up was that the beer supplied by the plaintiff was bad, and that the defendant had, therefore, ceased to deal with him. The plaintiff admitted that this was, if true, a good defence to the action, and in answer to it proposed to call some other publicans who dealt with

the plaintiff at the same time as the defendant, to show that they were satisfied with the beer supplied to them. This evidence was rejected by Lord Ellenborough. In *Griffits v. Payne*, 11 *Ad. & E.* 131, where the defence to an action by the indorsee against the acceptor of a bill of exchange was that the name of the acceptor was forged by the drawer, it was held that evidence that the drawer had forged several other bills in the defendant's name was inadmissible.

Presumption of payment—from lapse of time.] Lapse of time after the debt becomes due, when unexplained, is evidence from which the payment of a debt, due either by specialty or simple contract, may be presumed. Independently of the 3 & 4 *Will.* 4, c. 42, s. 3, where twenty years have run upon a bond debt, without anything to break the time or any circumstances to account for the non-payment, a presumption arises that the debt has been paid; *Christophers v. Sparke*, 1 *Jac. & W.* 234. Where a promissory note made in 1782, and payable on demand seven days after sight, was sued upon in 1803, Lord Ellenborough said that the same presumption of payment arose as in the case of a bond; *Duffield v. Creed*, 5 *Esp.* 52. Where, in 1819, an attempt was made to set off money lent in 1806, and the statute of limitations was not pleaded, it was held that it was for the jury to consider, whether they would presume that the debt, after so great a length of time, had not been satisfied; *Cooper v. Turner*, 2 *Stark.* 497. Where goods had been consigned to the defendant for sale in 1795, and an action was brought against him for not accounting in 1809, the Court said that, in the absence of special circumstances, the length of time would raise a presumption that the parties had accounted; *Topham v. Braddick*, 1 *Taunt.* 577.

The unexplained lapse of much shorter periods of time, in cases where, in the ordinary course of affairs, it is not usual to give credit, is evidence from which payment may be presumed. Where an action was brought for the wages of a household servant two years after she was shown to have quitted her master's house, the jury were told that they might presume that the debt had been paid; *Sellen v. Norman*, 4 *C. & P.* 80. Where the defendant was employed by the plaintiff, a cowkeeper, to carry out and sell milk to his customers, and was in the habit of paying over the money which she had received to the plaintiff without any written vouchers passing between them, it was held, in an action for money had and received, that the plaintiff must prove by positive evidence that the defendant had not accounted with him; *Evans v. Birch*, 3 *Camp.* 10. If a man gives a receipt for the last year's or quarter's rent, this is evidence of the payment of the rent for all former quarters, though it may undoubtedly be contradicted by other evidence; *Gilb. Ev.* 6th ed. 142.

Presumption of payment—from possession of the security.] The possession of a security, where, in the ordinary course of dealing, the security is given up to the person who pays the debt, is in some cases evidence of payment. Where an over-due bill of exchange was produced from the hands of the acceptor, it was held that there was no presumption that he had paid it, unless he went on to show that the bill was negotiated after acceptance; *Pfif v. Vanbatenburg*, 2 *Camp.* 439. Where the defendant, who was indebted to the plaintiff, drew a cheque upon his

bankers in favour of the plaintiff for the amount of the debt, and it was shown that the cheque was cashed at the bank by the plaintiff, it was held that although the defendant was not proved to have handed the cheque to the plaintiff, there was presumptive evidence of payment; *Mountford v. Harper*, 16 M. & W. 825. The strength of evidence such as that in the cases last cited must necessarily vary with the character of the debt, the mode in which it has been contracted, the position of the parties, and other similar circumstances. As if the party producing the security were fellow-lodger or clerk to the original holder, or his near relation, or in any position where he might easily possess himself of the document. Where S. proved that he lent B. a cheque on his bankers for £100, and produced the cheque crossed with the names of B.'s bankers, and showed that £100 had been paid to the account of B. the day after the cheque became due; but it appeared that the papers of B. after he became bankrupt, fell into the hands of S., it was held that there was no presumption that the amount of the cheque had been paid to B.; *Bleasby v. Crossley*, 3 Bing. 430. In an action against the acceptor of a bill, it was proved that the bill when due was presented to the defendant and dishonoured, and that the same day a stranger paid the amount of it to the holders, who handed to him the bill with a receipt upon it, and this bill was produced at the trial by the plaintiff. It was held that there was no evidence from which payment by or on behalf of the acceptor could be presumed; *Phillips v. Warren*, 14 M. & W. 379.

Presumption of the duration of life.] Where a lad had been absent at sea for about twenty-five years, and nothing was known of him during all that time, the court said that there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he was last heard of; *Doe d. George v. Jesson*, 6 East 81; *Doe d. Lloyd v. Deakin*, 4 B. & A. 433. Where, in an action of ejectment, it appeared that two persons had lived more than a hundred years before, and there was no evidence to show what had become of them, it was held that the jury might presume that they had died without issue; *Doe d. Oldham v. Wolley*, 8 B. & C. 22. In *Doe d. France v. Andrews*, 15 Q. B. 756, where a lad had not been heard of for nearly fifty years, and indeed, except the mention of his name in a lease, there was no proof that he had ever existed, the Court said that it could not be presumed that he was dead in the absence of evidence that he had not been heard of by those who would naturally have heard of him, or at least that inquiry had been made as to whether there were any such persons. In *Watson v. King*, 1 Stark. 121, where a vessel, on her return from the West Indies about a year before, had been lost sight of in a heavy gale, Lord Ellenborough directed the jury that there was evidence from which they might presume that the master, who was on board at the time, was dead, and that it was for them to decide upon the time of his death. Where a person had gone to America, and had not been heard of for twenty-five years, the Court said that at the end of seven years it might be presumed that he was dead; but that, if it were important to any one to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the jury for that purpose beyond the mere lapse of seven years; *Doe d. Knight v. Nepean*, 5 B. & A. 86; *in error*, 2 M. & W. 894. Where a girl of sixteen ran away from her

father, a small farmer, and was never heard of after 1814, when she left England, Shadwell, V.-C., refused to presume in 1844 that she was dead in 1821, the probability of intelligence from her being rebutted by the circumstances under which she had left; *Watson v. England*, 14 Sim. 28; *Bowden v. Henderson*, 2 Sm. & Giff. 360.

In *Wing v. Angrave*, 8 H. L. C. 183, where a husband and wife had been carried off the deck of a vessel by the same wave, it was held that there was no inference of law as to survivorship from the different sex, age, and state of health of the husband and wife; that the question was from beginning to end one of fact; and the difference in strength, age, and in other respects, was a mere matter of evidence for those who had to discharge the functions of a jury.

HEARSAY, OR SECOND-HAND EVIDENCE.

It is a well known general rule, that, in order to prove a fact, it is not allowed to give evidence that a person has been heard to state, or has stated in writing the existence of the fact. There are two objections to evidence of this kind; first, that the statement is not on oath; secondly, that it is not submitted to the test of cross-examination.

This is what is familiarly known as *hearsay* evidence; the term is not objectionable, provided it be recollected that the rule which excludes it does *not* exclude that which persons have been heard to say, when what they have said is itself a fact in dispute; and that it *does* exclude statements in writing as well as verbal statements.

There are certain exceptions to the rule which excludes hearsay evidence, which, in civil cases, are founded sometimes on some special difficulties in procuring more reliable evidence in the cases to which they apply; sometimes on circumstances, which make the falsity of the statement highly improbable; sometimes on considerations of public convenience.

Evidence of deceased witness on former trial between the same parties.] If a case has been already tried once, and for some reason a new trial is necessary, what was said in evidence by a witness at the former trial, who is dead at the time of the second, may be used on the second occasion.

Declarations of deceased persons in questions of pedigree.] In questions of pedigree the oral or written declarations of deceased blood relations of the family, and of their wives or husbands, are, subject to certain restrictions, admissible. This exception is founded on the obvious difficulty of tracing descent and the relationship of deceased members of families by any other evidence. And it has been said that these statements are entitled to credit, as being made concerning facts which were peculiarly within the knowledge of the declarants. Such declarations may be used to prove who is a person's grandfather, when he married, what children he had; or the death of a relation beyond sea; *B. N. P.* 294—5. The declarations of a deceased father and of a relation were admitted to show which of three children, all born at the same time, was the eldest; 12 Vin. Abr. 247. Declarations in a family, descriptions in wills, inscriptions upon monuments, in Bibles, and in registry books, are admissible under this head; *Whitelocke v. Baker*, 13 Ves. 514. A pedigree

which has long hung up in a family mansion, under circumstances from which a recognition of it by the family may be implied, is good evidence; *Goodright v. Moss, Coup.* 594. A minute book of a visitation, signed by the heads of the family, has been admitted, though produced from a private library; *Pittor v. Walker*, 1 *Str.* 162. A signed pedigree delivered to the Heralds' College, by virtue of a commission under which the College was authorised to receive and enrol such pedigrees, was admitted; *The Shrewsbury Peerage case*, 7 *H. L. C.* 19. In *Monckton v. The Attorney General*, 2 *Russ. & My.* 147, documents in the handwriting of a deceased relation, purporting to give a genealogical account of his family, were offered in evidence; this account was shown to be erroneous in many respects, and was admitted by the writer to be imperfect, and founded partly on hearsay, but it was said that those objections applied only to the credit, not to the admissibility of the documents, and it was admitted. An old pedigree, professing upon the face of it to be "collected from parish registers, wills, monumental inscriptions, family records, and history," but signed by a kinsman of the family as being correct, was held by the Court of Exchequer Chamber to be admissible, in the absence of anything to rebut the presumption that the recognition was in consequence of facts within the personal knowledge of the person who signed it, or which he knew or heard from other members of the family who lived before his time; *Davies v. Lowndes*, 6 *M. & G.* 471. The description of a person as "daughter and heiress of J. D." in a conveyance signed by a cousin by blood of J. D., was admitted in evidence, in *Doe d. Jenkins v. Davies*, 10 *Q. B.* 315; and the written memorandum of a father as to the time when his child was born has been received to prove when the infant would come of age; *Herbert v. Tuckal, Sir T. Raym.* 84; cited by Lord Ellenborough in *Roe d. Brune v. Rawlings*, 7 *East*, 290. In *R. v. The Inhabitants of Erith*, 8 *East*, 539, where a pauper, in answer to questions as to his birthplace, said that his father had told him that he was born illegitimate at Erith, it was held that the evidence was improperly received, as there was no question of pedigree. In *Shields v. Boucher*, 1 *De G. & Sm.* 40, it was proposed to ask what a deceased person had said of where her family came from, where she herself came from, and to what place her father belonged. Wilde, C.J., disallowed these questions, but Knight Bruce, V.-C., in an application for a new trial, said that *R. v. Erith* did not, he thought, apply, and that the questions seemed to him admissible, as leading to identify the deceased and her relations. In *Bauer v. Milford*, 7 *Weekly Rep.* 570, Kindersley, V.-C., expressed his concurrence with the opinion of the Vice-Chancellor Knight Bruce. In *Rushton v. Nesbitt*, 2 *Mood. & Rob.* 554, Rolfe, B., admitted evidence of a declaration made by a deceased person on leaving Manchester that he was going to Blackburn, as evidence of a tradition in the family that they had relations at Blackburn. Where inscriptions on a tombstone and on a monumental tablet were offered in evidence, together with the declarations of a deceased relation, to prove the ages of different persons, Tindal, C.J., refused the evidence; but Lord Brougham, after argument, expressed a very strong opinion in favour of it, and afterwards stated that he had consulted Littledale, J., and Parke, J., who concurred with him; *Kidney v. Cockburn*, 2 *Russ. & My.* 167. The suit being compromised, no further opinion in this case was delivered. In the argument, a case was cited of *Ryder v. Malbone*, where Littledale, J., at the Stafford Assizes, the age being material,

admitted as evidence an inscription on a tombstone stating the death of a party at the age of ninety years. In *Slaney v. Wade*, 7 Sim. 595, copies of a mural inscription in a church, which had been effaced, were admitted. An old and cancelled will, produced from among the papers of the testator's grandson, was admitted to prove the existence and relative ages of the testator's brothers; *Doe d. Johnson v. Pembroke*, 11 East, 504. In *Doe d. Wild v. Ormerod*, 1 Mood. & Rob. 466, Alderson, B., seems to have refused to receive the probate of a will in proof of a statement relating to pedigree to prove which the original will would have been admissible.

A person's declaration that his grandmother's maiden name was A. B. is admissible; per Lord Brougham; *Monckton v. The Attorney General*, 2 Russ. & My. 158. The declarations tendered in evidence may either refer to what the party knew of his own personal knowledge, or to what he has heard from others to whom he gave credit; *Ibid.* 165. The general rule against allowing particular facts or single acts to be proved by hearsay, which is frequently applied in cases of public right or custom, must be considered as extending, though probably in a less wide or less ample manner, to cases of pedigree; per Knight Bruce, V.-C.; *Shields v. Boucher*, 1 De G. & Sm. 51. An entry made for the express purpose of establishing the legitimacy of a son, and the time of his birth, in case the same should be called in question, is receivable in evidence, though its particularity is a strong circumstance of suspicion; *Berkeley Peerage case*, 4 Camp. 418.

Before any such declaration can be admitted in evidence the relationship of the declarant by blood or marriage must be established by some proof independent of the declaration itself. It is the duty of the judge to decide whether this relationship is proved. Slight evidence will, however, be sufficient; *Plant v. Taylor*, 7 H. & N. 237; 31 L. J. (Ex.) 289.

In *Vowles v. Young*, 13 Ves. 148, the Lord Chancellor admitted evidence of the declarations of a husband that his wife was illegitimate; and in *The Shrewsbury Peerage case*, 7 H. L. C. 1, a wife's statements as to her husband's family were received. In *Crispin v. Doghioni*, 3 Sw. & Tr. 41, S. C. 32 L. J. P. & M. 109, upon an issue whether the plaintiff was the natural son of H. C., evidence of declarations of J. C., a brother of H. C., that the plaintiff was the natural son of H. C. were rejected. In *Doe d. Bamford v. Barton*, 2 Mood. & Rob. 28, Patteson, J., rejected evidence of declarations made by one of two illegitimate sons as to his brother having died without issue. The declarations of servants and intimate friends cannot be received; *Johnson v. Lawson*, 2 Bing. 86. In *Wilson v. Mitchell*, 3 Camp. 392, acknowledgments of parties that they were married, with no further proof of an actual marriage, or that they had lived together as man and wife, were held insufficient proof of marriage. The declarations of a reputed father or mother are admissible to prove that they are not married, and that, therefore, their children are illegitimate; *R. v. The Inhabitants of Bromley*, 6 T. R. 330; though the non-access of a husband during marriage cannot, from motives of public policy, be proved by the direct evidence either of himself or of his wife; *R. v. The Inhabitants of Kea*, 11 East, 134; *R. v. The Inhabitants of Sourton*, 5 Ad. & E. 180. In bastardy cases, however, where the fact of non-access has been established by independent proof, the evidence of a married woman is admissible to charge the putative father of the bastard child; *R. v. Luffe*, 8 East, 203. Mere state-

ments in depositions by persons that they were relatives of A. B. were rejected as insufficient evidence that the parties sustained the character of relations; *The Banbury Peerage case, Le Marchant's Report, Gardner Peerage case, Appendix*, 413. But in *Freeman v. Phillips*, 4 M. & S. 486, the depositions of witnesses in a suit more than a hundred years old were admitted without further proof of the qualification of the witnesses than was supplied by the statements themselves. In *Doe d. Jenkins v. Davies*, 10 Q. B. 314, evidence of declarations made by E. D. as to statements of her mother respecting her marriage were admitted, although the legitimacy of E. D. was the question in dispute.

If the declarations which are sought to be given in evidence were made *post litem motam* they are not, in any case, admissible, otherwise there would be great temptation to construct evidence which it would be difficult to contradict. The meaning of the phrase *post litem motam* has been a good deal discussed. The cases have been collected in *Tayl. Ev.* ss. 563—569, and the result stated is, that "there must be not merely facts which may lead to a dispute, but a *lis mota*, or suit, or controversy preparatory to a suit, actually commenced, or dispute arisen, and that upon the very same pedigree or subject matter which constitutes the question in litigation." See *Davies v. Lowndes*, 6 M. & G. 528; *Shedden v. Patrick*, 30 L. J. (Pr. & M.) 217; 2 Sw. & Tr. 170; and the other cases there cited.

That the party making the declaration is interested in the subject of it does not in any case render it inadmissible, if it be not made *post litem motam* in the sense above stated. This only goes to the value of the evidence; *Doe v. Davies*, 10 Q. B. 314. But in *Plant v. Taylor*, 7 H. & N. 237, 31 L. J. (Ex.) 289, Channell, B., doubted whether a declaration by a person obviously in his own interest ought to be received.

Evidence of reputation on questions of public or general right.] Another exception to the rule which excludes hearsay evidence is where the statement relates to matters of public or general right. The grounds upon which evidence of reputation is admitted in such cases are that the origin of such rights is generally ancient and obscure, and consequently incapable of direct proof;—moreover in local matters all persons living in the neighbourhood, and interested in them, are likely to be conversant with them;—and common rights are naturally the subject of common and public conversation, in the course of which statements are made, which if uncontradicted, are likely to be true; and thus a trustworthy reputation may arise from the concurrence of many persons unconnected with each other, and interested in investigating the truth. Per Lord Campbell, C.J., in *R. v. Bedfordshire*, 4 E. & B. 535, 24 L. J. (Q. B.) 81.

A manorial custom is a public or general right which may be proved by general reputation; *Denn v. Spray*, 1 T. R. 466; and so is the extent of a manor; *Doe v. Skinner*, 3 Ex. 84; or of a reputed manor which once existed; *Doe v. Sleeman*, 9 Q. B. 298; so is a right of common by cause of vicinage; *Prichard v. Powell*, 10 Q. B. 589; and the boundaries between parishes or manors; *Nicholls v. Parker*, 14 East, 331; a parish modus; *Weeks v. Sparke*, 1 M. & S. 691; *White v. Lisle*, 4 Madd. 215; a parochial chapelry; *Carr v. Mostyn*, 5 Ex. 69; a toll traverse; *Brett v. Beales*, M. & M. 416;

a ferry; *Pim v. Curell*, 6 M. & W. 234; a county bridge; *R. v. Bedfordshire*, 4 E. & B. 585; 24 L. J. (Q. B.) 81.; or a right of freewarren by prescription over an entire manor, including demesne and tenemental lands; *Carnarvon v. Villebois*, 13 M. & W. 313. Therefore the declaration of deceased copyholders; or a saving of the right in a private act for enclosure, *inter alia*, of copyholders' common, are all evidence of such a right of freewarren; *Ib.*

In the *Marquis of Anglesea v. Lord Hatherton*, 10 M. & W. 218, the court was inclined to hold that a deed between the lord of a manor and a number of his customary tenants, alleging what the customs were, or what they conceived them to be at that time, would be receivable in evidence to negative a claim on behalf of all the customary tenants.

Reputation is admissible to prove the prescriptive liability of certain landowners to repair a county bridge, for though involving a matter of private right, matters of public concern likewise depend upon it; *R. v. Bedfordshire*, 4 E. & B. 535; overruling, *R. v. Wavertree*, 2 Mood. & Rob. 353. In *Steel v. Prickett*, 2 Stark. 463, Lord Tenterden admitted evidence of reputation alone to prove the existence of a manor, but in *Rushworth v. Craven*, M'C. & Y. 417, a penal action, Hullock, B., said that, in his opinion, to render such evidence admissible some foundation in fact, such as the exercise of manorial rights, should first be laid.

A presentment by the homage on the court rolls of a manor, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved; *Roe v. Parker*, 5 T. R. 26. Entries of admissions *durante castâ viduitate* are evidence of a custom to hold on that condition, though there may be no instance of a forfeiture for incontinence; *Doe v. Askew*, 10 East, 520. Proof of the admission of the youngest among collaterals of a certain degree of consanguinity is not evidence *per se* of the custom of descent to the youngest of a more remote degree: thus the entry of an admission of the youngest son of an uncle is no evidence that the custom extends to the youngest son of the youngest brother of a great-grandfather; *Muggleton v. Barnett*, 27 L. J. (Ex.) 125; 2 H. & N. 653. Presentments by the leet jury of unlawful fishing in a stream belonging to the lord of the manor are not evidence for the lord of his right to the stream; for they are made in the exercise of a criminal jurisdiction, and are *res inter alios*; *per* Erle, C.J., in *Mildmay v. Newton*, *Winton Sum. Ass.* 1846; *dubitante* Coleridge, J., in *Waddington v. Newton*, *Winton Sum. Ass.* 1850, who was disposed to admit them, on the same presentments being tendered at a subsequent trial on the same question between other parties. In *Culmady v. Rowe*, 6 C. B. 861, presentments of purprestures were rejected by Coleridge, J., because no fine appeared to have been imposed. Entries of fines assessed in the books of a deceased steward are not evidence of a custom to take such fines, unless there be some proof of payment; *Dean of Ely v. Caldecott*, 7 Bing. 433.

The rule with regard to the parties from whom the declarations proceed has thus been laid down: In cases of rights or customs which are not, strictly speaking, public, but are of a general nature and concern a multitude of persons (as in questions with respect to boundaries and customs of particular districts), it seems that hearsay evidence is not admissible, unless it be derived from persons conver-

sant with the neighbourhood. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. But where the right is strictly public (a claim of highway for instance), in which all the king's subjects are interested, it is difficult to say that there ought to be any such limitation. In a matter in which all are concerned, reputation from any one appears to be receivable, but almost worthless unless it came from persons who are shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. *Per Parke, B., in Crease v. Barrett*, 1 C. M. & R. 919; *Doe v. Sleeman*, 9 Q. B. 301, *per curiam*. Thus a document purporting to be a decree of certain persons, the Lord Treasurer and Chancellor of the Exchequer, &c., who had no authority as a court, was held to be inadmissible evidence as reputation on a question whether the city of Chester, before it was made a county itself, formed a part of the county palatine; because those personages had from their situations no peculiar knowledge of the facts; *Rogers v. Wood*, 2 B. & Ad. 245. So the answers of the tenants of a manor to an old commission of survey issued by the lord, finding the bounds of the manor and his right to wreck, are evidence of the former, but not of the latter; they having as to this no peculiar means of knowledge, and the lord's title to such a franchise not being a matter of public concern; *Talbot v. Lewis*, 1 C. M. & R. 495. Such a claim of wreck is one affecting only the interest of the Crown, and not the tenants; and the case differs in that respect from the claim of freewarren in *Curnarvon v. Villebois*, 13 M. & W. 313, cited *ante*, p. 41. A document, *tempore Eliz.*, produced from the office of the duchy of Lancaster, purporting to be a survey of a duchy manor taken by the deputy surveyor-general by the oaths of twenty tenants of the manor whose names were subscribed, was held to be inadmissible as evidence of the boundary of the manor, there being no proof of the authority under which the survey was taken, and, consequently, no ground for presuming that any such survey was in fact made; *Erans v. Taylor*, 7 Ad. & E. 617. If indeed the document had been generally accepted as a genuine presentment, it would have been evidence of reputation, *sembl. Ib.* In *Beaufort v. Smith*, 4 Ex. 450, it was held that a private survey, made by direction of Oliver Cromwell, of lands granted to him by Parliament, in which commissioners named by him stated the substance of information received from presentments of the tenants as to manorial tolls and royalties, was not evidence either as reputation, or as a public document. A private survey was also rejected on a question of parcel, or no parcel of a lordship, in *Daniel v. Wilkin*, 7 Ex. 429.

In *The Duke of Newcastle v. The Hundred of Broxtowe*, 4 B. & Ad. 273, where the question was whether a place was within the limits of a hundred, ancient orders of justices of the peace at the sessions of the county within which the district was alleged to be were admitted in evidence, though the justices were not proved to have been resident within the hundred or county. A paper signed by a number of the inhabitants of a hamlet at a public meeting held there is evidence, though slight, of the truth of a statement contained in the paper as to the non-existence of a public right of way; *Barraclough v. Johnson*, 8 Ad. & E. 99.

In *Pollard v. Scott*, Peake N. P. Ca. 18, a copperplate map, describing a close as a public road, and purporting on the face of it to be taken by the direction of the churchwardens of that time,

was rejected, although evidence was offered to prove that it was generally received in the parish as an authentic map. But it would seem that, at any rate upon the ground last mentioned, the evidence ought to have been received. In *Hammond v. Broadstreet*, 10 *Ex.* 390, a map produced by a county magistrate, who had had it some years, was held inadmissible. In *Pipe v. Fulcher*, 1 *E. & E.* 111, 28 *L. J. (Q. B.)* 12, a copy of a map used by a steward of a manor deceased, for the purpose only of defining the copyholds, and containing no indication of a public highway, was held not to be admissible to prove that the latter did not exist, on the ground that the steward had recognised its truth in that respect. A verdict and judgment thereon is frequently used as evidence of reputation in a matter in which reputation is admissible, if the proceedings appear to be regular. In *Brisco v. Lomax*, 8 *Ad. & E.* 198, the finding of a jury, under a commission issued out of the Duchy Court of Lancaster to ascertain the bounds of adjoining manors, was admitted as evidence of such bounds. But an interlocutory order of the same court, not intended to be final, is not evidence of reputation; *Pim v. Curell*, 6 *M. & W.* 234. In *Erans v. Rees*, 10 *Ad. & E.* 151, an award in pursuance of a reference at nisi prius, and setting out the boundaries between two counties, was tendered as evidence of reputation to prove these boundaries in a subsequent suit between different parties, but was rejected. In *Brett v. Beales*, *Mood. & M.* 416, in an action for tolls by a lessee of the corporation of Cambridge, an old deed of composition between the town and the university, reciting an award by which the composition was stated at a fixed sum, was admitted in evidence on behalf of the plaintiff, though there was no proof of its having been acted upon, the court saying that this objection applied rather to the effect than to the admissibility of the evidence. See also *Crease v. Barrett*, 1 *C. M. & R.* 919. In *Nichols v. Parker*, 14 *East* 331, upon a question of boundary between two parishes and manors, evidence of what old persons deceased had said concerning the boundaries of the parishes and manors was admitted, though these old persons were parishioners, and claimed rights of common, the wastes of which would be enlarged by their declarations. The declarations of a deceased lord of a manor as to the extent of his own waste, are not evidence in support of a right which depends on the boundary of the manor; *Crease v. Barrett*, 1 *C. M. & R.* 919.

Upon questions of mere private rights, evidence of reputation is not admissible. In *R. v. Antrobus*, 2 *Ad. & E.* 793, the declarations of old persons in Chester, that the sheriffs of the county were exempted from executing criminals, and that the corporation was bound to execute them, were disallowed. Evidence of reputation as to the existence of a farm modus is inadmissible; *Pritchett v. Honeyborne*, 1 *You. & Jer.* 135. But in *Thomas v. Jenkins*, 6 *Ad. & E.* 525, after it had been shown that the boundary of a farm and of a hamlet were the same, evidence of reputation was admitted to show the boundary of the farm. In *Weeks v. Sparke*, 1 *M. & S.* 679, evidence of reputation that the occupiers of two messuages had a right of tilling the common was admitted, upon the ground that such tillage qualified the rights of a number of persons. But in *Dunraven v. Llewellyn*, 15 *Q. B.* 791, where there was a dispute between the plaintiff, the lessee of a manor, and the defendant, the owner of an adjoining estate, as to the right to the possession of a piece of land lying between the manor waste and the estate of the defendant, declarations by deceased tenants who had enjoyed rights of

common over the manor waste that it included the *locus in quo* were rejected, on the ground that there was no common law right for all the tenants of the manor to common appendant on its wastes, and that consequently the question was not one of uniform, or general interest.

Matters of general interest cannot be proved by declarations which relate to particular facts. In *Ireland v. Powell*, *Pea. Er.* 16, where the question was, whether a turnpike stood within the limits of a town, *Chambre, J.*, admitted evidence of reputation that the town extended to a certain point, but would not allow it to be proved that old people, since dead, had said that upon that spot stood houses which had now disappeared. In *R. v. Bliss*, 7 *Ad. & E.* 550, evidence that the occupier of a meadow, over which ran an alleged public way, had planted a willow, saying that he did so to show where the boundary of the road was when he was a boy, was rejected.

Reputation as to public rights, as in cases of pedigree, must not be *post litem motam*; *Richards v. Bassett*, 10 *B. & C.* 657, see *suprà*, p. 40.

The declarations of old persons still living cannot of course be admitted as evidence of reputation; *per Patteson, J.*; *Woolway v. Rowe*, 1 *Ad. & E.* 117.

Entries by a deceased rector or vicar.] It is said to be an established rule, and the cases seem to warrant the assertion, that entries by a deceased rector or vicar are evidence for or against his successors in a question relating to the ecclesiastical receipts of the rectory or vicarage; *Young v. Clare Hall*, 17 *Q. B.* 537. And similar entries in books of ecclesiastical corporations aggregate have also been admitted; *Short v. Lee*, 2 *Jac. & W.* 479. This species of evidence has, however, been frequently disapproved of; see 1 *Ph. Er.* 10th ed. p. 247.

Declarations of deceased persons against their own interest.] The declarations of deceased persons are frequently admitted on the ground that their truth is guaranteed by the circumstance, that these are statements against the pecuniary or proprietary interest of the person making them.

In *Higham v. Ridgway*, 10 *East*, 109, 2 *Sm. L. C.* 5th ed. 270, it was necessary to ascertain the day on which a child was born. A book kept by the person who delivered the child's mother was produced, in which was an entry, which was interpreted to mean that the child in question was born on a certain day, that the person making the entry attended the mother in her confinement, that he charged a certain sum for so doing, and that it was paid. The part of the entry which showed that the charge was paid was apparently made after the entry of the charge itself. It was held that the entry was admissible to show the date of the birth of the child.

According to the report of *Higham v. Ridgway*, *Bayley, J.*, said that the entry must be by a person who could have himself been called as a witness if he were alive. This qualification is disapproved of in *Short v. Lee*, 2 *Jac. & W.* 489; and expressly repudiated by *Bayley, J.*, himself in *Gleadow v. Atkin*, 1 *C. & M.* 424.

The entry must be against the pecuniary or proprietary interest of the party making it. The fact that the entry, if true, would subject the party making it to criminal proceedings, will not make it admissible; *Sussex Peerage case*, 11 *Cl. & Fin.* 85.

There has been much discussion, whether an entry, in order to be

admissible, must be, when taken altogether, against the interest of the person who made it, or whether it is admissible if part of it be so; it being frequently the case that the entry consists of a charge, and a further statement that the charge has been paid. This question would not arise if the admissibility was confined to that part of the entry which is against the interest of the person who makes it; but (as we have seen) in *Higham v. Ridgway* the whole entry was held to be admissible; and though it is true that the facts of the child having been born and of the person who made the entry having attended the mother in her confinement were proved, in that case, by independent evidence, and the point was, therefore, not necessary to be decided, it has always been considered as an authority for the admission of the whole entry. So in *Barry v. Bebbington*, 4 T. R. 514, entries by a deceased steward of money due from persons in satisfaction of trespasses committed on the waste, with a discharge of those sums, were admitted to prove the right to the soil of the waste. But in *Doe d. Gallop v. Vowles*, 1 Mood. & Rob. 261, Lawrence, J., refused to receive, as evidence of repairs having been done for a certain person, a deceased tradesman's bill charging certain repairs against that person, with the tradesman's receipt annexed.

In *Rowe v. Brenton*, 3 M. & Ry. 267, the point was a good deal discussed. There a toll-book in which the deceased person kept a debtor and creditor account of tolls received by him on account of the owner, was received by Lord Tenterden and Littledale, J. In *Williams v. Geaves*, 8 C. & P. 592, Patteson, J., took a similar course.

In *Davies v. Humphreys*, 6 M. & W. 153, a promissory note for 300*l.* was produced with the following indorsement in the handwriting of the payee, who was dead: "Received of W. D. the sum of 280*l.* on account of the within note, the 300*l.* having been originally advanced to E. H." This was admitted in an action by W. D. against E. H., as evidence that the money was originally advanced to E. H. as principal. Parke, B., who delivered the judgment of the Court of Exchequer, thought the cases had gone a long way, but felt bound by them to decide that the evidence was rightly received. The report of the next case, that of *Musgrave v. Emmerson*, in 10 Q. B. 326, differs considerably from that in 16 L. J. (Q. B.) 174, and it is not very easy to see what the point decided really was. The question was, whether a fee farm rent was due in respect of certain land. Books were tendered, which stated this rental to be due amongst many others, but they were rejected. A paper was afterwards produced from the same box as that from which the books were produced, in which a deceased receiver charged himself with having received an amount corresponding with the amount of the rentals for two years; and, after this, the books were held receivable as being connected with the paper. In *Doe d. Kinglake v. Bevis*, 7 C. B. 456, the Court of Common Pleas held that entries on the ancient rolls of a manor of disbursements by the reeve were not receivable, although there were corresponding entries in which the reeve charged himself with the receipt of the moneys so disbursed. The Court thought there might be a difference if the charging and discharging entries were so connected as not to be intelligible one without the other. This decision seems scarcely consistent with *Musgrave v. Emmerson*, which is certainly a strong case.

It is a rule of evidence that a person in possession of real property is, if nothing appears to the contrary, presumed to be seised in fee.

From this it is deduced that every statement made by a person which shows that he is possessed under an inferior title than a fee simple absolute is against his interest, and on this ground such declarations are considered to be admissible. Such evidence would not probably be considered by a jury as very cogent.

In *Holloway v. Rakes* stated by Buller, J., in delivering judgment in *Davies v. Pierce*, 2 T. R. 53, it was necessary to prove seisin in a devisor; and it was held that this might be done by proving the declaration of a deceased tenant in possession that he held as tenant to the devisor. It will be observed that the declaration is here used to prove a fact, about which the tenant might have no interest whatever; or which he might have an interest to misrepresent, namely, of whom he held. But the case has been followed to the full extent, and indeed it is in accordance with *Higham v. Ridgway*, *Peaceable d. Uncle v. Watson*, 4 Taunt. 16, and *Carne v. Nicoll*, 1 N. C. 430, are precisely similar cases.

In *Crease v. Barrett*, 1 C. M. & R. 931, the dispute was, whether certain land was part of the waste of a manor. The defendant contended that it was not, and he sought to prove it by showing that a deceased owner of the manor had stated where the boundary of the manor was, which boundary excluded the land in question. But the Court thought this evidence was not admissible, for that in this case the statement was not against the apparent interest of the person who made it, so as to render it improbable that he would make it, if it were not true.

Roe d. Brune v. Rawlings, 7 East 279, is rather a complicated case. A. was tenant for life, with a power of leasing for twenty-one years, upon condition that he reserved the ancient rent. He was succeeded by other tenants for life, and ultimately by B., who had a similar power. At B.'s death the defendant was in possession of part of the estate as tenant under a lease granted by B. by virtue of the power. The lessor of the plaintiff, however, who was the next owner of the estate, sought to invalidate this lease by showing that the rent reserved by it was not the ancient rent. In order to show what the ancient rent was, and that it was more than that reserved by the existing lease, a paper was produced, which was indorsed by A., with the words, "a particular of my estate," and in it the rent of this land was stated. It was held that this paper was admissible, for that A. had an interest to make the rent as low as possible, and so increase the fine upon renewal.

In *R. v. Birmingham*, 31 L. J. (M. C.) 63, it was held that a declaration by a deceased person, that he held certain land as tenant at a rent of 20*l.* a year, was evidence, in a question of settlement of a pauper, that the rent was over 10*l.* a year.

A verbal declaration is equally admissible with a written one. *Ib.*

After the lapse of a long time the death of the person making the declaration will be presumed. The lapse of fifty-five years was considered enough to dispense with further proof of death of the person, although, if alive, he would not have been of an age beyond the ordinary term of human life; *Doe d. Ashburnham v. Michael*, 17 Q. B. 276. See *suprà*, p. 36.

In *Edie v. Kingsford*, 14 C. B. 759, 23 L. J. (C. P.) 123, *Jervis, C.J.*, seemed to doubt whether a declaration against his interest by a deceased person was admissible in an action by his executor, but it is not very easy to see on what the doubt is founded.

Declarations of deceased persons in the regular discharge of business.] A declaration which it is the duty of a person to make in the usual course of business is admissible in evidence after his decease. Thus, in *Price v. Lord Torrington*, Salk. 285, 1 Sm. L. C. 139, it was proved to be the custom in the establishment of the plaintiff, who was a brewer, for the draymen to come every night to the clerk at the brewhouse and give him an account of the beer they had delivered out, which he set down in a book kept for the purpose, to which the draymen set their names. In an action for the price of beer sold to the defendant, it was held that an entry in one of these books, by which it appeared that a certain quantity of beer had been delivered to the defendant, might be used, after the death of the drayman who had signed it, as evidence to prove delivery.

It is said by Parke, J., in *Doe d. Pateshall v. Twiford*, 3 B. & Ad. 898, that in order to render a declaration in the form of an entry of this kind admissible, "it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." It is not quite clear what is meant by a contemporaneous entry, probably it is sufficient if it is made at the time when by the course of the business it ought to be made.

The declaration is only admissible to prove those facts which it is the duty of the person making the declaration to include in it. This was so laid down in *Chambers v. Bernasconi*, 1 Tyr. 342, *in error*, 4 Tyr. 531; and though, as pointed out in 1 Sm. L. C. 5th ed. 280, the facts of that case scarcely support the decision, the above principle has since been generally recognised.

In *Davis v. Lloyd*, 1 Car. & K. 275, it was proved that it was the practice of the Jews to circumcise a child on the eighth day after its birth, and that it was the duty of the Chief Rabbi who performed the operation to enter a memorandum of the fact in a book kept for the purpose. The Chief Rabbi in this case being dead, the book was tendered in evidence to prove the age of a Jew, but Lord Denman, after consulting Patteson, J., rejected the evidence.

In *Brain v. Preece*, 11 M. & W. 773, the course of business at a coal mine was for H., one of the workmen, to give notice to Y., the foreman, of the coal which was sold. Y. was not usually present when the coal was delivered, and was unable to write, but he employed one B. to make entries for him of the sales of coal in a book kept for the purpose. H. and Y. were both dead, and in order to prove delivery of the coal B. was called, who produced the book, and stated that he made it out from Y.'s directions, and that every evening he read over the entries to Y. It was held that this book was not admissible.

Whether a declaration by word of mouth, which it is a person's duty to make in the course of his business, would be admissible, is doubtful; *Stapylton v. Clough*, 2 E. & B. 293; 23 L. J. (Q. B.) 5. It is not very likely that such a duty would exist.

An attorney's bill was produced with the following indorsement upon it:—"March 4, 1815, delivered a copy to C. D." This was proved to be in the handwriting of a deceased clerk whose duty it was to deliver a copy of the bill and to make the indorsement, and it was held to be evidence to prove the delivery of the bill; *Champneys v. Peck*, 1 Stark. 404. An entry of dishonour of a bill, made by a notary's clerk in the usual course of business, is evidence of the fact of dishonour, after the clerk's decease; *Poole v. Dicas*, 1 N. C. 649. In *Marks v. Lahee*, 3 N. C. 408, an entry by the plaintiff's

attorney's deceased clerk in a daybook, stating a tender and refusal by the defendant, was held to be evidence in support of a replication to that effect; but there was a previous entry of a receipt by him of the money for the purposes of such tender.

As to proof of notice of calls made by a public company from the memorandum of a deceased clerk, see *Eastern Union Railway Co. v. Symonds*, 5 Ex. 237. An entry in a letter-book kept by a deceased clerk in the course of duty is secondary proof of the contents of the letter sent, and of the posting of it, if that was the course of business; *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, 1b. 379.

Declarations when admissible as part of res gestæ.] There is a great deal of looseness about the doctrine that evidence of declarations are sometimes admissible on the ground that they are part of the *res gestæ*. It is very difficult indeed to say exactly what is meant by that doctrine.

Upon an examination of the cases it will be seen that there are very few indeed where evidence is allowed to be given of what another person has said or written, who is in existence and could be called as a witness, except in those cases where the saying or writing is itself a fact in issue. Perhaps this is what is meant by *res gestæ*.

On the trial of Lord George Gordon for high treason, it was held that evidence might be given of the cries of the mob which accompanied the prisoner on one of the occasions in question; *R. v. Gordon*, 1 Leach, 515.

In *Tull v. Parlett, Mood. & M.* 472, a conveyance was impeached on the ground that it was not founded on a valuable consideration. The consideration expressed in the deed was "esteem for A. B. and other good considerations." To show that the real consideration was an intended marriage of the grantor with A. B., evidence was tendered "of the declarations of the grantor, made after the deed was executed and before the marriage took place, that he conveyed the property as a settlement on his intended wife; and also the instructions given by him to his solicitor, desiring him to prepare the deed as a marriage settlement." Tindal, C.J., said he thought he ought to receive the evidence, not making any distinction between the two branches of it.

In *Thompson et al. v. Trevanion*, Skin. 402, an action for an assault upon the wife, Holt, C.J., allowed what the wife said "immediate upon the hurt received, and before she had time to contrive anything for her own advantage," to be given in evidence. It is not said what the nature of the woman's statement was. In *Aveson v. Lord Kinaird*, 6 East 188, the action was brought on a policy of insurance effected by a husband on the life of his wife. The defence was that the wife was a hard-drinker, and was in ill-health at the time the policy was effected. The surgeon who had examined the wife on behalf of the office was called by the plaintiff, and he swore positively to his belief of her good health at the time, and said that he formed his opinion principally from the satisfactory answers which she gave to his inquiries. A witness was then called for the defence, who stated that she saw the deceased a day or two after the surgeon had examined her; that she then complained of being unwell; that she said that she was unwell when she saw the surgeon at the interview above-mentioned; and that she made other similar statements. These statements were all objected to, but the court held that they were admis-

sible to rebut the evidence of the surgeon given on the other side. In the *Gardiner Peerage case*, reported separately by Le Marchant, a great many doctors were examined on the part of the claimant as to their experience of cases of protracted gestation. Of course the commencement of the period of gestation was only known to the doctors, in most cases, through the answers to questions put to the women relating to their intercourse with men, their menstruation, and other facts of a similar kind. Evidence of what these answers were was repeatedly objected to, and finally rejected by the committee upon the advice of Lords Gifford and Redesdale. See p. 176. In *R. v. Johnson*, 2 C. & K. 354, where it was necessary to ascertain the state of a woman's health a few days before her death, a witness (not medical) was allowed to state the answers of the deceased woman to inquiries made by him.

In *Kent v. Lowen*, 1 Camp. 177, the action was by the indorsee against the maker of a promissory note. The defendant, in order to show that the note was given for a usurious consideration, offered in evidence a letter from one C., the payee of the note, to himself, written just before the making of the note, in which C. offered to lend the defendant money at a usurious rate of interest. Lord Ellenborough held that the letters were evidence of an act done by C., who was the payee of the note, and through whom the plaintiff made title. It does not appear that C. was dead. If in this case there was any reply to the letters by the defendant, so that it would appear that a usurious offer was made and accepted, and that thus the note was a part of the transaction, this evidence might be unobjectionable.

In *Fellowes v. Williamson*, Mood. & M. 306, it was held, that in a suit for a false representation as to the solvency of A. B., whereby the plaintiffs were induced to trust him, evidence might be given of the declarations of the plaintiffs made at the time the credit was given, that they trusted A. B. in consequence of the representations made to them.

The cases having reference to the proof of an act of bankruptcy stand somewhat apart. Formerly a bankrupt could not be called in support of a commission against himself, and the difficulty of proving an act of bankruptcy, where so much depends on intention, may have led to some latitude in the evidence given in this class of cases. In *Bateman v. Bailey*, 5 T. R. 512, it was proved that the bankrupt had been absent from home, and it was held that statements made by him, leading to the inference that his intention was to avoid his creditors, might be given in evidence. So it has been held, that in an action brought by the assignees to recover money paid away by the bankrupt fraudulently, and in contemplation of bankruptcy, it might be shown that the bankrupt had, in the hearing of the defendant, admitted himself to be insolvent; *Vacher v. Cocks*, Mood. & M. 353; *Herbert v. Wilcocks*, Id. 355, n. In *Rouch v. The Great Western Railway Company*, 1 Q. B. 51, it was held, that in an action by the assignees of a bankrupt to recover property of the bankrupt, which had come into the possession of the defendant just before the bankruptcy, a letter from the bankrupt to the defendants might be given in evidence by the plaintiff, which stated that he was then absent from home in order to avoid two writs that were out against him. There are numerous other cases relating to this species of evidence in cases of bankruptcy. But *quære*, whether since the 6 & 7 Vict. c. 85, the bankrupt is not an admissible witness to prove his own bankruptcy; on which see *Udal v. Walton*, 14 M.

& W. 254. If so, the admissibility of hearsay evidence in these cases ought, it would seem, to be restricted.

In *Lewis v. Rogers*, 1 C. M. & R. 48, the question was whether an assignment of all the estate of A. B. to the defendant, for the benefit of the creditors of A. B., was *bonâ fide*. The defendant put in the assignment and also a list of creditors made out by A. B., and handed to the defendant. The plaintiff objected to the list, but the Court thought it was admissible; not, of course, to show who were creditors, but to show the *bona fides* of the assignment.

In an action for criminal conversation, letters which pass between the husband and wife have been generally admitted, to show the terms of affection or otherwise existing between them *Willis v. Bernard*, 8 Bing. 376.

The case of *Milne v. Teister*, 31 L. J. (Ex.) 257, 7 H. & N. 786, hardly appears to be a decision on this subject, although there appears some inclination so to rank it. There the question was whether A. had sold goods to B., or to C. It was decided, or at least assumed, that evidence of the fact that A. had made inquiries as to the credit of B., and not of C., was evidence, as between A. and C., that he had trusted B. and not C., although these inquiries were made after part of the goods were delivered. This was the really doubtful question; the further question, whether, these inquiries being by letter, the letter was admissible, could hardly, after the decision on the first branch of the inquiry, admit of any doubt.

Proof of acts of ownership by means of private documents.] The doctrine of prescription, which allows the existence of rights to be inferred from the enjoyment of them, necessarily opens the door to a species of evidence which sometimes looks rather like second-hand, or hearsay evidence; but these are really only cases in which an act of ownership has been recorded in writing, under such circumstances as to make the writing the proper evidence of the act. Thus old expired leases are proper evidence to show that the lord of a manor has let certain lands; *Hale, De Jure Maris*, p. 35; *Clarkson v. Woodhouse*, 5 T. R. 412, n. See *Malcolmson v. O'Dea*, 11 Week. Rep. 178.

Proof by public documents generally.] There are some facts which may be proved by the recital of them in documents of a public nature. This is obviously hearsay, or second-hand evidence.

It is not very easy to define the class or classes of documents to which this unusual degree of credit is given. In *Huntley v. Donovan*, 15 Q. B. 96, it was assumed all through by counsel and the Court, that, if there were a duty cast by act of parliament upon a person to give a certificate stating that certain facts existed, the certificate would be evidence of those facts. And by a parity of reasoning it would seem that the same result would follow, if the duty to give a certificate were imposed on the officer by the common law. So also any facts which by law a person is required to record, or to register, would seem to be proveable by the record, or register.

In *Kinnersley v. Orpe*, 1 Dougl. 56, it was held that the indorsement of enrolment upon the back of a deed signed by the proper officer was sufficient evidence of enrolment; and the same is stated by Buller, J., in that case to have been frequently held with respect to bargains and sales enrolled under the 27 Hen. 8, c. 16. The same

principle is laid down by the Court in *Doe d. Williams v. Lloyd*, 1 M. & G. 671. In *Grindell v. Brendon*, 6 C. B. N. S. 698, 28 L. J. (C. P.) 333, it was necessary to prove that a copy of the bill of sale together with an affidavit of the time of execution had been registered in the Queen's Bench Office, as directed by the 17 & 18 Vict. c. 36, s. 1. It was held that this might be proved by a certified copy of the entry in the book at the office kept in accordance with the directions of the act, inasmuch as the book itself would have been admissible if produced (See 14 & 15 Vict. c. 99, s. 14, *post*, p. 72). An objection was also taken that there was not in the entry any distinct statement that the bill of sale and the affidavit were filed *together*; but the Court held that, as the officer would not be justified in filing one without the other, it must be presumed that they were so, and that the entry was sufficient to prove this fact also.

The following are some of the cases in which evidence of this kind has been received. Most of them, it will be observed, range themselves under one or other of the principles stated in the preceding page. Lists of registers which have been treated as authentic will be found in most of the books on evidence, but sufficient care has not been taken to distinguish between proof of the contents of a document, and its effect when proved.

Proof by public documents—books relating to ships and shipping.]

The register of the navy office, with proof of the usage to mark all persons dead with the letters *dd.*, has been admitted to prove the death of a sailor; *B. N. P.* 249. So the books of the Sick and Hurt Office, made up from returns of the King's ships, and kept by a public officer under the Admiralty, were admitted as evidence of the death of a sailor there stated; *Wallace v. Cook*, 5 Esp. 117.

The log-book of a man-of-war is evidence to prove the time of a vessel sailing under its convoy, when produced as an official public book from the Admiralty; *Rundle v. Beaumont*, 4 Bing. 537. An official letter written at the end of a voyage by the captain, and produced from the Admiralty, seems to have been held evidence of the facts stated in it in a suit *inter alios*; *Watson v. King*, 4 Camp. 275. Muster rolls of the King's ships, produced from the Admiralty, are evidence of the fact that persons therein named were then on board; *Semb. Barber v. Holmes*, 3 Esp. 190; and the cases cited, *arguendo*, in *Huntley v. Donovan*, 15 Q. B. 100. A copy of the searcher's report at the Custom House is evidence of the cargo on board, being an official paper made under a statute; *Johnson v. Ward*, 6 Esp. 48. The copy of an official paper containing the number of passengers on board a vessel, made by the captain in pursuance of an act of parliament and deposited at the India House, is admissible to show the number and description of the persons on board the vessel; *Richardson v. Mellish, Ry. & Mood*, 66; 2 Bing. 229. Shipping entries at the Custom House have been rejected as evidence to fix a party with fraud, unless the original note, from which the entry was made, be produced and traced to him or his agent; *Hughes v. Wilson*, 1 Stark. 179. Formerly an entry of the sale of a ship in the register of the Custom House was thought not to be evidence of ownership without connecting the party with it, though made under an act of parliament; *Fraser v. Hopkins*, 2 Taunt. 5. But see now 17 & 18 Vict. c. 104, v. 107, *infra*. The certificates or reports which are required from masters of foreign vessels by the rules of the Custom House for the purpose of landing, and filed there, are not evidence of

the particulars certified, except as against the master and those in privity with him; *Huntley v. Donovan*, 15 Q. B. 96.

The use of documents relating to merchant ships is now, in a great measure, specially regulated by act of parliament. By the 17 & 18 Vict. c. 104, s. 107, every register and every certificate of registry of a British ship is made *prima facie* evidence "of all the matters contained or recited in such register," and also "of all the matters contained in, or indorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar." No doubt this provision would be held only to extend to such particulars as were by the act directed to be inserted in the register and the certificate of registry, which are very fully specified. By s. 280 of the same act it is directed that official logs should be kept in the form sanctioned by the Board of Trade; the matters to be entered being specified by s. 282. By s. 285, "all entries made in any official log-book as hereinbefore directed shall be received in evidence in any proceeding in any court of justice subject to all just exceptions." The saving clause renders the section almost unintelligible. Entries in lighthouse journals were received as original evidence in *The Maria Das Doria*, 32 L. J. (P. M. & A.) 163.

Proof by public documents—prison books.] In *R. v. Aickles, Lea*, C. C. 435, the book kept at Newgate was admitted to show the time of a prisoner's discharge. In *Salte v. Thomas*, 3 B. & P. 188, the books of the Fleet and King's Bench prisons were produced to show that a person had committed an act of bankruptcy by having lain two months in prison on civil process for debt. The Court held that they were not admissible for the purpose, but that the *committitur* from which the entry was taken ought to have been produced. They distinguished this case from *R. v. Aickles* on the ground that there was, in that case, no better evidence in existence than the book produced. There is also the distinction that the books in the latter case were produced to show (not only the time of the person entering the prison but) the cause of the commitment, and this is alluded to in the judgment, but not very distinctly relied on, although the marginal note makes it the ground of the decision.

Proof by public documents—books of public companies.] By the Companies Clauses Consolidation Act, 1845, (8 Vict. c. 16), s. 98, the directors are to cause minutes of the proceedings of meetings of the company, and of the directors, and of committees of directors, to be entered in a book, signed by the chairman, "and such entry so signed shall be received in evidence in all courts, and before all judges, justices, and others, without proof of such respective meetings having been duly convened or held, or of the person making or entering such orders or proceedings being shareholders or directors or members of committee respectively, or of the signature of the chairman, or of the fact of his having been chairman, all of which last mentioned matters shall be presumed until the contrary be proved."

By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 18, the certificate of incorporation given by the registrar is made conclusive evidence that all the requisitions of the act in respect of registration have been complied with. By s. 31, the certificate of shares is made *prima facie* evidence of the title of the shareholder to the shares therein specified. By s. 37 the register of shareholders is made evidence of any matters by that act directed or authorised to

be inserted therein. By s. 67 the company are to cause minutes of all resolutions and proceedings of general meetings to be entered in books, and "any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed, or proceedings had, or by the chairman of the next succeeding meeting, shall be receivable in evidence in all legal proceedings, and, until the contrary is proved; every general meeting of the company, or meeting of the directors or managers in respect of the proceedings of which minutes have been so made, shall be deemed to have been duly held and convened." By s. 60, inspectors may be appointed to examine the affairs of the company; and by s. 61, a copy of the report of any inspectors appointed under the act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible as evidence in any legal proceeding.

Proof by public documents—proceedings of courts.] Probably the proceedings of any established court which preserves a regular record of those proceedings may be proved by the production of the original record. This seems to be assumed in the numerous statutes relating to the proof of proceedings in various courts, and by which the proof of these proceedings is very frequently still further facilitated by making a copy certified by the proper officer proof of the contents of the original record. See p. 69. As to county courts, see 9 & 10 Vict. c. 95, s. 111.

Proof by public documents—land-tax books.] Whether land-tax assessment books are evidence of the occupation of land by the parties named in them is doubtful. See *Doe d. Strode v. Seaton*, 2 Ad. & E. 171.

Proof by public documents—notarial and consular certificates.] Notarial and consular certificates are not evidence of the facts certified, except by act of parliament in some cases; *Ex parte Church*, 1 D. & R. 324. In *Waldron v. Coombe*, 3 Taunt. 162, it was held, in an action on a policy of insurance on goods to recover a loss by sea damage, that the amount of the loss could not be proved by a certificate from the British vice-consul at Rio Janeiro, although it was the duty of the vice-consul to superintend the sale.

In Batavia charter-parties are entered into by the instrument being written in a book by a notary (he being a public officer by the Dutch law, which prevails in Batavia), and there signed by the parties. The notary makes copies, which he signs and seals, and which the principal officer of the government of Java signs, upon proof of their being executed by the notary. Then one copy is delivered to each party. In the courts of Java, in order to prove the charter-party, it is requisite to produce the notary's book; but this book is never allowed to be taken out of Java; and in Dutch courts, out of Java, faith is given to the above copies as to an original. It was held, that the copies were not receivable in evidence in this country. The chief contention was that they had been made originals by the authority given to the notary by the parties themselves, which failed. The court also thought that, though secondary evidence of the contents of the notary's book might, under the circumstances, be admissible, still these copies were not sufficiently authenticated to be used for that purpose; *Brown v. Thornton*, 6 Ad. & E. 185. See *Boyle v. Wiseman*, 11 Ex. 360; 24 L. J. (Ex.) 160; *supra*, p. 8.

Proof by public documents—post-mark.] The post-mark on a letter has been admitted as evidence of the date of its being sent; *Abbey v. Lill*, 5 Bing. 299; *R. v. Plumer*, Russ. & Ry. 264; *Kent v. Lowen*, 1 Camp. 178. The post-mark is no proof of a publication of the contents of the letter at the place of posting; *R. v. Watson*, 1 Camp. 215. Where it was required to prove that A. effected an insurance by order of B., the production by B. of an order in a letter, with the post-mark, addressed to A., was received as evidence that a policy effected in A.'s name of the date of the letter was effected under that order; *Arcangelo v. Thompson*, 2 Camp. 623. In *R. v. Plumer*, *suprà*, it was held that the double postage office mark on a letter was not, *per se*, proof that it was a double letter.

Proof by public documents—parish and other registers.] The registers of christenings, marriages, and burials, preserved in churches, are generally assumed to be good evidence of the facts which it is the duty of the officiating minister to record in them; *B. N. P.* 247; *Doe v. Bray*, 8 B. & C. 816. See further, as to the exact effect of these registers, *infra*, p. 89.

The preamble of a public general act of parliament, reciting the existence of certain outrages, was admitted as evidence that such outrages existed in *R. v. Sutton*, 4 M. & S. 532. This was a prosecution for a libel on the Government in troublesome times, and these cases are never a very satisfactory source of the rules of evidence. Even a direct allegation of fact in a public statute is not conclusive; for it has been held, that a place named as a borough or corporation in the Municipal Reform Act may be proved not to be such; *R. v. Greene*, 6 Ad. & E. 548; and (on a local act) that a road which the act recited to be in one parish might be proved to be in another; *R. v. Haughton*, 1 E. & B. 501. In *Taylor v. Parry*, 1 M. & G. 604, Erskine, J., said that the recitals in an inclosure act were not evidence against those who were not parties or privies to the enactment; and it was only as evidence of reputation respecting a franchise as between lord and tenants of a manor that it was admitted in *The Earl of Carnarvon v. Villebois*, 13 M. & W. 313. The King's proclamation has been used to prove a fact of a public nature recited in it, as that certain outrages had been committed in different parts of certain counties; *R. v. Sutton*, *ubi supra*.

The Gazette also was used as evidence that certain addresses had been presented to the King in *R. v. Holt*, 5 T. R. 436. And proclamations may be proved by production of the Gazette; *Ibid.* 443; *Attorney-General v. Theakstone*, 8 Price, 89. But the Gazette is not evidence of the appointment of an officer to a commission in the army; *Kirwan v. Cockburn*, 5 Esp. 233; *R. v. Gardner*, 2 Camp. 513. Where a declaration for simony alleged the division of a parish into two distinct parishes by an order in council, under 58 Geo. 3, c. 45, the Gazette purporting to contain a copy of such order was rejected as evidence of it; *Greenwood, q. t. v. Woodham*, 2 Mood. & Rob. 363.

A paper from the Secretary of State's office, transmitted by the British ambassador at a foreign court, and purporting to be a declaration of war by the government of that country against another foreign state, is evidence of the precise period of the commencement of that war; *Thelluson v. Cosling*, 4 Esp. 266. The existence of a war, which had been recognised in several acts of parliament, was judicially noticed in *R. v. De Berenger*, 3 M. & S. 67.

Proof by public documents—judgments.] It sometimes happens that facts which have already been inquired into by a competent tribunal, are again disputed before a jury. In this case, the judgment or conclusion of the first tribunal may, in some cases, be used as evidence to lead the second tribunal to the same conclusion; though it is doubtful how far this, strictly, belongs to the heading of hearsay, or second-hand evidence.

A judgment of a competent tribunal upon the very point may be used as an estoppel if the same point be raised again between the same parties. But in this case the prior judgment is not used as evidence, but to prevent inquiry.

If a judgment cannot be pleaded as an estoppel, it may sometimes be used as an estoppel at the trial. That is, upon proof of it, all further inquiry is at an end. A judgment which might have been, but has not been pleaded, cannot be used as an estoppel at the trial.

It has not been fully discussed in what cases the result of a previous inquiry can be used as evidence. It may be so used in cases where it might have been, but has not been pleaded as an estoppel; *Duchess of Kingston's case*, 2 Sm. L. C. 5th ed. p. 643, and the notes, p. 670; *Magrath v. Hardy*, 4 Bing. N. C. 782. On the other hand, it seems clear that such evidence is never admissible, unless the second inquiry is between the same parties as the first; *Doe d. Foster v. The Earl of Derby*, *infra*. The difficulty consists in defining how far the subjects of the two inquiries must be identical.

Frequently the result of a previous inquiry is admissible in evidence on the ground that the inquiry was into a matter of public and general interest, in which case this is good evidence of reputation. See *supra*, p. 40. In this case, it makes no difference who were the parties to the inquiry.

Proof by public documents—depositions.] The testimony of a witness on a previous inquiry, or, as it is usually called, his deposition, may be sometimes used on a second inquiry in lieu of the *vivâ voce* testimony of the witness.

This is, of course, exceptional; and such evidence can only be resorted to from necessity.

Depositions can only be admitted if it is impossible to produce the witness on the second occasion. There must also be some identity between the parties and the inquiries on the two occasions, though to what extent is not, perhaps, very accurately ascertained.

With respect to the nature of the previous inquiry, it was said by Lord Kenyon, in *R. v. Eriswell*, 3 T. R. 721, that the evidence should be given "under the sanction of an oath legally administered, and in a judicial proceeding." Whether or no an oath be legally administered, is easily ascertained, but it may be doubtful what would be included in the term "judicial proceeding."

As to how far the parties must be identical, it is said in *Com. Dig. Evidence*, A. 5, "a verdict in another action for the same cause shall be allowed in evidence between the same parties. So it shall be evidence when the verdict was for one under whom any of the present parties claim." In *Doe d. Foster v. The Earl of Derby*, 1 Ad. & E. 783, it was contended that the rule as to the admission of depositions was the same; but Littledale, J., says this must mean "a claim acquired through such party subsequently to the verdict." In that case A. being seised of two closes which he claimed as heir-at-law, conveyed one to B. Both A. and B. were afterwards ousted by C., whereupon

they each brought ejectment against C., and succeeded. B. was again ousted by C., and again brought ejectment against him. At the trial of this action, he sought to use the deposition of a witness, since deceased, given at the trial between A. and C. It was held that the evidence was inadmissible. In *Wright v. Doe d. Tatham*, 1 *Ad. & E.* 3, it appeared that a bill had been filed by A. against B., C. and D., whereupon an issue of *devisavit vel non* was ordered, in which B., C. and D. were plaintiffs and A. was defendant, the question being as to whether the will of M. devised certain property. At the trial of the issue one of the three attesting witnesses to the will swore to its execution. A. afterwards brought ejectment upon his own demise, as heir-at-law of M., against B., who claimed as devisee under the will already mentioned. The deposition of the witness who spoke to the execution of the will on the trial of the issue, he being since dead, was offered in evidence upon the trial of the action of ejectment, and was objected to on the ground that B. was not the only plaintiff at the trial of the issue, and also that A. was only the lessor of the plaintiff, and not the actual plaintiff in the action of ejectment. The evidence was rejected by Gurney, B., but his ruling was set aside by the Court of Exchequer Chamber.

The inquiry must also be to some extent identical on the two occasions. It seems to be sufficient if it is so far the same as that the attention of all parties would be drawn to the particular matter which the deposition is intended to prove, so as to make it a subject of careful investigation. This question has been much discussed in criminal cases, and that seems to be the rule there adopted. See *R. v. Beeston*, Den. C. C. 405, 24 *L. J. (M. C.)* 5; *Rosc. Cr. Ev.* 6th ed. 71.

In order that the testimony given on a previous occasion may be admissible, the witness must be proved to be either dead, or out of the jurisdiction.

If a witness cannot be found, or heard of after diligent inquiry, he will be assumed to be either dead, or out of the jurisdiction, and his deposition will be admissible; *Godbold*, 326.

How far the previous testimony of a witness is admissible, if he be insane, or so ill as not to be able to travel, is not very clearly settled. In *R. v. Eriswell*, 3 *T. R.* 707, in which the question was as to the settlement of a pauper, the witness was insane at the time of the second inquiry, and had been so about fourteen years, Buller, J., said, "I consider the witness as dead, he being in such a state as renders it impossible to examine him." And it seems clear that if, on account of his illness, there is no prospect of the witness being able to appear in court within a reasonable time, his deposition may be read, though it is remarkable that the only two cases in which the question has arisen between private persons are the other way. In *Harrison v. Blades*, 3 *Camp.* 458, Lord Ellenborough refused to receive the deposition of a witness who was *in extremis*; and in *Doe v. Evans*, 3 *C. & P.* 219, Vaughan, J., refused to receive the evidence of a witness who was bed-ridden, and who was nearly 100 years old. See *Tayl. Ev.* ss. 444, 445.

It may be useful to compare the law in criminal cases. See *Rosc. Cr. Ev.* 6th ed. p. 65.

ADMISSIONS.

Admissions generally.] The direct admissions of a party to a suit,

and admissions which may be implied from his conduct, are evidence against him. There are, indeed, some cases in which such admissions are conclusive, but that is only where they have been expressly made for the purposes of the cause, or where the person who relies on them can show that by reason of them he has been induced to alter his condition.

It is, perhaps, well to notice here some of the cases in which it has been discussed how far such admissions are conclusive, although that is a subject which does not strictly belong to evidence.

In *Heane v. Rogers*, 9 B. & C. 586, a tenant had given notice to his landlord in the form required by the Bankrupt Acts that he was willing to give up the lease of the farm which he occupied: it was held, in an action by him against his assignees, that he was still at liberty to dispute the validity of the commission. In *Newton v. Belcher*, 12 Q. B. 921, it was decided that the jury, before whom letters written by the defendants (members of the provisional committee of a company), acknowledging their liability, had been read, were properly directed to consider the mistaken view under which the defendants might have acted in respect of the supposed liability of all members of provisional committees. In *Newton v. Liddiard*, 12 Q. B. 925, a case where the facts were similar to the one last cited, the Court said that such admissions might be qualified by mistakes in respect of legal liability, as well as in respect of facts. And in *Bailey v. Macaulay*, 13 Q. B. 821, where statements had been made under circumstances of questionable liability, it was held, that it was for the jury to say whether such statements amounted to an admission of liability, or to the mere expression of a willingness to pay the amount claimed. In *Barrymore v. Taylor*, 2 Esp. 326, letters of the defendant, containing promises of payment, were admitted, although those to which they were answers were not produced. The recitals in instruments under seal, respecting the payment of money or other facts, are, in actions founded upon the deed or some contract having reference to it, considered as estoppels. But in actions not founded on the deed, and wholly collateral to it, such recitals are merely evidence, and may be disputed on the ground that they were made under a misapprehension; *Carpenter v. Buller*, 8 M. & W. 209; *Fraser v. Pendlebury*, 31 L. J. (C. P.) 1. In *Graves v. Kay*, 3 B. & Ad. 318, the Court held that a receipt for a certain sum not under seal was an admission only, and might be contradicted, or explained by parol evidence, subject to the usual exception that nobody had been induced by it to alter his condition. In *Lampon v. Corke*, 5 B. & A. 607, it was held that a receipt indorsed on the back of a deed not being under seal might be disputed in the same manner as any other parol admission. It would seem from the cases of *Bristow v. Eastman*, 1 Esp. 172, and *Alher v. George*, 1 Camp. 392, that in cases where there are accounts between the parties, a receipt "in full of all demands," given with full knowledge of the facts, is conclusive evidence of payment. In *Dalzell v. Mair*, 1 Camp. 532, an underwriter was held bound by the receipt contained in the body of the policy in an action by the assured, whose broker had effected the insurance. Where, however, the assured was clearly aware of the fact that no premium had been paid by his broker to the underwriter, and had acted with breach of faith towards him, the receipt was allowed to be disproved; *Foy v. Bell*, 3 Taunt. 493.

These decisions are alluded to in *Bourcs v. Foster*, 2 H. & N. 779. The Court saying that it is only where such a receipt is given as and

for a real receipt and discharge that it can be taken as conclusive; but that in other cases it might be shown that the receipt was fictitious, and that no money passed.

What admissions may be given in evidence.] Admissions made with a view to a compromise, and in order "to buy peace," are not evidence against the maker; *B. N. P.* 236. But in *Waldridge v. Kennison*, 1 *Esp.* 143, an admission of a party's handwriting, made during a treaty for a compromise, was admitted as a matter in no way connected with the merits of the cause. And in *Gregory v. Howard*, 3 *Esp.* 113, Lord Kenyon said that he should receive admissions of facts made before arbitrators. It may be a question, however, whether the fact that admissions were made during negotiations for a compromise does (in the absence of any understanding, express or implied, that what passes is to be without prejudice) more than affect the weight of the evidence. Accordingly, in *Wallace v. Small*, 1 *Mood. & M.* 446, evidence of an offer of a specific sum by way of compromise was admitted. Similar evidence was admitted in *Nicholson v. Smith*, 3 *Stark.* 128. As a general rule, statements made upon an express or implied understanding that they are to be "without prejudice" are inadmissible in evidence. In *Paddock v. Forrester*, 3 *M. & G.* 919, Tindal, C.J., refused to allow a letter written in answer to an offer, expressed to be made "without prejudice," to be read. In *Williams v. Thomas*, 2 *De G. & Sm.* 37, Kindersley, V.C., allowed a letter, offering to compromise a suit and expressed to be written "without prejudice," to be read as evidence in favour of the writer of the letter that the offer had been made, but declared that such evidence could not be received against him; *Hoghton v. Hoghton*, 15 *Bear.* 278.

It is no objection to the reception in evidence of an admission, that it was made under compulsory process. In *Grant v. Jackson*, 1 *Peake, N. P.* 268, an answer to a bill in Chancery filed against the defendant by a stranger was admitted to prove facts stated therein. In *Robson v. Alexander*, 1 *Moore & P.* 448, depositions before commissioners in bankruptcy were admitted in proceedings taken against the witness by the assignees. So, too, such a deposition was admitted, though it did not appear to contain all that the witness had said; *Mihwood v. Forbes*, 4 *Esp.* 170. The compulsory process, however, by which the evidence is obtained, must not, it would appear, be illegal; *R. v. Garbett*, 1 *Den. C. C.* 236. In *Stockfleth v. De Tastet*, 4 *Camp.* 10, the examination of a witness taken before commissioners in bankruptcy in a matter unconnected with the interests of the bankrupt's estate, was admitted in evidence, as it did not appear that the witness had been imposed upon or subjected to duress. And in *Collett v. Lord Keith*, 4 *Esp.* 213, Le Blanc, J. refused to exclude evidence of what a witness had stated under examination in another cause, upon the ground that the witness was stopped while giving his testimony. In *Tucker v. Barrow*, 7 *B. & C.* 625, Littledale, J. expressed an opinion that an admission obtained under a compulsory examination before commissioners in bankruptcy of the receipt of a sum of money on behalf of a bankrupt, was not evidence of an account stated with his assignees.

Admission of the contents of documents.] Though the contents of a written instrument cannot, in general, be proved by a witness without production of it, yet what a party to the record says is *primary* evidence against himself as an admission, though it relates

to the contents of a written instrument, and though the contents be directly in issue in the cause. This was first deliberately ruled in *Slatterie v. Pooley*, 6 *M. & W.* 664; followed by *King v. Cole*, 2 *Ex.* 628; and *Fox v. Waters*, 12 *Ad. & E.* 43. The doctrine has been since discussed, but not over-ruled. See *Lawless v. Queale*, 8 *Ir. L. Rep.* 382. See also the observations in *Boulder v. Peplow*, 9 *C. B.* 493; 19 *L. J. (C. P.)* 190. To make an oral admission receivable when it relates to a written document, it ought to be clear and distinct; thus where the defendant, in order to show that an expired lease had been renewed by the ancestor of the plaintiff, proved a statement by the ancestor many years ago, that the land had been "new-lived" by him, without more, it was held insufficient; *Doe v. Crago*, 6 *C. B.* 90.

In an action for work done, to which the general issue was pleaded, a statement made by the plaintiff that his demand had been referred to an arbitrator, who awarded that nothing was due, was admitted as evidence against him; *Murray v. Gregory*, 5 *Ex.* 468. The registered copy of a deed, signed and certified by the plaintiff, was held to be primary evidence against him of the contents of the deed; *Boulter v. Peplow*, 9 *C. B.* 493; 19 *L. J. (C. P.)* 190. So an abstract of title containing recitals, which had been relied upon by the defendant in a suit in Chancery, was admitted as evidence against him in a subsequent action of the matters so recited, without producing the original deeds; *Pritchard v. Bagshaw*, 11 *C. B.* 459; 20 *L. J. (C. P.)* 161. See also *R. v. Basingstoke*, 14 *Q. B.* 611.

Before the doctrine was carried to its present length it had been held that the terms of a lease might be proved by oral admissions; *Smith v. Howard*, 3 *M. & G.* 251. A parol admission of a debt is also evidence on an account stated, though it refers to a written instrument not produced; *Newhall v. Holt*, 6 *M. & W.* 662. A defendant in ejectment may prove an admission of the plaintiff that he had sold and assigned his lease to a third person, though such assignment must be in writing; *Doe v. Watson*, 2 *Stark.* 230. A notice signed by partners, stating that the partnership "has been dissolved," is evidence against them of the dissolution, though the partnership was by deed; *Doe v. Miles*, 1 *Stark.* 181; 4 *Camp.* 373.

Admissions implied from silence or demeanor.] If a statement be made in the presence of a person which it is his interest to deny, and under such circumstances as to make it probable that, not denying it, he acquiesces in its truth, this may be taken as an admission of the statement; and it is the same as if the person against whom it is used had himself made it. This is analogous to the principle of criminal evidence, by which everything said in presence of the prisoner is admissible against him.

There are some cases in which the fact of not replying to a letter may be used as an admission, but it requires a much stronger combination of circumstances to establish the admission.

In *Fairlie v. Denton*, 3 *C. & P.* 103, Lord Tenterden received an unanswered letter claiming money as evidence of a demand, but not as any admission of the facts stated therein. In *Gaskill v. Skene*, 14 *Q. B.* 664, where the plaintiff discovered that he had inadvertently paid a debt to the defendant twice over, and his accountant wrote repeatedly to the defendant explaining how the mistake arose, and requesting repayment, but the defendant took no notice of the letters, it was held that the letters were all admissible

against the defendant in an action to recover back the money paid. In *Lucy v. Monflet*, 5 H. & N. 229, 29 L. J. (Ex.) 110, an unanswered letter to the defendant, complaining of the bad quality of a cask of cider sold by him to the plaintiff, and asking for directions as to its disposal, was received as evidence of a waiver of the plaintiff's delay in returning the cider. See *Edwards v. Towels*, 5 M. & G. 624; *Carne v. Steer*, 5 H. & N. 629. In *Fellhouse v. Bindley*, 31 L. J. (C. P.) 204, A. and B. had had considerable negotiation about the purchase of a horse; A. at last wrote making an offer to split the difference, which was very trifling, as to price, and finished his letter thus:—"If I hear no more about him I consider the horse is mine at 30*l.* 15*s.*" This letter was never replied to by B. Willes, J., said that A. had no right to put on B. "the burden of choice of writing a letter of refusal, or being bound by the agreement proposed;" and the court held there was no assent by B. to the bargain. But, if it were the usual or adopted course of business between the parties to carry on negotiations by letter, it would only be reasonable to infer assent from silence after such a letter as that last mentioned. See *Richardson v. Dann*, 2 Q. B. 218.

The fact that B. had dealt with A. as farmer of the post-horse duties, was used as evidence in an action by A. against B. to prove that he was such farmer; *Radford v. McIntosh*, 3 T. R. 632; and see *Peacock v. Harris*, 10 East, 104. So in an action for slandering the plaintiff in his profession of an attorney, the words themselves, importing that the defendant would have the plaintiff struck off the roll of attorneys, were held to be an admission of the plaintiff's character of attorney; *Berryman v. Wise*, 4 T. R. 366; *Pearce v. Whale*, 5 B. & C. 39. So payment of tithes by a parishioner to the plaintiff is evidence against the former of the plaintiff's title to the living; *Chapman v. Beard*, 3 Austr. 942. Where an auctioneer has advertised for sale the "property of J. S., a bankrupt," this is evidence of the bankruptcy in an action brought by the assignees against the auctioneer for the proceeds; *Maltby v. Christie*, *Exp.* 340. And such an admission is evidence on a plea denying the title of the assignees; *Inglis v. Spence*, 1 C. M. & R. 432. A bankrupt is not precluded from disputing the commission by having surrendered, or having petitioned the Chancellor to enlarge the time for his surrendering; *Mercer v. Wise*, 3 *Exp.* 219; nor by having applied to a commissioner to appoint an official assignee for investigating the petitioner's creditors' debts, &c.; *Munk v. Clark*, 2 N. C. 299. So, as against a creditor, the merely proving a debt under the commission is not such an admission as will dispense with regular proof of the bankruptcy when disputed.

In an action for a debt, evidence that the plaintiff is an insolvent debtor, and has not inserted the debt in question in his schedule, may be used as an admission that it is not due; *Nicholls v. Downes*, 1 Mood. & Rob. 13.

Admissions by use of documents.] Documents which have been used by a party to a litigation are receivable in evidence against him, because a person, by using a document, is taken to have admitted the truth of its contents. In *Johnson v. Ward*, 6 *Exp.* 47, where the defendant moved to put off the trial upon an affidavit made by D., wherein D. swore that he had subscribed a policy for and on account of the defendant, this affidavit was received as evidence of the agency of D. In *Brickhill v. Hulse*, 7 Ad. & E. 454, an action of trover

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against the sheriff, the affidavit of one W., made in order to obtain an interpleader rule, in which he swore that he was the officer of the sheriff, was received. In *Gardner v. Moulton*, 10 *Ad. & E.* 464, an action by the assignees of a bankrupt, the plaintiffs, in order to prove the act of bankruptcy, were allowed to put in evidence a deposition made by one H., whom their solicitor had sent to prove the act of bankruptcy at the opening of the fiat. In *Pritchard v. Bagshaw*, 11 *C. B.* 459, an action of trover was brought against a company, who had previously filed a bill for specific performance of a contract of sale, and upon the suit being referred to the Master the company had made use before him of the affidavit of one D., in which he stated that he was the manager of the company at certain works: the affidavit was received in the action as an admission of the agency of D. In *Atkins v. Humphreys*, 2 *Mood. & Rob.* 523, at the trial of an issue directed by the Court of Chancery, depositions used by the defendants in a previous suit where also they were defendants, but where there was a different plaintiff, were rejected by Tindal, C.J., upon the ground of the difference in the parties. The decision in this case can hardly be reconciled with the later authorities, for when depositions are put in evidence as admissions, this identity between the parties is not necessary. The Court, in the cases of *Brickhill v. Halse* and *Gardner v. Moulton*, *supra*, appear to have been under the impression that depositions in Chancery, taken under the old system (before November, 1852), could not be received as admissions, upon the supposition that the depositions were sealed up from the time of their being taken until publication had passed; but in the case of *Richards v. Morgan*, 33 *L. J. (Q. B.)* 114, this error was pointed out and explained by the Court. In that case depositions used by the vendee of an estate in a suit in Chancery commenced against him for the purpose of setting aside the sale, and containing statements as to the extent of the land, were received in a subsequent suit as admissions of the extent of the estate in question. See also the observations of Parke, B., in *Boileau v. Ittlin*, 2 *Ex.* 678, 680. Although evidence as admissions, affidavits and depositions are not, of course, to be taken as conclusive. In *Morgan v. Couchman*, 14 *C. B.* 100, an affidavit of the plaintiff, in which he alleged that his agent had received payment for certain goods, was not allowed to prevent him from afterwards suing the buyer for the price of those goods.

The declarations of one proved to have been a joint contractor with the defendant, if made concerning matters which took place during their joint interest, and upon the subject of their joint interest, are admissible. So also are the declarations of one who has stood in such a relation to the defendant; *Grant v. Jackson*, *Peake, N. P. Ca.* 203; *Wood v. Braddick*, 1 *Taunt.* 104.

Admissions by nominal parties, and by interested persons, not parties.] On the one hand, an admission is evidence when made by a trustee or nominal party, who sues for the benefit of another; *Bauerman v. Radenius*, 7 *T. R.* 664; *Gibson v. Winter*, 5 *B. & Ad.* 96; and, on the other hand, it is admissible when made by the person really interested in the suit, although not named on the record. Thus, in an action on a bond conditioned for the payment of money to L. D., the declaration of L. D. that the defendant owes nothing is evidence against the plaintiff; *Hanson v. Parker*, 1 *Wils.* 257. So in an action by the master of a ship for freight, brought for the benefit of the owner, the admissions of the

latter are evidence; *Smith v. Lyon*, 3 *Camp.* 465. And in actions on policies, the declarations of the parties really interested are admissible; *per* Lord Ellenborough; *Bell v. Ansley*, 16 *East*, 143. But the statement of a *cestui que trust* is either wholly inadmissible against his trustee, or admissible only as to his own interest, where the trustee holds in trust, not for him only, but for others. Thus where an action of ejectment was brought by a trustee having the legal estate in fee, and the defendant offered evidence of admissions made by the *cestui que trust* of a particular estate; it was considered doubtful whether such evidence could be received, inasmuch as the interest of the *cestui que trust* was not co-extensive with that of the lessor of the plaintiff, and the declarations were prejudicial to the remainderman; *Doe v. Wainwright*, 8 *Ad. & E.* 691. And according to *May v. Taylor*, 6 *M. & G.* 261, in order to make the statements of the *cestui que trust* admissible against the trustee, the interest of the *cestui que trust* ought to be identical with that of the trustee, and it is not enough to prove a subsisting trust without showing the nature and extent of it, or that the *cestui que trust* is the real party to the action, and the nominal party a mere agent. It is said in *B. N. P.* 237, that an "answer" by a trustee can in no case be used as evidence against a *cestui que trust*. It is however probable that this passage relates to evidence in equity; for it is there only that a *cestui que trust* can, as such, be party to the suit, and the trustee would be a co-defendant. Admissions by tenants of the existence of rights or easements are not evidence against their landlords; *Papendick v. Bridgwater*, 24 *L. J. (Q. B.)* 289; 5 *E. & B.* 166. But where in an action of ejectment one of the defendants defends in the character of landlord to the other defendants, their admissions are evidence against him; *Doe d. Mee v. Lightfoot*, 4 *A. & E.* 784.

On an appeal against an order of removal, the admissions of rated inhabitants of a parish are evidence against that parish, for they are the parties really interested; *R. v. Whitley*, 1 *M. & S.* 636. So in an action against the sheriff, the declarations of a party, who has indemnified the sheriff, are evidence against the defendant; *Dyke v. Aldridge*, cited 7 *T. R.* 665. So in trover for a deed, which the defendant detained at the request of W. and in the detainer of which W. was substantially interested, the declarations of W. in favour of the plaintiff's claim were held admissible; *Harrison v. Vallance*, 1 *Bing.* 45; and see *Robson v. Andrade*, 1 *Stark.* 372. So the declarations of the party for whose benefit the plaintiff sues on a bill, *Welstead v. Lery*, 1 *M. & Rob.* 138, or of a party from whom he received the bill or note when overdue, *Beauchamp v. Parry*, 1 *B. & Ad.* 89, are evidence against the plaintiff. Admissions by one of several trustees will not affect his co-trustees where they are not all personally liable; *Davies v. Ridge*, 3 *Esp.* 102.

Admissions by one of several defendants in an action of tort will not establish the others to be co-trespassers; but, if they be shown to be co-trespassers by other competent evidence, the declarations of the one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object; *R. v. Hardwick*, 11 *East*, 578. Nor are admissions by one of several defendants evidence in actions founded upon contracts, unless they relate to a matter wherein there is an identity of interest. Admissions by the crew are not evidence against the shipowners in cases of collision; *The Foyle*, 1 *Lush.* 10. Where two executors were sued, as such, upon a covenant

by their testator for quiet enjoyment, and the question was, whether the defendants, who had evicted the plaintiff, had done so under lawful title, it was held that an admission of one of the defendants, after eviction, was no evidence of such title; *Fox v. Waters*, 12 *Ad. & E.* 43. In the case of *Scholey v. Walton*, 12 *M. & W.* 510, Parke, B., expressed an opinion that one executor cannot be bound by the express promise of another, so as to take a debt due from the testator out of the statute of limitations.

Admissions by members of corporations and companies.] It would seem that admissions by a member do not generally bind the corporation; *Mayor of London v. Young*, 1 *Camp.* 213. But, in an action for the disturbance of a corporate office, what is said by the officer whose right is alleged to be disturbed is evidence against the corporation; *Ib.* 25. And in *Peyton v. The Governors of St. Thomas' Hospital*, 3 *C. & P.* 363, a letter, written by the surveyor of the hospital, was admitted in an action against the hospital for negligently pulling down a house; see *R. v. Adderbury, East*, 9 *Q. B.* 187. Evidence may be given against companies of admissions made by their directors or agents relating to matters within the scope of their authority. In *Meux's Executor's case*, 2 *De G. M. & G.* 522, a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M., was admitted on behalf of his executors in proceedings against them; see also *The National Exchange Company of Glasgow v. Drew*, 2 *M. & Q. H. L.* 103. The secretary of a projected company has not, by virtue only of his office, any power to bind the members of the provisional committee by admissions; *Burnside v. Dayrell*, 3 *Ex.* 225. In *Bruff v. The Great Northern Railway Company*, 1 *F. & F.* 345, Willes, J., rejected an admission of the secretary of a company as to the receipt of a letter. And an admission by the board meeting of a company, registered under 7 & 8 Vict. c. 110, consisting of a less number of directors than was required by the deed of settlement, was rejected in *Ridley v. The Plymouth Banking Company*, 2 *Ex.* 711. In an action against an incorporated company by one of its bondholders, entries in a book kept by the clerk of the company, to which all members by the act of incorporation had access, cannot be used against him as an admission; *Hill v. The Manchester Water Works*, 5 *B. & Ad.* 866. In *Stiles v. The Cardiff Steam Navigation Company*, 12 *Weekl. Rep.* 1080, admissions by servants of a company as to the ferocious habits of a dog were not allowed to bind the company in the absence of evidence that these servants had the care of the animal.

Admissions by partner.] When sufficient evidence has been given to raise a presumption that several persons are partners, the admissions of each of these persons are evidence against the others on matters arising within the ordinary course of the partnership business. In *Wood v. Braddick*, 1 *Taunt.* 104, the letter of one partner upon a subject connected with the partnership vouchers written after the cessation of partnership between him and the defendant, was received. In *Pritchard v. Draper*, 1 *Russ. & My.* 191, declarations by one partner, after the dissolution of the partnership, as to the receipt of money by him on the partnership account (after its dissolution), were admitted as evidence to charge the other. The admissions of one partner as to a debt contracted by his fellow-partner several years before the partnership commenced, are no evidence to

charge that partner; *Catt v. Howard*, 3 Stark. 3. In *Lucas v. De la Cour*, 1 M. & S. 249, in an action brought by two partners, the statement of one of the partners that the goods, the subject-matter of the contracts sued upon, were his separate property, was admitted. But an admission by one of two partners of a debt due from them, as joint owners of a vessel and not as partners, is inadmissible; *Jaggers v. Binnings*, 1 Stark. 64. In an action against two partners on a deed purporting to be executed by one defendant "for self and partner," a subsequent acknowledgment of the deed by the other defendant was decided not to be evidence to prove the actual execution by him without producing the authority under seal; *Steiglitz v. Eggington*, Holt, N. P. 141. But see *Bell v. Dunsterville*, 4 T. R. 13, *infra*, p. 77. And in *Harvey v. Kay*, 9 B. & C. 356, letters of a member of a joint-stock company, admitting that he was a partner in it, were received as proof of that fact, without any evidence of his having executed the deed of settlement by which the company was formed. In *Tunley v. Erans*, 2 D. & L. 747, an admission by one who had entered into partnership with the plaintiff after the accruing of the cause of action, was rejected.

Admissions by guardian, and prochein amy.] The admissions of a guardian are not evidence against an infant who sues by his guardian; *Cowling v. Ely*, 2 Stark. 366; *Eggleston v. Speke*, 3 Mod. 258. Nor are the admissions of a *prochein amy*; *Webb v. Smith*, Ry. & Mood. 106.

Admissions by agents and servants.] As a general rule, parties are affected by the admissions of general agents, or those to whom they have entrusted the sole management of a particular transaction, or those who may reasonably be presumed to act in either capacity, when such admissions have been made at the time of transacting and relate to the business which is the origin of the litigation. In *Fairlie v. Hastings*, 10 Ves. 123, where it had been agreed that money should be lent to H., and that H. should place his bond for the amount in the hands of C. B., evidence of declarations by C. B. that he had delivered up the bond to H. were rejected. In *Langhorn v. Allnutt*, 4 Taunt. 511, letters of an agent to whom goods were addressed on account of the consignees, giving an account of the progress of the adventure, were rejected. See *Kahl v. Jansen*, 4 Taunt. 365; *Helyear v. Hawke*, 5 Esp. 72. Where the servant of a horse-dealer, who was employed to take a horse to the stables of the purchaser, had signed a receipt containing a warranty, this receipt, without proof of the servant's authority to give a warranty, was rejected in an action against his master; *Woodin v. Burford*, 2 C. & M. 391. In an action of trover against a pawnbroker, the declarations of the shopman concerning what must have been a private transaction, unconnected with the general business of the shop, were not admitted as evidence against his master. See *Schumack v. Lock*, 10 B. Moore, 39. In an action against a surety, the unsupported admissions of the principal are not sufficient to prove the delivery of the goods to him for the price of which the guarantee was given; *Evans v. Beattie*, 5 Esp. 26. In *Ley v. Peter*, 3 H. & N. 101, 27 L. J. (Ex.) 239, a letter written by the defendant's estate agent, who was in the habit of receiving his rents, to the plaintiff, in answer to one from the latter, inquiring upon what terms he would let his land, was tendered in evidence as an acknowledgment of the plaintiff's tenancy by the

defendant; the Court of Exchequer differed greatly in opinion, but the majority thought the letter inadmissible.

There is a class of cases where, by reference to the opinion or evidence of another, parties are bound by the admissions of that person as much as if they had themselves made them. Thus in *Williams v. Innes*, 1 Camp. 364, where the plaintiff had been referred by certain executors to one R. for information concerning the estate, who stated that they had received a large sum of money, this was taken as an admission by them of assets. And in *Daniel v. Pitt*, *Ib.* 366, where defendant had said, "If C. (a carman) will say that he did deliver the goods, I will pay for them," the statement of C., who had since died, was received in evidence. See *Emerson v. Blonden*, 1 Esp. 142. In *Sybray v. White*, 1 M. & W. 405, where a mare had fallen down a shaft, and the defendant said that if a jury of miners would say the shaft was his, he would pay the value of the animal, the finding of the jury against him was received in evidence. In *Reid v. Hoskins*, 5 E. & B. 729, what was said by an agent's interpreter in the agent's presence was received.

The letters of an agent to his principal, giving an account of past transactions, cannot always be received as evidence of admissions by the principals; however, in *Coates v. Bainbridge*, 5 Bing. 58, a letter from a foreign correspondent, stating a receipt of money on account of his principals, was admitted in evidence against them, when it was proved that they had answered the letter and given directions as to the disposal of the money.

Before the admissions of an agent can be received, the fact of his agency must be proved. This can be done by proving that the agent has acquired credit by acting in that capacity, and that he has been recognised by the principal in other instances of a similar character to that in question. In *Watkins v. Vince*, 2 Stark. 368, a guarantee signed by a son for his father was admitted, upon proof of the son having signed for his father upon three or four previous occasions. But in *Courteen v. Touse*, 1 Camp. 43, n., where, in an action upon a policy, a witness proved that he had often seen B. sign policies for the defendant, but was not acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed, it was held that the agency was not sufficiently proved.

Admissions by under-sheriffs and bailiffs.] The admissions of the under-sheriff are evidence against the sheriff in matters connected with his office without any proof of authority; *Doct. d. James v. Brown*, 5 B. & A. 243; *Haynes v. Hayton*, 6 L. J., K. B. (O.S.) 231. In *Snowball v. Goodricke*, 4 B. & A., declarations of the under-sheriff after he had gone out of office were rejected as evidence against the sheriff. In *Drake v. Sykes*, 7 T. R. 113, it was held that the authority of the bailiff must be proved in each particular case, in order to charge the sheriff; and that this could be done by production or secondary evidence of the warrant.

Admissions by wife.] In order that the husband may be affected by the admissions of his wife, it must be shown that they fall within the scope of the authority which she may reasonably be presumed to have derived from him.

In *Dean v. White*, 7 T. R. 112, a judgment in ejectment obtained by the acquiescence of the wife was held not sufficient to bind the husband. In *Anderson v. Sanderson*, 2 Stark. 204, admissions by

the wife were received to take a case out of the statute, where she was shown to have always conducted the business in the course of which the debt was contracted. In *Clifford v. Burton*, 1 *Bing.* 199, admissions of a wife as to a debt due from her husband for goods supplied to his shop were received, on proof that she had served in his shop, and carried on the business in his absence. But in *Meredith v. Footner*, 11 *M. & W.* 202, the defendant's wife, who had the management of the retail business of the shop, was not allowed to affect him by admissions as to the tenancy. A wife's declaration that she agreed to pay four shillings a week for nursing a child, will charge the husband, it being a matter usually transacted by women; *Anon.* 1 *Str.* 527. In *Humphreys v. Boyce*, 1 *Mood. & Rob.* 140, where the husband was sued as administrator for money lent to his wife before marriage, Lord Tenterden was inclined to receive admissions after marriage by the wife of the debt, but the point was not decided. In *Kelly v. Small*, 2 *Esp.* 716, in an action by husband and wife for a loan by the wife *dum sola*, her admissions, after coverture, of the extinction of the debt were rejected.

In *Alban v. Pritchett*, 6 *T. R.* 680, where a husband and wife sued in right of the wife as executrix, the declarations of the wife were not allowed to be given in evidence against the husband. It is to be noticed, that in these cases there was no further proof of the agency of the wife, otherwise the doctrine there laid down that the husband cannot be prejudiced by the act or evidence of his wife, would seem to be too widely stated. A joint answer in Chancery by husband and wife is not evidence against her, being considered as the answer of the husband alone; *Elston v. Wood*, 2 *My. & K.* 678. In *Shelberry v. Briggs*, 2 *Vern.* 249, in a bill against husband and wife for payment of a legacy, of which the wife was executrix, the answer was admitted against the wife after the death of her husband. See *Wrottesley v. Bendish*, 3 *P. Wms.* 238.

[*Admissions by counsel.*] In *Colledge v. Horn*, 3 *Bing.* 122, Burrough, J., expressed an opinion, that if one of the parties to a cause was in court and had heard an admission made by his counsel in his opening statement, this was evidence against him. In *Haller v. Worman*, 2 *F. & F.* 165, where, in an action of detinue, it was proved that the defendant's counsel had stated, while attending a summons at chambers, that his client had the papers in his possession, this was admitted at the trial to negative the plea of "not possessed." Where the existence of a certain fact was assumed throughout the trial of a cause, with the knowledge of counsel on both sides, it was not afterwards allowed to be disputed; *Stracey v. Blake*, 1 *M. & W.* 168. If the counsel for the plaintiff states in his opening a fact, from which it may be presumed that his client has a certain document in his possession (as payment of a cheque), the defendant may, upon notice to produce, give secondary evidence of the contents of that document without further proof of the plaintiff's possession; *Duncombe v. Daniell*, 8 *C. & P.* 222. Where, after a verdict subject to a special case, a new trial has been directed, the special case, signed by counsel on both sides, is evidence of the facts therein stated; *Van Wart v. Wolley*, *Ry. & Mood.* 4. Where, in an action of ejectment, the plaintiff's counsel at a former trial of the title to the same property had made a statement in court of the contents of a deed, of which a short-hand writer's note was taken, it was held that this note could not be produced at the later trial as

secondary evidence of the contents of the deed; *Doe d. Gilbert v. Ross*, 7 M. & W. 102.

Admission by attorney.] An attorney, without express authority, is not an agent to make admissions for his client, except after action commenced, and in matters relating to that action; *per* Watson, B.; *Ley v. Peter*, 3 H. & N. 111; *Wagstaff v. Wilson*, 4 B. & Ad. 339. In *Young v. Wright*, 1 Camp. 139, where a witness stated that he had been told by the defendant's attorney that the bill sued upon was an accommodation one, the evidence was rejected by Lord Ellenborough, who said that, if a fact be admitted by the attorney on the record, with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and the client will be bound by it; but that what the attorney says in the course of conversation is not evidence in the cause; *Mihard v. Temple*, 1 Camp. 375. In *Gainsford v. Grammar*, 2 Camp. 9, evidence of admissions by the defendant's attorney was received in order to take a case out of the statute of limitations without further proof of the attorney's authority, than the mere fact of his employment.

In *Wagstaff v. Wilson*, 4 B. & Ad. 339, the court refused to admit a letter written to the plaintiff's attorney before action brought by the attorney, who afterwards appeared in the cause for the defendant, as evidence of a fact stated therein, without further proof that the communication was authorised. In *Blackstone v. Bilson*, 26 L. J. (Ex.) 229, where the defendant had accepted two bills, and the attorney, whom he employed in an action upon the first bill, before the second became due, had said that "all the bills" were the plaintiff's, the court expressed an opinion that this statement was not admissible in a subsequent action brought upon the second bill. In *Petch v. Lyon*, 9 Q. B. 147, words uttered by the plaintiff's attorney in a casual conversation with the defendant's attorney were held to be not receivable in evidence as an admission; see *Parkins v. Hawkshaw*, 2 Stark. 239. An undertaking to appear for Messrs. J. and M., "joint owners of the sloop A.," given by the attorney on the record, is evidence of the joint ownership; *Marshall v. Cliff*, 4 Camp. 133.

In *Elton v. Larkins*, 1 Mood. & Rob. 196, Tindal, C. J., received at the second trial of a cause an admission by the defendant's attorney in the first action of the execution of a policy. In *Doe d. Wetherell v. Bird*, 7 C. & P. 6, under similar circumstances, admissions made by the defendant's attorney in the first cause were received, although notice had been given at the second trial that the defendant would make no admissions. In *Weary v. Alderson*, 2 Mood. & Rob. 127, a receipt by the London agent of the plaintiff's attorney was admitted as evidence of payment.

Effect of particulars as an admission.] The object of particulars is to control the generality of the claim, or set-off, in respect of which they are delivered. Their value as an admission depends upon the mode in which they are framed. Where they merely limit the amount claimed in the pleadings, no admission can be implied; but where they, in addition, give credit to the opposing party for some particular specified item, they are evidence in his favour as to the date, origin, and nature of that item. In *Rymer v. Cook*, 1 Mood. & M. 86, n., where the defendant put in particulars of the plaintiff's demand, containing an admission that he was indebted to the defen-

dant in a certain sum, it was held that that admission was evidence. In *Kenyon v. Wakes*, 2 M. & W. 768, where a payment on account to the amount of 70*l.* was admitted in the particulars, and the jury found that 70*l.* was all that was due, it was held that the particulars were properly received in evidence as an admission of the payment of that sum. So in *Boulton v. Pritchard*, 4 D. & L. 117, Wightman, J., held that particulars giving credit for specific items were evidence although they had been withdrawn and others substituted for them before trial. See *Rowland v. Blakesley*, 1 Q. B. 413. In *Buckmaster v. Micklejohn*, 8 Ex. 634, particulars delivered with a plea or set-off, which had been withdrawn, were admitted in support of a replication of fraud to a plea *puis darrein continuance*. It would seem, however, that particulars can only be made use of as an admission in an issue upon the pleadings in respect of which they are delivered. Therefore in *Miller v. Johnson*, 2 Esp. 602, where the notice of set-off contained an admission of a sale, this was not allowed to be taken as an admission of the sale upon the plea of never indebted. In *Harrington v. Macmarris*, 5 Taunt. 229, an admission of the debt in the notice of set-off was not received in the issue raised upon *non-assumpsit*. And in *Burkitt v. Blanshard*, 3 Ex. 89, where a simple payment of 50*l.* was inserted in the particulars of set-off, Parke, B., expressed an opinion that the plaintiff could not have taken this as an admission of a part payment in order to take the case out of the statute of limitations.

PROOF OF DOCUMENTS.

Documents generally—how proved.] Sometimes the contents of a document are in issue, as a fact in the cause; in other cases the statement of a fact in a document is made evidence of the fact, in exception to the rule which excludes second-hand or hearsay evidence.

As a general rule, for whatever purpose the document is to be used, the original must be produced and shown to the jury, who are to decide whether or not it be genuine. But to this rule there have been established numerous exceptions, chiefly having reference to public documents which it is not generally considered desirable to remove from their place of deposit, and of these, in some cases, copies may be used as evidence.

If a document be produced as an original, it will be presumed to be so, if it come from the proper custody and bear no internal marks of having been fabricated or tampered with.

If a copy be used it must be shown to have been obtained from the original document, or from the person properly having the custody of the original document; the document alleged to be original being presumed to be so, if found in the proper custody.

Copies of documents, when used as evidence in substitution for the original documents, must be verified in some special manner. The modes in which they are verified has led to their being divided into five classes, namely—1, exemplifications under the Great Seal; 2, exemplifications under the seal of a court; 3, office copies; 4, certified copies; 5, examined copies. Many documents are capable of being proved in several of these ways, and the first two are rarely resorted to. See *Tayl. Ev.*, s. 1380.

Office copies.] At common law an office copy, that is, a copy made by the officer having custody of the document, is, in the same court

and in the same cause, equivalent to the document of which it is a copy; *per* Lord Mansfield, in *Denn v. Fulford*, 2 Burr. 1179. And the court which tries the issue at *nisi prius* is considered, for this purpose, to be identical with the court in which the action is pending; *R. v. Jolliffe*, 4 T. R. 285. In *Highfield v. Peake*, Mood. & M. 109, it was held by Littledale, J., that on a trial of an issue out of Chancery, office copies of the proceedings in that court might be used; but in *Burnand v. Nerot*, 1 C. & D. 578, it was held by Best, C.J., directly otherwise. In an action against the sheriff for a false return, the plaintiff cannot use office copies of the writ and return, though the original cause was in the same court; *Pitcher v. King*, 1 C. & K. 655.

A chirograph of a fine is at common law evidence of the contents of a fine; *B. N. P.* 229; but a recital on it that the fine was levied with proclamations is not admissible to prove that fact; *Doe v. Black*, 6 Taunt. 485.

Certified copies.] There are some cases in which copies certified by persons not attached to any court, but holding a public position, are made evidence. The following are amongst the statutes containing such provisions:—The 41 Geo. 3, c. 109, s. 35, 3 & 4 Will. 4, c. 87, ss. 2 and 4, 8 & 9 Vict. c. 118, s. 146, awards and orders of Inclosure Commissioners; 7 Geo. 4, c. 46, ss. 4 and 6, 12 & 13 Vict. c. 1, s. 15, returns made by bankers of the members, &c. of their firms; 2 & 3 Will. 4, c. 114, s. 9, 1 & 2 Vict. c. 110, ss. 4, 6, orders and proceedings of the Insolvent Court; 3 & 4 Will. 4, c. 74, s. 88, acknowledgments of deeds by married women; 4 & 5 Will. 4, c. 30, ss. 10 and 11, 5 & 6 Vict. c. 27, s. 14, leases and exchanges by ecclesiastical corporations; 6 & 7 Will. 4, c. 71, s. 2, agreements and awards confirmed by the Tithe Commissioners; 6 & 7 Will. 4, c. 86, s. 38, 25 & 26 Vict. c. 53, s. 123, documents from the General and Land Register Office; 5 & 6 Vict. c. 45, s. 11, 7 & 8 Vict. c. 12, s. 8, 25 & 26 Vict. c. 68, ss. 4 and 5, entries at Stationers' Hall relating to copyright; 6 & 7 Vict. c. 18, s. 94, poll books at parliamentary elections; 13 & 14 Vict. c. 104, s. 14, registration of designs; 5 & 6 Vict. c. 108, s. 29, leases and instruments deposited with the Ecclesiastical Commissioners; 6 & 7 Vict. c. 18, s. 68, decisions of the Court of Common Pleas in appeals from revising barristers; 6 & 7 Vict. c. 86, s. 16, cab licences; 7 & 8 Vict. c. 85, s. 23, proceedings of the Board of Trade with reference to railways; 12 & 13 Vict. c. 106, ss. 236 and 299, 24 & 25 Vict. c. 134, s. 203, proceedings of the Court of Bankruptcy, 7 & 8 Vict. c. 101, s. 69, proceedings of board of guardians; 8 Vict. c. 18, s. 50, proceedings of the sheriff's court under the Lands Clauses Consolidation Act; 8 & 9 Vict. c. 16, s. 66, orders for general meetings of public companies; 8 Vict. c. 20, s. 10, plans and books deposited by railway companies with clerks of the peace; 8 & 9 Vict. c. 100, s. 7, orders and proceedings of the Lunacy Commissioners; 12 & 13 Vict. c. 109, ss. 11 and 17, documents issuing from Chancery and the Enrolment Office; 16 & 17 Vict. c. 70, s. 100, orders of the Lord Chancellor in lunacy; 9 & 10 Vict. c. 95, s. 101, proceedings in the new county court; 11 & 12 Vict. c. 60, s. 35, orders and proceedings of a local board of health, orders and proceedings of the general board of health; 17 & 18 Vict. c. 95, s. 6, 18 & 19 Vict. c. 116, ss. 13 and 15, orders and proceedings of local authority for the removal of nuisances; 21 & 22 Vict. c. 97, s. 7, orders of the Privy Council

under the Public Health Act; 11 & 12 Vict. c. 112, s. 25, orders and proceedings of the Metropolitan Commissioners of Sewers; 14 & 15 Vict. c. 99, ss. 7, 8, 13, proclamations, treaties, and other acts of State, and judgments, decrees, orders, and other judicial proceedings of any foreign state, or in any British colony, qualifications of apothecaries; 16 & 17 Vict. c. 41, s. 5, entries respecting common lodging-houses; 16 & 17 Vict. c. 115, s. 4, patents and documents relating thereto; 16 & 17 Vict. c. 137, s. 8, 18 & 19 Vict. c. 124, s. 5, orders and proceedings of the Board of Charity Commissioners; 16 & 17 Vict. c. 41, s. 5, entries in registers kept under the Common Lodging House Acts of 1851 and 1853; 17 & 18 Vict. c. 104, ss. 107 and 277, 23 & 24 Vict. c. 22, s. 27, 25 & 26 Vict. c. 63, s. 26, shipping documents; 18 & 19 Vict. c. 63, ss. 30, 48, 25 & 26 Vict. c. 87, s. 5, rules of friendly and building societies; 18 & 19 Vict. c. 108, s. 15, rules of coal mines and collieries; 18 & 19 Vict. c. 121, s. 32, orders and resolutions under the Nuisances Removal Act; 25 & 26 Vict. c. 89, ss. 61 and 174, proceedings of joint-stock companies; 26 & 27 Vict. c. 65, s. 24, rules of volunteer corps; 27 & 28 Vict. c. 113, s. 33, bye-laws of Thames Conservancy; and certificates under the 27 & 28 Vict. c. 120, s. 18, and 27 & 28 Vict. c. 121, s. 20, relating to railways. There are also provisions which authenticate certified copies of matters relating to newspapers, and of registers of births, marriages, and deaths, which are noticed at length; *infra*, tit. *Libel*, and p. 89.

By the 1 & 2 Vict. c. 94, s. 12, it is provided "that the Master of the Rolls, or deputy keeper of the records, may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and cost of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers aforesaid, and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made."

By s. 13, "every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either house, without any further or other proof thereof, in every case in which the original record could have been received there as evidence."

The records of all the superior courts, and some public records not of a judicial character are, after the lapse of a certain time, deposited in the Record Office, in the custody of the Master of the Rolls.

By the 8 & 9 Vict. c. 113, s. 1, after reciting that "it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes;" and that "the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine, and it is expedient to facilitate the admission in evidence of such and the like documents;" it is enacted that, "whenever by any Act now in force, or hereafter to be in force, any certificate, official or public document, or document or

proceeding of any corporation, or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceedings, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp, and signed as directed by the respective Acts made or hereafter to be made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

The meaning of the last paragraph in this section is by no means clear. In many cases there is no original record. The object of the statute seems to have been to dispense with proof of the genuineness of a document in all cases where it is by statute made evidence of the facts to which it relates.

By the 14 & 15 Vict. c. 99, s. 7, "all proclamations, treaties, and other acts of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

By s. 8, every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London, shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the

authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

By s. 12, every register of a vessel kept under any of the Acts relating to the registry of British vessels may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence either by the production of the original, or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling: and every such register or such copy of a register, and also every certificate of registry granted under any of the Acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all the matters contained or recited in such register, when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or endorsed on such certificate of registry when the said certificate is produced.

By s. 14, "wherever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having, by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it be proved to be signed or certified as a true copy or extract by the officer to whose custody the original is entrusted.

A foreign patent is an "act of state" within the meaning of s. 7: *In re Betts' Patent*, 11 *Weekl. Rep.* 221. And an order of a foreign court made *ex parte* on a shareholder is a judicial proceeding within the same section; *Malcomson v. O'Dea*, 12 *Weekl. Rep.* 178.

Examined copies.] The contents of a public document may be proved by producing a copy verified by the oath of a witness who has compared it with the original, and will swear that it is complete and correct. What are public documents, in this sense, has never been very accurately defined; but the term seems to include all documents in which the community at large is interested, and which it is desirable not to remove from their place of deposit; *Lynch v. Clarke*, 3 *Salk.* 154. The term would clearly include all records of any court whatsoever, and all registers of births, deaths, and marriages; registers having reference to shipping and navigation, to trade, and to the public health. It was said that an order of Her Majesty in Council, or a licence preserved in the Secretary of State's office, might be so proved; *per Lord Ellenborough*, *Eyre v. Palsgrave*, 2 *Cump.* 606. Examined copies have been received of entries in the bank books; *Mortimer v. M'Callan*, 6 *M. & W.* 58; and also of a bank-note filed at the Bank of England, *Munn v. Cary*, 3 *Salk.* 155.

The 14 & 15 Vict. c. 99, puts certified copies and examined copies

on the same footing, making the latter equally authentic with the former. See their provisions at length, *supra*.

MATTERS JUDICIALLY NOTICED WITHOUT PROOF.

There are some facts which, contrary to the usual rule, may be asserted before tribunals to which the legal rules of evidence apply, without any proof in support thereof, and which, even if not asserted, are considered as part of the case for consideration. The theory is, that the tribunal is already cognizant of the truth respecting them, but, whether it really be so or not is of no importance, so far as the rule, or rather the exception is concerned, which substitutes assertion for proof.

Such facts for the most part relate to matters which, although, strictly, within the province of the jury, are generally in practice left entirely to the judge, who invariably expresses to the jury his opinion with regard to them.

The following is an enumeration of some of the facts which are judicially noticed.

The ordinary course of proceedings in Parliament; *Lake v. King*, 1 *Saund.* 131; the established privileges of Parliament; *Stockdale v. Hansard*, 9 *Ad. & E.* 1; probably the existence of war with a foreign state, *R. v. De Berenger*; 3 *M. & S.* 67; *Dolder v. Lord Huntingfield*, 11 *Ves.* 292; the existence of foreign states recognised by the British Government; *Taylor v. Barclay*, 2 *Sim.* 213; *City of Bern v. The Bank of England*, 9 *Ves.* 347.

The Great Seal; *Lord Melville's case*, 29 *How. St. Tr.* 707; the Chancery Common Law Seal, 12 & 13 *Vict. c.* 109, s. 11; the Seal of the Enrolment Office in Chancery, 12 & 13 *Vict. c.* 109, s. 17; of the Probate Court, 20 & 21 *Vict. c.* 77, s. 2; of the Divorce Court, 20 & 21 *Vict. c.* 85, s. 13; of the Court of Admiralty, 24 & 25 *Vict. c.* 10, s. 14; of the Court of Bankruptcy, 24 & 25 *Vict. c.* 134, s. 204.

In *Tooker v. The Duke of Beaufort*, *Say.* 297, the Court took judicial notice of a seal of a superior court at Westminster; in *Olive v. Gwyn*, 2 *Sid.* 145, *Hard.* 108, of the seal of the Great Sessions of Wales; in *Kempton v. Cross*, *Rep. t. Hardw.* 108, of the seal of the Prerogative Court of Canterbury; in *Doe v. Mason*, 1 *Esp.* 53, of the seal of the corporation of the City of London.

The seal of a notary public has also been judicially noticed; *Bayl. on Bills*, 490; *Cole v. Sherard*, 11 *Ex.* 482. By the 14 & 15 *Vict. c.* 99, s. 10, "every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law, or by consent of parties, authority to hear, receive and examine evidence, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same." By the 18 & 19 *Vict. c.* 42, s. 3, "any document, purporting to have affixed, impressed, or subscribed thereon, or thereto, the seal and signature of any British ambassador, envoy, minister, chargé-d'affaires, secretary of embassy or of legation, consul-general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any such oath, affidavit, affirmation, or act, having

been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence, without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person."

There are numerous provisions which make copies of documents, authenticated by the seal of a court or public body, good evidence without further proof. See p. 69.

In the *Barrett Navigation Company v. Shower*, 8 *Dowl.* 173, the Court refused to take judicial notice of a stamp impressed by judges' clerks on papers at chambers.

By the 8 & 9 Vict. c. 113, s. 2, "all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

There is no doubt that the existence of all the superior courts will be judicially noticed; *Tregany v. Fletcher*, 1 *Lord Raym.* 154; and so of course will that of all courts established by act of parliament. In the case of *In re Clarke*, 2 *Q. B.* 619, the Court took judicial notice that the Master of the Rolls is a judge of the Court of Chancery; but in *Van Sandau v. Turner*, 6 *Q. B.* 773, the Court refused to take notice who was the judge, and what was the practice of the Court of Review in Bankruptcy. In *Dobson v. Bell*, 2 *Ler.* 176, and *Pugh v. Robinson*, 1 *T. R.* 118, it was stated generally, that the practice of the superior courts would be judicially noticed; but in *Caldwell v. Hunter*, 10 *Q. B.* 86 (in error), Maule, J., seemed inclined to doubt whether, the jury having found the practice to be one way, the Court could hold it to be another, when the practice was not prescribed by statute, or by the common law, by which latter expression he seems to mean immemorial usage, as distinguished from modern usage. The doubt is altogether not very clearly expressed, and Parke, B., appears not to assent to it.

In *Dicas v. Lord Brougham*, 1 *Mood. & Rob.* 309, Lord Eldon was called as a witness to prove the practice of the Court of Chancery; and a similar course was pursued in *Tucker v. Inman*, 4 *M. & G.* 1049. In *Place v. Potts*, 8 *Ex.* 705, 22 *L. J. (Ex.)* 269, the Court took judicial notice of the proceedings of the Court of Admiralty. In *Doe d. Williams v. Lloyd*, 1 *M. & G.* 671, the Court informed itself by private inquiries as to the course of practice in the Inrolment Office of the Court of Chancery; which is the same thing as taking judicial notice of it. In *Pilkington v. Cooke*, 16 *M. & W.* 616; 17 *L. J. (Ex.)* 141, the Court refused to take judicial notice of when an order of the judges, allowing a scale of fees, was made. In the case of *In re Ramsden*, 15 *L. J. (Q. B.)* 234, Wightman, J., refused to take notice of the general rules and orders made by the Commissioners of Bankruptcy for the regulation of the practice of their Courts, under the 5 & 6 Vict. c. 122, s. 70. In *Neeves v. Burrage*, 14 *Q. B.* 504, the Court took judicial notice that a bill filed in Chancery by a creditor of a deceased testator for the administration of the estate under the direction of the Court did not, of itself, control or suspend the right of the executors to dispose of the property.

A Court will notice the privileges of its own officers, including

those of attorneys; *Stokes v. Mason*, 9 East, 426; *Ogle v. Norcliffe*, 2 *Ld. Raym.* 869.

It has been established by many decisions that the law of foreign countries, and even of Scotland, though recognised, must be proved. But as the laws of Ireland are substantially the same as England, they would probably be noticed; *Reynolds v. Fenton*, 3 C. B. 194; *Tayl. Ev.* s. 5. See p. 76.

By the 7 & 8 Vict. c. 101, s. 71, rules, orders, and regulations made by the Poor Law Board, under the 4 & 5 Will. 4, c. 76, and printed by the Queen's printer, are to be "received in evidence, and judicially taken notice of, and shall, until the contrary be shown, be deemed sufficient proof that such order was duly made, and is in force."

The Court is bound by the Mutiny Act to take judicial notice of the Articles of War.

In *Astley v. Fisher*, 6 C. B. 572, 18 L. J. C. P. 59, the Court refused to take judicial notice of the lien of attorneys in New South Wales.

In *Brune v. Thompson*, 2 Q. B. 789, the Court refused to take judicial notice that the Tower of London was within the City of London. In *R. v. St. Maurice*, 20 L. J. (M. C.) 221, 16 Q. B. 908, judicial notice was taken that York was a county of a city.

The Court of Quarter Sessions ought to take judicial notice of petty sessional divisions of a county; *R. v. Whittles*, 13 Q. B. 248.

In *Regina v. Anderson*, 9 Q. B. 663, the Court took judicial notice that the assessor and collector of the land tax and assessed taxes were "public annual" officers within the meaning of the 3 W. & M., c. 11, s. 6.

In the case of *In re The Bodmin United Mines*, 26 L. J. (Ch.) 570, 23 *Beav.* 370, Romilly, M. R., refused to take judicial notice of the nature of an association on the cost-book principle.

As to how far judicial notice will be taken of the custom of gavel-kind and borough English, see *Ruler v. Wood*, 24 L. J. (Ch.) 737; 1 *Kay & J.* 644; *Co. Litt.* 175 b., n. 4; *Rob. on Gavel.* 41; *Tayl. Ev.* s. 5. There are perhaps some other customs of which judicial notice would be taken, especially some of those in use amongst persons engaged in commerce. See *Lethulier's case*, *suprà*, p. 17. In *Barnett v. Brandao*, 6 M. & G. 630, the Court took judicial notice of the lien of bankers on the securities of customers in their custody. Probably also judicial notice would in some cases be taken of the practice of solicitors; *Vestry of Shoreditch v. Hughes*, 12 *Weekl. Rep.* 1106. A custom of which judicial notice is taken ought to be considered, not as a fact, but as part of the general law of the land.

PROOF OF PARTICULAR DOCUMENTS AND FACTS.

There are some documents and facts the proof of which, either from its exceptional nature, or from its frequent use and recurrence, it is considered desirable to notice separately.

[*Acts of Parliament.*] Acts of Parliament may be divided into four classes:—1. Public general acts; 2. Public local and personal acts; 3. Private acts, printed by the Queen's printer; 4. Private acts, not printed by the Queen's printer. This division is only established by custom, and this a very uncertain one, at least until lately.

Formerly it was the custom to declare most local and personal acts to be public; some of these were printed by the Queen's printer with, and formed part of the regular series of public acts; other

public local and personal acts, as well as local and personal acts not public, and private acts were not always printed. The public local and personal acts not printed were chiefly road acts.

By a resolution of both Houses of Parliament, which took effect in the year 1798 (38 Geo. 3), the public acts were divided into two series; public general acts, and public local and personal acts; and all public local and personal acts have, since that time, been printed. The other acts were all classed as private, although they included many which ought clearly to come under the denomination of local and personal, as, for instance, inclosure acts.

In 1815 a resolution was passed, under which almost all private acts—except name acts, estates acts, naturalisation acts, and divorce acts—have been printed. These form a third series of printed acts.

Since 1815 it has been usual to refer to the series of public local and personal acts by small Roman figures, by way of distinction.

All public acts, whether general, or local and personal, are part of the law of the land, which all tribunals are bound to notice and apply.

By the 13 & 14 Vict. c. 21, s. 7, it is provided that “every act made after the commencement of this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such act.”

Such acts should be, and probably are all inserted in the series of public general, or public local and personal acts.

By the 8 & 9 Vict. c. 113, s. 3, it is provided that “all copies of private, and local and personal acts of Parliament, not public acts, if purporting to be printed by the Queen’s printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any, or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed.”

If it should be necessary to prove a private act, not printed by the Queen’s printer, it must be done by procuring an examined copy of the Parliamentary roll.

In searching for private acts (and they are sometimes very difficult to find) *Vardon’s Index to the Local and Personal and Private Acts* from 1798 to 1839, *Bramwell’s Analytical Table of the Private Statutes* from 1727 to 1812, and the *Index to the Statutes, Public and Private*, published by the Select Committee on the Library of the House of Lords, from 1801 to 1859, will be found useful. The best collection of private acts is in the British Museum. There are also fair collections in the libraries of Lincoln’s Inn, the Inner Temple, and the Incorporated Law Society.*

Foreign Laws.] Foreign laws must be proved by a witness versed in the law of the country, the law of which is in issue; it cannot be taken from any book, however authoritative; *Sussex Peerage case*, 11 Cl. & Fin. 115; and the witness must be a member of the legal profession; *Bristow v. Sequerille*, 5 Ex. 275. Now by the 24 & 25

* The formation of these very useful collections was, it is believed, much assisted by the liberality and diligence of the late Mr. William Salt, of Lombard Street.

Vict. c. 11, s. 1, any one of the superior courts may remit a case for the opinion of a court in any foreign state with which her Majesty may have made a convention for that purpose: and by the 22 & 23 Vict. c. 63, a case may be stated for the opinion of the Court of Session in Scotland.

Deeds—more than thirty years old.] A deed more than thirty years old, coming from the proper custody, may be presumed by the jury to be genuine without further proof. Though there be an attesting witness alive and able to attend, it will not in any case be necessary to call him; *Doe d. Oldham v. Wolley*, 8 B. & C. 22.

By *proper custody* is meant, not the best and most proper place of deposit, but any place in which, if genuine, the document might reasonably be expected to be found; per Tindal, C. J., in *The Bishop of Meath v. The Marquis of Winchester*, 3 N. C. 200. See *Tayl. Ev.* s. 594.

It is not absolutely necessary when a deed is produced more than thirty years old to explain an alteration or erasure appearing upon the face of it. It is for the jury to say whether the alterations were made before the execution of the deed; *Doe d. Tatham v. Cuttamore*, 16 Q. B. 745; 20 L. J. (Q. B.) 364; *Andrews v. Motley*, 12 C. P. N. S. 527; 32 L. J. (C. P.) 128. But it would frequently be very dangerous to lay a deed before a jury in such a state without any explanation.

Deeds—proof of execution.] Strictly speaking, the execution of a deed consists in sealing it, or laying the finger on a seal already there, and saying the words "I deliver this as my act and deed," or saying, or doing something equivalent, showing the intention to seal and deliver the deed. Execution is not invalid although two persons have used the same seal; *Ball v. Dunsterville*, 4 T. R. 313.

The actual affixing of the seal need not take place in the presence of the witness who is called to prove the execution; it is sufficient if the person executing acknowledges a seal already made. Where one partner in the presence of his co-partner executed a deed, and the co-partner apparently did no more than acknowledge the ceremony as performed on his behalf also, it was held sufficient; *Ball v. Dunsterville*, 4 T. R. 313.

The safest way of proving a deed is by an attesting witness, and it was formerly necessary to do so, if there were one, whether the instrument required attestation for its validity or not; but by the Common Law Procedure Act, 1854, s. 26, "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto."

Very often there is considerable difficulty in finding a person who was present at and saw the execution of the deed, or a person who was present may have no recollection of the matter. The latter was the case in *Talbot v. Hodson*, 7 Taunt. 251; and the only proof given was that the signature attached to one of the seals was in the handwriting of the person whose execution it was necessary to prove; but it was held to be enough to go to the jury. Very often also an attesting witness will say that he does not recollect the fact of execution, but that, seeing his own signature to the attestation clause, he has no doubt that he saw the deed executed: this has always been received

as sufficient evidence of execution; *per* Bayley, J., *Maugham v. Hubbard*, 8 B. & C. 16; *per* Taunton, J., *R. v. St. Martin's, Leicester*, 2 Ad. & E. 213.

Deeds requiring attestation—proof of.] If the deed is one which requires attestation, and it be necessary to prove execution, then the attesting witness, or one of them, if there be more than one, must be called, if any be living, and can by reasonable diligence be produced. And, prior to the decision in *Slatterie v. Pooley*, 6 M. & W. 664, it was held that an admission of the contents of a deed did not admit its execution, so as to dispense with the necessity of producing the attesting witness; *Cunliffe v. Sefton*, 2 East, 183; *Barnes v. Trompowsky*, 7 T. R. 265; *Best Ev.* s. 529. And since the case of *Slatterie v. Pooley* it has been held that the admission in open court by a party to the suit that he executed a deed is not sufficient evidence of a deed requiring attestation; *Whyman v. Garth*, 8 Ex. 803. This seems very strange.

If all the attesting witnesses be dead, or none can be found and produced, then the handwriting of one of the attesting witnesses must be proved, in which case the statement contained in the attestation clause will be presumed to be correct; *Adam v. Kerr*, 1 B. & P. 360. If all the requisite formalities are here noticed, then the proof is complete; and where the attestation clause mentioned "signing and sealing" only, it seems to have been thought that the jury might infer that the deed was delivered; *Hall v. Bainbridge*, 12 Q. B. 699. And probably a still more liberal presumption in favour of due execution might be made. See *post*, p. 84, and p. 85.

If the attesting witness, when called, can recollect nothing about the execution, it is sufficient to prove it *aliunde*; *Talbot v. Hodson*, 7 Taunt. 251; the fact of attestation being still proved by the attesting witness.

If the deed be lost, and it be one requiring attestation, the attesting witnesses, or one of them, must be called; *Keeling v. Ball, Peak. Ev. App.* 22. But if their names be unknown, or they cannot be found and produced, then the execution and attestation may be proved by other witnesses; *R. v. St. Giles', Camberwell*, 1 E. & B. 642.

If attestation only is required, it will be sufficient to call one attesting witness, although the deed be attested by more. But the death or excusable absence of all must be proved before evidence of execution *aliunde* can be resorted to.

If attestation by more than one witness be required, then may arise a question, whether so many as are required must not be called, or their absence accounted for. Or it may be that one attesting witness may prove the attestation by the others, as in the analogous case of wills. See *post*.

With regard to the search which it is necessary to make after an attesting witness, it has been held that where no description was given of the attesting witness, and nothing was known of him, inquiry at the residence of the obligor and obligee was sufficient; *Cunliffe v. Sefton*, 2 East, 183. So diligent inquiry at the witness's usual place of residence, and information there and from the witness's father that he had absconded to avoid his creditors, has been held sufficient; *Crosby v. Percy*, 1 Taunt. 366; *Fulmouth v. Roberts*, 9 M. & W. 469. So, inquiry after the witness at the Admiralty, where it appeared by the last report that he was serving on board ship; *Parker v. Hoskins*, 2 Taunt. 223; or proof that the witness

went abroad twenty years ago, and has not been heard of since; *Doe v. Johnson*, 1 *Phill. Ev.* 455 (n). A witness who was defendant's clerk, being subpoenaed, said he would not attend, and the trial was twice put off in consequence of his absence; search was then made at the defendant's house, and in the neighbourhood, and upon information obtained at the defendant's house that the witness was gone to Margate, inquiry was made there without success: held that, under these circumstances, evidence of his handwriting was admissible; *Burt v. Walker*, 4 *B. & A.* 697; *Spooner v. Payne*, 4 *C. B.* 328. Where diligent inquiry had been made without success for a witness, proof of his handwriting was admitted, although it appeared that a letter had been received from him a few days before the trial, but which did not disclose his retreat; *Morgan v. Morgan*, 9 *Bing.* 359. So where an attorney's clerk was an attesting witness, and the attorney could give no account of him; although afterwards at the trial the attorney recollected where he might probably be heard of; *Miller v. Miller*, 2 *N. C.* 76.

Deeds—signature.] Signature forms no part of the execution of a deed. But the following question has been raised. The first section of the Statute of Frauds enacts that all interests in land created by livery and seisin only, or by parol, and not put into writing and signed by the parties, should have the force and effect of leases, or estates at will only, except leases for three years at rack-rent. Blackstone seems to think that this enactment may possibly render signature of a deed necessary, in order to create an interest in land greater than an estate at will, and not within the exception. But Mr. Preston, in his edition of *Shep. Touchst.* c. 4, n. 24, p. 56, disputes this. In *Aveline v. Whisson*, 4 *M. & G.* 801, it was admitted that this enactment did not apply to the creation of interests in land by deed; in *Cooch v. Goodman*, 2 *Q. B.* 580, the point was raised, but not decided.

The aspect of the question is now slightly altered, for the 8 & 9 Vict. c. 106, which came into effect on the 1st of October, 1845, requires, "that a feoffment, made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a partition, and an exchange, of any tenements or hereditaments not being copyhold, and a lease, required by law, to be in writing, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed: provided always, that the said enactment, so far as the same relates to a release or a surrender, shall not extend to Ireland." This statute will, therefore, in terms be complied with by a deed executed in the ordinary way, and not signed.

A similar question has been raised under the 4th section of the Statute of Frauds, which enacts that no action shall be brought in certain cases of contract, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith." But in *Cherry v. Heming*, 4 *Exc.* 631; 19 *L. J. (Ex.)* 63, Alderson, B.,

and Rolfe, B., expressed their opinion that this section did not apply to deeds.

Deeds produced by a party claiming beneficially under them.] Where a party, producing a deed upon a notice, claims a beneficial interest under it, it is not necessary for the party calling for the deed to prove the execution of it; for in such a case the defendant, by claiming under it, accredits it as against him, though not to the extent of estopping him; *Pearce v. Hoopes*, 3 Taunt. 62. Thus proof is unnecessary where assignees produce the assignment of the bankrupt's effects; *Orr v. Morice*, 3 B. & B. 139. So in an action by a lessee against the assignee of his lease for breach of a covenant in the assigned lease, which the assignee was bound to observe, the defendant having produced the original lease, it was held unnecessary for the plaintiff to prove the execution of it, though the defendant had assigned over the lease before action; *Burnett v. Lynch*, 5 B. & C. 589. So in an action against the vendor of an estate to recover a deposit on the contract for purchase, if the defendant on notice produces the contract, the plaintiff need not prove its execution; *Bradshaw v. Bennet*, 1 Mood. & Rob. 143. And where, in ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants a subsisting lease of the premises to prevent its being set up by the defendants, it was held, that this was a recognition of the lease as a valid instrument; and that, when produced in pursuance of notice from the defendants, it might be read by them without proof of execution, though the attorney had furnished them with the names of the attesting witnesses, and though the plaintiff's title was independent of the lease; *Doe v. Heming*, 6 B. & C. 28. It is immaterial that the party calling for it denies its validity; as where the defendant produces an assignment of a bankrupt's goods which the plaintiffs (assignees of the bankrupt) impugn as fraudulent; *Carr v. Burdiss*, 1 C., M. & R. 782. Where notice was given to defendant to produce a feoffment under which he was in possession of land, the plaintiff proved by secondary evidence (the feoffment not being produced), that it had livery indorsed, and was witnessed: held, that it was unnecessary, as against defendant, to call the witness, or to prove livery; *Doe v. Wainwright*, 5 Ad. & E. 520. In an action against a sheriff for taking insufficient pledges in replevin, the replevin bond, produced by the defendant, is admissible in evidence against him without proof of execution; *Scott v. Waithman*, 3 Stark. 169. So where the sheriff has assigned it to the plaintiff; *Barnes v. Lucas*, Ry. & Mood. 264.

Where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner; *Gordon v. Secretan*, 8 East, 548; *Doe v. Marquis of Cleveland*, 9 B. & C. 864. So, if the party producing it claims an interest in it, but an interest unconnected with the cause; as where the action is for commission for procuring an apprentice for defendant, and the instrument produced is the deed of apprenticeship; *Rearden v. Minter*, 5 M. & G. 204, 206. And a party producing at the trial of a cause a deed which has been some months in his possession is not excused from proving the execution, merely because he received such deed from the adverse party, who formerly claimed a beneficial interest in it; *Vacher v. Cocks*, 1 B. & Ad. 145. As the principle of the cases is, that the party, who claims an estate or interest under the instrument in his possession, impliedly affirms its due execution, the

rule is inapplicable to instruments that merely testify contracts under which no permanent interest passed. Therefore, where defendant wished to show himself to be a partner with A., under whom plaintiff sued; it was held, that a contract in the plaintiff's possession to do some works for the firm, produced on notice by the plaintiff, must be proved by the defendant; *Collins v. Bayntun*, 1 Q. B. 117; *Rearden v. Minter*, 5 M. & G. 204.

Deeds enrolled.] Where a deed, to the efficacy of which enrolment is essential (as a bargain and sale under 27 Hen. 8, c. 161), is accordingly enrolled, proof of the enrolment by an examined copy will dispense with evidence of the execution by any of the parties to the original deed; *Thurle v. Madison*, *Styles*, 462; *Smartle v. Williams*, 1 Salk. 280. And this is also provided in the case of deeds of bargain and sale, enrolled and pleaded, by stat. 10 Ann. c. 18, s. 3. So where a deed, to which enrolment is not essential, is enrolled on the acknowledgment of one of the parties, it is evidence of execution against that party; *B. N. P.* 255, 256. But it should seem that, unless such enrolment be rendered evidence by force of an act of parliament, it will not dispense with proof by a subscribing witness, where a subscribing witness is necessary; *Gommersall v. Serle*, 2 You. & Jer. 5; *Giles v. Smith*, 1 C., M. & R. 470.

Wills of personalty.] A will relating to personalty is scarcely ever used in evidence in a court of law, and, therefore, it is rarely necessary to prove it. The probate granted by the proper court is the proper evidence of a will of personalty, and being sealed with the seal of the court, it is assumed to be a genuine document.

Instead of producing the probate the will may be proved by production of the register, or act book of the court in which the will was proved; *Cox v. Allingham*, *Jac.* 514. And where there was no such register or book, the production of the will itself from the registrar's office with a memorandum upon it stating that the probate had been granted, it not being usual to keep any other record of the grant, was held sufficient proof of the will; *Doe d. Bassett v. Mew*, 7 Ad. & E. 240.

These cases are put on the ground that the record in the Ecclesiastical Court is primary evidence of the will, and so it would seem that no secondary evidence would be admissible until both the non-production of the probate, and the non-production of any other record of the Ecclesiastical Court had been accounted for.

It was said by Holt, C. J., in *Hoe v. Nelthorpe*, 3 Salk. 154, *nom. Hoe v. Nathorp*, 1 Ld. Raym. 154, that the copy (of course, examined) of a probate of a will is good evidence, because the probate is an original taken by authority; but this view has not generally been adopted, though it is not altogether inconsistent with principle.

Wills of realty.] There is some difficulty in dealing with the law relating to the proof of execution of wills of realty, in consequence of the partial alterations which have from time to time been made in the formalities necessary for that purpose. The simplest way seems to notice the various changes in the law upon the subject, and the decisions thereon, so far as they illustrate the law in its present state.

By the 32 Hen. 8, c. 1, s. 1, a will was required to be in writing. By the fifth section of the Statute of Frauds, "all devises and

bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

By the 1 Vict. c. 26, s. 9, it is enacted, "that no will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

By s. 13, "every will executed in manner hereinbefore required shall be valid without any other publication thereof."

By the 15 Vict. c. 24, s. 1, "where by an act passed in the first year of the reign of Her Majesty Queen Victoria, intituled, 'An Act for the Amendment of the Laws with respect to Wills,' it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid, within the said enactment, as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent, on the face of the will, that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow, or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow, or be after, or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under, or beside the names, or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page, or other position of the paper or papers containing the will whereon no clause, or paragraph, or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act, or this Act, shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

By s. 2, "The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the

property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the rights thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will."

There has been some question as to whether sealing a will is sufficient without a written signature; a similar question to that which has been raised under the Statute of Frauds with respect to deeds; see p. 79. In *Lemayne v. Stanley*, as reported in 3 *Lev.* 1, it was said by three judges against Levinz himself, that signature was unnecessary, if the will were sealed; but it was held that there the will was signed. Levinz, according to his own report, quoted a case in support of his difference of opinion on the *dictum* which is not at all in point. It is remarkable that Freeman, who also reports the case, makes Levinz alone say that "sealing was a good signing," and says nothing of the opinion of the other judges on this point; *Freem. Rep.* 538. In *Warneford v. Warneford*, *Str.* 764, it was held by Lord Raymond, that sealing alone was sufficient; but in *Grayson v. Atkinson*, 2 *Ves. Sen.* 459, Lord Hardwick expressed some doubt about it; and Willes, C. J., in *Ellis v. Smith*, 1 *Ves.* 11, expressed the same doubt still more strongly. In *Wright v. Wakeford*, 17 *Ves.* 454, Lord Eldon said, that sealing without signing was insufficient for a will, though sufficient for a deed.

In *Lemayne v. Stanley*, *suprà*, it was held by all the judges that an autograph will beginning "I, A. B.," was sufficiently signed. The case of *Hilton v. King*, 3 *Lev.* 86, is a peculiar one. The testator had duly made and signed his will. Afterwards he directed a clause of revocation to be written upon it underneath his signature. This was properly attested, but the testator did not sign it. In the first instance North, C. J., and Levinz, J., held that the revocation was good, the signature already there being sufficient; this was probably so held on the ground that the testator had acknowledged his previous signature in the presence of the witnesses to the codicil. But subsequently, North being removed into Chancery, and Levinz sick, Pemberton, C. J., Wyndham, J., and Charlton, J., granted a rule *nisi* to enter the verdict against this opinion, and Levinz says he is unable to say what became of the case.

The 1 *Vict. c.* 26, s. 9, directed the will to be signed "at the foot or end thereof;" but this created considerable difficulty, and a great many cases were discussed upon what was a compliance with this direction in the statute (see note in *Chit. Stat. ad loc.*). But since the 15 *Vict. c.* 24, *suprà*, there has been no difficulty.

In the case of *In re James Clark*, 2 *Curt.* 329, it was held that, where a testator requested another person to sign his will for him, which the other did in his own name, that was sufficient.

The question of what is a sufficient acknowledgment is sometimes a difficult one. It would be useless to state the cases except at great length, as they depend on very minute details. They will be found collected in *Chit. Stat.*, 2nd ed. p. 1575.

The same remark applies to what is a sufficient attestation within the Act. The cases on this point will also be found collected in *Chit. Stat.*, *ubi suprà*.

Wills of realty—interested witness.] By the 25 *Geo.* 2, c. 6, s. 1,

"If any person shall attest the execution of any will or codicil which shall be made after the 24th day of June, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act; notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil."

By s. 2, "In case by any will or codicil already made, or hereafter to be made, any lands, tenements, or hereditaments are or shall be charged with any debt or debts; and any creditor whose debt is so charged, hath attested or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil within the intent of the said Act.

By the 1 Vict. c. 26, s. 14, "If any person who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid."

By s. 15, "If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife, or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

By s. 16, "In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor whose debt is so charged shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof."

By s. 17, "No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."

Wills of realty—attestation.] If any attesting witness be alive, he must be called, or his absence accounted for (see p. 78). But only one need be called, except on an issue out of Chancery; *Wright v. Doe d. Tatham*, 1 *Ad. & E.* 323. In the case excepted all attesting witnesses must be called.

In *Andrews v. Motley*, 12 *C. B.*, *N. S.*, 527, 32 *L. J. (C. P.)* 128, Williams, J., said, "Although no authority was cited before us, and I have not been able to find any in support of it, my impression,

founded, I believe, on the practice of the Oxford circuit, has long been, that where, as in the present case, the attestation clause recites a compliance with all the requisite ceremonies in respect of all the witnesses, it is enough, in order to make a *prima facie* case, to prove the death of all, and the handwriting of one of them; because it will be presumed that everything the witness thus declared by his attestation to have been done, was really done." This is similar to the presumption in case of deeds (see p. 78). In *Doe d. Davies v. Davies*, 9 Q. B. 648, two of the witnesses were dead, and the other, who was a marksman, when called, could recollect nothing of the matter. Upon proof of the handwriting of the two dead witnesses the will was held to be admissible.

If the attestation clause do not recite the fulfilment of all the necessary formalities, then, if no attesting witness can be called to speak to them, there is more difficulty. In *Hands v. James*, 2 Com. Rep. 531, *Croft v. Pawlett*, 2 Str. 1109, and *Brice v. Smith*, Willes 1, it was held that though the attestation did not state that the witnesses signed in presence of the testator, a jury might presume it; and these decisions seem to be fully recognised in *Doe d. Spilsbury v. Burdett*, 4 Ad. & E. 1; 6 M. & G. 386; 10 Cl. & F. 840, in the House of Lords (see this case, *infra*). From these cases it does not seem always even necessary to produce evidence *aliunde* that the formalities not mentioned in the attestation clause were gone through. But it is certainly safer to do so, if possible.

Wills of really thirty years old.] A will thirty years old, coming from the proper custody, will be presumed, in the same way as a deed, to have been duly executed. If it be produced from the custody in which, if genuine, it would properly be found, it may be presumed to be genuine, notwithstanding that it bears some marks of cancellation; *Andrews v. Motley*, *ubi supra*.

In *Doe d. Spilsbury v. Burdett*, *ubi supra*, it was considered by the Court of Queen's Bench that, where the instrument creating a power required it to be executed by will, to be "signed, sealed, and published in the presence of, and attested by three or more credible witnesses," the will, although thirty years old, must bear an attestation that it was regularly executed according to the power (see p. 19 of the report in *Adolphus & Ellis*). But this strictness as to the attestation clause applies only to wills executed under powers; in other cases of wills, as in deeds (p. 78), the attestation clause is by no means conclusive as to what was done. Even the oral testimony of the attesting witnesses is not so; *Lowe v. Jolliffe*, 1 W. Bl. 365; and the decision in *Andrews v. Motley*, 32 L. J. (C. P.) 128; 12 C. B., N. S., 527, would be strong to show that the admissibility of a will thirty years old without proof of execution was not affected by such a defect in the clause of attestation (see *post*, p. 86).

Under the old law it was held that the thirty years were to be reckoned from the date of the will being executed; *Doe d. Oldham v. Wolley*, 8 B. & C. 22. Whether that would be so now that the will speaks from the death of the testator may be doubtful.

Wills of realty—use of probate to prove.] By the 20 & 21 Vict. c. 77, s. 64, "in any action at law, or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party

intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days at least before the trial or other proceedings in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise, or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate, or letters of administration, or a copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

By s. 65, "in every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the Court or Judge before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid."

Execution of powers by deed, or will.] Formerly, all the circumstances required by the creator of a power, however otherwise unimportant, must have been observed, and could not be satisfied but by a strict and literal performance, *per* Lord Ellenborough, C. J., *Hawkins v. Kemp*, 3 *East*, 440. And if the instrument creating the power directs attestation and other formalities, it has been held that the attestation must notice the compliance with the formalities. Thus, where it was to be executed "by any deed or writing under the hands and seals of the parties, to be by them duly executed in the presence of and attested by two or more witnesses," it was held that as the attestation stated only a sealing and delivery, and omitted the signing, the power was not duly executed; *Doe d. Mansfield v. Peach*, 2 *M. & S.* 576; *Wright v. Wakeford*, 4 *Taunt.* 214. So if the power was to be executed by an appointment to be signed and published in the presence of, and attested by two witnesses, and the attestation omitted to mention the publication; *Moodie v. Reid*, 7 *Taunt.* 355; though where the attestation mentioned "delivery," this was held equivalent to publication; *Ward v. Swift*, 1 *C. & M.* 171.

The cases above referred to assume, however, rather than expressly decide, that, if the attestation is deficient, the deficiency cannot be supplied by evidence *aliunde* that the formalities were all gone through. But this is directly contrary to the law, in the analogous case of formalities required by statute; and perhaps after the language of Lord Lyndhurst, in *Burdett v. Doe d. Spilsbury*, at p. 461 of the report in 6 *Manning & Granger*, and of Lord Campbell, at p. 468, sqq., it will be held, if the question should arise, that the attestation clause is not conclusive. Indeed Lord Campbell, in *Newton v. Ricketts*, 9 *H. L. C.* 262; 31 *L. J. (Ch.)* 247, says that the *ratio decidendi*, in *Burdett v. Doe d. Spilsbury*, was that such extrinsic evidence might be given. This was certainly not so. But still this expression of opinion gives to the view under discussion the full weight of Lord Campbell's authority. On the other hand, we have, in *Burdett v. Doe d. Spilsbury*, Lord Brougham's express refusal to over-rule the cases which lay down the very strict rule

requiring all the formalities to be noticed in the attestation. See p. 465 of the report.

The 1 Vict. c. 26, abrogated the necessity of following the formalities prescribed by the donor of a power to be exercised by a will, or by an appointment in the nature of a will; for it provides by s. 10, that "no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." Hence the execution of wills in virtue of powers must hereafter conform to the regulations pointed out in the 9th section of the Act, and need conform to no others.

By the 22 & 23 Vict. c. 35, a like remedy has been provided for the relief of donees of powers to be exercised otherwise than by will: for, by s. 12, a deed executed after August 13, 1859, in the presence of and attested by two or more witnesses in the ordinary manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or instrument in writing, although some other execution, attestation, or solemnity may have been prescribed by the donor; provided that this shall not dispense with any requirement prescribed by him other than the manner of execution or attestation, nor prevent the donee from executing the power in the manner prescribed by the donor.

It is to be remarked, that whereas a will executed under a power must conform to the provisions of 1 Vict. c. 26, an appointment by deed made since 22 & 23 Vict. c. 35, may be executed in the manner prescribed either by that act, or by the donor of the power.

Handwriting.] The result of the various cases on this head is thus stated by Mr. Justice Patteson in *Doe v. Suckermore*, 5 Ad. & E. 730, 731, where references to all the authorities will be found. "The knowledge of handwriting may be acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him."

To prove the handwriting of a member of Parliament, the opinion of a clerk employed to inspect franks, who never had occasion to

verify his handwriting, was held insufficient; *Batchelor v. Honeywood*, 2 Esp. 714; *Cary v. Pitt*, Peak. Ev. App. 84. And where an attorney was called to prove the signature of C. to a promissory note, it was held insufficient that he acted on a written retainer, purporting to be signed by A., B. and C., and that he was acquainted with the handwriting of A. and B. only; *Drew v. Prior*, 5 M. & G. 264. A witness cannot be permitted to give his opinion of the handwriting from extrinsic circumstances, such as his knowledge of the party's character and habits; *Du Costa v. Pym*, Peak. Ev. App. 85.

In the case of ancient documents, where it is impossible for any witness to swear that he has seen the party write, it is sufficient if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings bearing the same signature, and preserved as authentic documents; *B. N. P.* 236; *Taylor v. Cook*, 8 Price, 652; and see other cases cited, *Doe v. Suckermore*, 5 Ad. & E. 736; *Fitzwalter Peerage case*, 10 Cl. & Fin. 193; *Lindsay Peerage*, 2 II. L. C. 557. Ancient writings (as a receiver's account one hundred years old) may be laid before a witness at the trial for his inspection; and upon his judgment of their character, so formed, his belief as to the handwriting of the documents in question may be inquired into; *Doe v. Turver*, Ry. & Mood. 143; and see *Roe v. Rawlings*, 7 East, 282. A copy of a parish register purporting to be signed by the curate eighty years ago may be received with no other proof of handwriting than the evidence of the present parish clerk, who speaks from his having seen the same handwriting attached to other entries in the register; *Doe v. Davies*, 10 Q. B. 314. In these cases the question often becomes one of skill; the character of the writing varying with the age, and the discrimination of it being assisted by antiquarian studies; per Coleridge, J., *Doe v. Suckermore*, 5 Ad. & E. 736.

It was formerly a very doubtful question under what circumstances, and how far handwriting in modern instruments could be proved or disproved by the testimony of a witness, founded on the mere comparison of different signatures. In the case of *Doe v. Suckermore*, *supra*, the Judges of the Court of K. B. were equally divided on the question whether, after a witness had sworn to the genuineness of his signature, another witness (a bank inspector) could be called to prove that in his judgment the signature was not genuine, such judgment being solely founded on a comparison pending the trial with other signatures admitted to be those of the witness. It had also been doubted whether a person practised in the examination of handwriting could be called to state his opinion whether a writing is in a feigned or a genuine hand; *Gurney v. Langlands*, 5 B. & A. 330; *Doe v. Suckermore*, 5 Ad. & E. 751. It was, however, held that, under certain circumstances, the Court and jury might be permitted to institute a comparison between documents for the purpose of verifying handwriting, when a witness called expressly for that purpose would be rejected. Thus in *Griffith v. Williams*, 1 C. & J. 47, it was held that the rule as to the comparison of handwriting does not apply to the Court or jury, who may compare two documents when they are both properly in evidence. But the documents with which the handwriting is compared must be such as are in evidence for other purposes in the cause, and not put in or selected by the party merely for comparison; *Doe v. Newton*, 5 Ad. & E. 514, 534; *Griffith v. Ivery*, 11 Ad. & E. 323. To put such selected documents

into the hands of the witness, merely for the purpose of shaking his credit by subsequent independent evidence contradicting his testimony as to those documents, would tend to raise collateral issues; *Hughes v. Rogers*, 8 M. & W. 123. This course was, however, held admissible where the object was to show that the plaintiff was the author of an anonymous letter, by putting in evidence other letters in which he had mis-spelt defendant's name in the same way as in the anonymous letter; *Brookes v. Tichborn*, 5 Ex. 929.

Some of the questions discussed above are now disposed of by s. 27 of the Common Law Procedure Act, 1854, which provides, that "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting them, may be submitted to the Court and jury, as evidence of the genuineness, or otherwise, of the writing in dispute."

Under this provision it seems that the genuine writing used for the purpose of comparison may be put in, and even written, for the express purpose of comparison. In such cases, however, the evidence will be less satisfactory to the jury; for a document, written under such circumstances, though genuine, cannot be so well relied on as fairly representing the writer's ordinary handwriting. The genuineness of the writing is made a collateral issue, triable by the Judge, and the writing and testimony of the witnesses thereupon are evidence for the jury in the principal issue. See *Birch v. Ridgway*, 1 Fost. & Fin. 270; *Cooper v. Dawson*, *Id.* 550.

Births, deaths, and marriages.] There are facts which are capable of proof in any of the ordinary ways. But as they are events at which few people may be present, which it is frequently necessary to prove, and that a long time after they have taken place, it has been found convenient to relax the rules of evidence in respect of them, and for the purpose of proving them to allow resort to be had to what are called *registers*. These registers are records of those events, kept by official or authorised persons; and though only second-hand evidence, they are, as authentic records, allowed to be used on the principle already explained (see p. 54).

What these registers contain is a statement that a certain person, described with a certain particularity, was born, or baptised, or was married, or died, or was buried. Some evidence of identity of the person whose birth, marriage, or death is in question with the person named in the register must, therefore, also be given. In the case of a marriage, the parties to it sign the register, so that proof of their handwriting will serve as an identification; *Sayer v. Glossop*, 2 Ex. 409.

Births, deaths, and marriages—proof by official registers.] The general registration of births, marriages, and deaths is regulated by the 6 & 7 Will. 4, c. 86, explained and amended by the 1 Vict. c. 22. By these acts district registrars are appointed, whose duties are independent of those belonging to the parochial clergy. Regulations are made for the custody of the register books, and the registrars are directed to learn and register the particulars required to be registered according to the forms in the schedules to the first act. These particulars comprise in the case of births, the time of birth, and the names of the parents; and in the case of marriages and deaths, the age, sex, and condition of the parties. By 27 & 28 Vict. c. 97, all

burials in any burial ground in England are to be registered. These registers may be used in evidence.

Births, deaths, and marriages—proof by parochial registers.] Parochial registers kept by the clergyman of the parish may also be used in evidence. The keeping of them is regulated by the 52 Geo. 3, c. 146, which directs that the rector, vicar, minister, or curate of the parish, or chapelry, shall enter baptisms, marriages, and burials in books, which are to remain in the custody of the officiating minister, and are to be kept in an iron chest. Annual copies of these books are to be transmitted to the registrar of the diocese. In *Walker v. Beauchamp*, 6 C. & P. 552, Alderson, B., expressed an opinion that examined copies of the transcripts of parochial registers sent to the registrar of the diocese were evidence. If the person by whom the register is kept has made the entries from information supplied by others, this would appear to be no objection to its authenticity, and it will be presumed that he has satisfied himself of its truth; *per Erle, J., Doe d. France v. Andrews*, 15 Q. B. 759. In *May v. May*, 2 Stra. 1072, the evidence of the register was not allowed to be added to by the entries in the day book from which the register was compiled; and in *Doe d. Warren v. Bray*, 8 B. & C. 813, entries copied into the register by the minister of the parish from memoranda taken by the parish clerk before the appointment of the minister, were rejected, as were also the memoranda taken by the clerk.

The book in which the register is kept must come from the proper custody. In *Doe d. Lord Arundel v. Fowler*, 14 Q. B. 700, where a witness stated that a book containing entries of burials was shown to him by a person calling himself the parish clerk, it was held that, as no explanation had been given of how the book came to be in his custody, it would not be admitted, inasmuch as the 52 Geo. 3, c. 150, directs that the parish register shall be kept by the clergyman.

Births, deaths, and marriages—proof by other registers.] Formerly a register of ceremonies performed in a dissenting chapel was not admitted as evidence; *Newham v. Raithby*, 1 Phill. Rep. 315. Now, however, provision is made for the keeping of these registers, and since that time they have been considered admissible. By 6 & 7 Will. 4, c. 85, marriages celebrated in buildings occupied as places of public worship may be registered. The provisions of the 6 & 7 Will. 4, c. 86, also apply to these marriages. And by 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, arrangements are made for the custody and reception in evidence of a large number of non-parochial registers.

By 19 & 20 Vict. c. 99, s. 17, in the case of marriages contracted under the 6 & 7 Will. 4, c. 85, 1 Vict. c. 22, and 3 & 4 Vict. c. 72, proof of the marriage having been performed in a certified building, or that the consent of the parties whose consent is required by law was given, or of the dwelling, or period of dwelling, of either of the parties previous to the marriage, need not be given after the ceremony has been performed, nor can proof be admitted to show the contrary.

In *Sichel v. Lambert*, 15 C. B., N. S., 81, it was held to be sufficient, in order to prove a marriage in a French Catholic chapel in London, to produce a certificate from a priest of a marriage under the

6 & 7 Will. 4, c. 85, and that it was not necessary to add any evidence that the ceremony was performed in presence of the registrar.

It is not necessary in any case to produce the original register. An examined copy, or a copy certified by the official person to whom the original is entrusted, may be used; 14 & 15 Vict. c. 90, s. 14.

Births, deaths, and marriages—of what facts registers are evidence.]

An attempt is sometimes made to use the register for the purpose of proving facts stated therein in addition to the main fact of birth, baptism, marriage, death, or burial, as the case may be. There has been a good deal of discussion as to how far this can be done. In a criminal proceeding against a person for falsely swearing that he was twenty-one years of age, Lord Tenterden refused to allow that part of a register of baptisms which stated the day upon which the defendant was born to be read; *R. v. Clapham*, 4 C. & P. 29; and in *Burghart v. Augerstein*, 6 C. & P. 690, the entry in a register of baptisms of the day of the defendant's birth was rejected as proof of a plea of infancy. In *R. v. North Petherton*, 5 B. & C. 508, a copy of a register of baptism was put in, to show that an infant was born in a certain parish, but Bayley, J., rejected the evidence; saying, however, that if it could be shown that the child was very young at the time of baptism, the register would afford presumptive evidence of its having been born in the parish where it was baptised; see *R. v. St. Katharine*, 5 B. & Ad. 970. In *Cope v. Cope*, 1 M. & R. 269, upon an issue as to the legitimacy of a child, a baptismal register which described it as the illegitimate son of E. C. was admitted, though with the observation that it was entitled to little weight.

By 6 & 7 Will. 4, c. 86, s. 37, certified copies of entries in the register office are to be received as evidence of the birth, death, or marriage, to which the same relates, without further or other proof of such entry. It may, therefore, be contended that at least in the case of a birth, where every part of the entry is derived from the same sources, the entry in the register is *prima facie* evidence of all the facts stated therein. And by 1 Vict. c. 22, s. 8, the registrar-general is allowed to direct that the place of birth or death of any person, whose birth or death shall be registered under the said Act for registering births, deaths, and marriages, shall be added to the entry in such manner as the registrar-general shall direct, and such addition when so made shall be taken to all intents to be part of the entry in the register. These provisions, it must be remembered, apply to the Act, 6 & 7 Will. 4, c. 85, by which marriages in the presence of the registrar are instituted.

Births, deaths, and marriages in colonies.] Births, marriages, and deaths in India, previous to 14 & 15 Vict. c. 40, may be proved by the books in which copies of Indian registers are bound up, such copies having been made under the authority of the company, and transmitted to England; Ratcliff v. Ratcliff, 29 L. J. (P. M. & A.) 171. These registers are deposited in Victoria Street, Westminster, at the office of the Secretary of State for India.

By the 14 & 15 Vict. c. 40, provision is made for the registration of the marriages of persons professing the Christian religion in India, and copies of the register are directed to be transmitted to the secretary to the government in the presidency, or place, or place of the residence of the registrar, to be kept by him; and in certain

instances these copies are to be transmitted to England. In Australia, Canada, Nova Scotia, the West Indies, and other of the British colonies, acts of parliament are in force for the registration of births, marriages, and deaths, and where such is the case the registers may be used in evidence.

Births, deaths, and marriages at sea.] By 17 & 18 Vict. c. 104, s. 282, the masters of ships for which official log-books are required are to enter therein births, marriages, and deaths taking place on board, and these entries are to be received in evidence in any proceeding in any court of justice, saving all just exceptions.

Births, deaths, and marriages abroad.] Foreign registers of births, marriages, and deaths would seem to be admissible, if proved to have been prepared under official authority. In *Abbott v. Abbott*, 29 L. J. (P. M. & A.) 57, a certificate copied from a register made by the *curé* of a parish in Chili, under public authority, was received. Registers of births, baptisms, marriages and burials of British subjects beyond seas, which have been transmitted from different British embassies and factories on the continent of Europe and elsewhere, are now placed in the registry of the Consistory Court of London. By 12 & 13 Vict. c. 68, British consuls authorised to act for this country abroad are empowered to grant licences of marriages where both or one of the parties are British subjects; and they are directed to make entries of these marriages in a register book, copies of which are to be forwarded to the Secretary of State, and by him transmitted to the Registrar-General. These are also evidence.

Births, deaths, and marriages—presumption and reputation.] There is a presumption of death which arises out of the presumption of the duration of life, which has been already noticed; and a presumption of marriage from cohabitation. See p. 36.

Very often also a birth, death, or marriage is inquired into as a question of pedigree; in such cases the declarations of deceased persons upon the subject are admissible. See p. 37.

Examinations taken under a commission.] By the 13 Geo. 3, c. 63, s. 40, it is provided, “ that in all cases of indictments or informations laid or exhibited in the said Court of King’s Bench for misdemeanors or offences committed in India, it shall and may be lawful for his Majesty’s said court, upon motion to be made on behalf of the prosecutor or of the defendant or defendants, to award a writ or writs of mandamus, requiring the chief justice and judges of the said supreme court of judicature for the time being, or the judges of the mayor’s court at Madras, Bombay, or Bencoolen, as the case may require, who are hereby respectively authorised and required accordingly to hold a court, with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments, or informations respectively, and in the meantime to cause such public notice to be given of the holding the said court, and to issue such summons, or other process, as may be requisite for the attendance of witnesses, and of the agents or counsel of all or any of the parties respectively, and to adjourn from time to time, as occasion may require, and such examination as aforesaid shall be then and there openly and publicly taken, *viva voce*, in the said

court, upon the respective oaths of witnesses and the oaths of skilful interpreters, administered according to the forms of their several religions, and shall by some sworn officer of such court be reduced into one or more writing or writings on parchment, in case any duplicate or duplicates shall be required by or on behalf of any of the parties interested, and shall be sent to his Majesty in his Court of King's Bench, closed up, and under the seals of two or more of the judges of the said court, and one or more of the said judges shall deliver the same to the agent or agents of the party or parties requiring the same, which said agent or agents (or in the case of his or their death, the person into whose hands the same shall come) shall deliver the same to one of the clerks in court of his Majesty's Court of King's Bench, in the public office, and make oath that he received the same from the hands of one or more of the judges of such court in India (or if such agent be dead, in what manner the same came into his hands), and that the same has not been opened or altered since he so received it, which said oath such clerk in court is hereby authorised and required to administer, and such depositions being duly taken and returned, according to the true intent and meaning of this Act, shall be allowed and read, and shall be deemed as good and competent evidence as if such witness had been present and sworn and examined *vivâ voce* at any trial for such crimes or misdemeanors, as aforesaid, in his Majesty's said Court of King's Bench, any law or usage to the contrary notwithstanding, and all parties concerned shall be entitled to take copies of such depositions at their own costs and charges."

By s. 44 it is provided that, whenever "any person or persons whatsoever shall commence and prosecute any action, or suit, in law or equity, for which cause hath arisen, or shall hereafter arise in India against any other person or persons whatever, in any of his Majesty's courts at Westminster, it shall and may be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a mandamus or commission as aforesaid, to the chief justice and judges of the said supreme court of judicature for the time being, or the judges of the mayor's court at Madras, Bombay, or Bencoolen, as the case may require, for the examination of witnesses as aforesaid, and such examination being duly returned shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action, in the same manner in all respects as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated."

By the 1 Will. 4, c. 22, s. 1, it is provided that all the powers, authorities, provisions, and matters contained in the 13 Geo. 3, c. 63, relating to the examination of witnesses in India, shall be "extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ of commission may be directed, or elsewhere when it shall appear that the examination of witnesses under a writ, or commission, issued in pursuance of the authority hereby given, will be necessary, or conducive to the due administration of justice in the matter wherein such writ shall be applied for."

By s. 4, "it shall be lawful to and for each of the said courts at Westminster, and also the Court of Common Pleas of the County Palatine of Lancaster, and the Court of Pleas of the County Palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just."

By s. 10. "No examination or deposition to be taken by virtue of this Act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions."

The presiding judge alone decides whether the absence of the witness is sufficiently accounted for so as to render the deposition admissible under this section. Some judges, as Lord Denman, in *Carruthers v. Graham*, Car. & M. 5, and Lord Abinger, in *Robinson v. Markis*, 2 Moo. & Rob. 375, have required the strictest legal proof on this point; but this is not in accordance with the practice in the analogous cases of depositions admissible at common law.

The depositions must appear to have been taken and to have been returned with the proper formalities. It will be seen that the formalities required by the 13 Geo. 3, c. 63, s. 40, relating to criminal cases in India only, were very elaborate. And as the general power of taking depositions in civil cases is an extension of the power contained in that section, it might be considered that all those formalities, so far as applicable, ought to be observed. It is doubtful, however, whether such is the case, though the formalities mentioned in order are clearly necessary. Thus, in *Greville v. Stulz*, 11 Q. B. 997, it was held that the order for a commission was void, because it did not state the place where the examination was to be held. But such an omission is an irregularity which is waived, apparently, by the opposite party attending at the examination and cross-examination of the witnesses; *Hawkins v. Baldwin*, 16 Q. B. 375. It seems to have been assumed that the 1 Will. 4, c. 22, s. 4, gives the court which makes the rule or order control over the formalities.

The course prescribed by the rule or order must be strictly followed. Where it was directed that the depositions should be returned, it was held that certified copies were inadmissible; *Clay v. Stephenson*, 7 Ad. & E. 185.

Strong presumptions will be made in favour of the examination

having been duly taken; *Greville v. Stulz*, *ubi supra*; *Simms v. Henderson*, 11 Q. B. 1015.

The order need not name the commissioners; *Nicol v. Alison*, 11 Q. B. 1006.

Where the return was ordered to be made to the Master's Office, and a clerk of the office produced a commission, return, and examinations delivered at the office by an unknown person, and it was proved that it was the same commission that was issued, and the signatures of the commissioners to the return were proved, this was held enough to make the examinations admissible; *Simms v. Henderson*, 11 Q. B. 1015.

A witness about to leave the country is frequently examined under a judge's order before the trial takes place. If a private person takes the examination, he ought to return it to the person who obtained the order, who files it, and either the original or an office copy must be produced at the trial.

See further, as to the examination of witnesses under a commission, 1 *Chit. Prac.* 11th ed. p. 329—348.

EXAMINATION OF WITNESSES.

Ordering witnesses out of court.] During a trial the Court will, on the application of either of the parties, order all the witnesses in the cause, except the one under examination, to go out of court. But if the attorney in the cause is a witness he will, in general, be suffered to remain, his assistance being necessary to the proper conduct of the cause; *Pomeroy v. Baddeley*, *Ry. & Mood.* 430. This, however, is a matter entirely for the discretion of the judge. If the witness remains after being ordered to withdraw, it will not necessarily prevent his being examined; *Parker v. M^cWilliam*, 6 *Bing.* 683; *R. v. Colley*, *Moo. & M.* 329; and the better opinion is that, although the witness may be fined for disobedience, the judge cannot refuse to hear him under such circumstances; *Chandler v. Horne*, 2 *Moo. & Rob.* 423; *Cobbett v. Hudson*, 1 *E. & B.* 14; except in Exchequer causes, where the witness is peremptorily excluded on trials between the Crown and a subject; *Attorney-General v. Bulpit*, 9 *Price*, 4; *Parker v. M^cWilliam*, 6 *Bing.* 684. It is not the practice to order either of the parties out of court so long as their conduct there is unobjectionable; *Charnock v. Devings*, 3 *C. & K.* 378. But as a party can now be a witness, as such he is probably liable to be ordered out of court. It has, however, been decided that a party may lawfully conduct his own cause in court, examine his witnesses, and give evidence as one himself; *Cobbett v. Hudson*, 1 *E. & B.* 11; a decision which necessarily implies that the party in such a case has a right to remain in Court.

Form of oath.] By law there is no prescribed form of oath; it is to be that which the witness himself declares to be binding upon his conscience, and he is always allowed to adopt the ceremonies of his own religion; *Phill. Ex.*, 9th ed. p. 9; *per* Alderson, B., in *Miller v. Salomons*, 7 *Ex.* 534; and *per* Pollock, C.B., *id.* 558. A Jew, consequently, is sworn upon the Pentateuch with his head covered; 2 *Hale P. C.* 279; *Onichund v. Barker*, *Willes*, 543. But a Jew who stated that he professed Christianity, but had never been baptised, nor had even formally renounced the Jewish faith, was allowed to be sworn on the New Testament; *R. v. Gilham*, 1 *Esp.* 285. A

witness who stated that he believed both the Old and New Testament to be the word of God, yet, as the latter prohibited, and the former countenanced, swearing, he wished to be sworn on the former, was permitted to be so sworn; *Edmonds v. Rowe, Ry. & Mood.* 77. So where a witness refused to be sworn in the usual form, by taking the book in his right hand and afterwards kissing it, but desired to be sworn by having the book laid open before him, and holding up his right hand, he was sworn accordingly; *Dalton v. Colt*, 2 *Sid.* 6; *Willes*, 553. And where, on a trial for high treason, one of the witnesses refused to be sworn in the usual manner, but put his hands to his buttons; and in reply to a question whether he was sworn, stated that he was sworn and was under oath, it was held sufficient; *R. v. Love*, 5 *How. St. Tr.* 113. A Scotch witness has been allowed to be sworn by holding up the hand, without touching the book or kissing it, and the form of the oath administered was: "You swear according to the custom of your country, and of the religion you profess, that the evidence," &c. &c.; *R. v. Mildrone, Lea. C. C.* 412; *Mee v. Reil, Peak. N. P.* 23. Lord George Gordon, before he turned Jew, was sworn in the same manner, upon exhibiting articles of the peace in the King's Bench; *MS.*; *M'Nally Ev.* 97. In Ireland it is the practice to swear Roman Catholic witnesses upon a Testament with a crucifix or cross upon it; *Id.* The following is also given as the form of a Scotch Covenanter's oath: "I, A. B., do swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give to the Court and jury touching the matter in question is the truth, &c. So help me God"; 1 *Lea. C. C.* 412, n.; *R. v. Walker, Id.* 498. A Mahomedan is sworn on the Koran. The form in *R. v. Morgan*, 1 *Lea. C. C.* 54, was as follows: The witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo has been received, who touched with his hand the foot of a Brahmin; *Omichund v. Barker*, 1 *Atk.* 21. The following is given in one case as the form of swearing a Chinese. On entering the box the witness immediately knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The crier of the Court then, by direction of the interpreter, administered the oath in these words, which were translated by the interpreter into the Chinese language: "You shall tell the truth, and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer"; *R. v. Entrehman*, 1 *Car. & M.* 248.

The 1 & 2 Vict. c. 105, s. 1, enacts that "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity, in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

A witness may be asked whether he considers the form of administering the oath to be such as will be binding on his conscience. The most correct and proper time for asking a witness this question is before the oath is administered; but as it may happen that the oath may be administered in the usual form, by the officer, before the attention of the Court, or party, or counsel, is directed to it, the objection is not, in such a case, to be precluded; but the witness may nevertheless be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answers in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding upon his conscience; *The Queen's Case*, 2 Br. & B. 284. So where a person who was of the Jewish persuasion at the time of trial, and an attendant on the synagogue, was sworn on the Gospels as a Christian, the Court refused a new trial on this ground, being of opinion that the oath, as taken, was binding on the witness, both as a religious and moral obligation; and Richardson, J., added, that if the witness had sworn falsely, he would be subject to the penalties of perjury; *Tells v. Hoare*, 3 B. & B. 232; 7 B. Moore, 36, S. C.

The usual ceremony of swearing a Christian witness is as follows. He takes a copy of the New Testament into his right hand, and the officer of the court whose duty it is to administer the oath addresses him thus: "The evidence which you shall give between the parties shall be the truth, the whole truth, and nothing but the truth, so help you God;" and the witness then kisses the book.

Affirmation in lieu of oath.] Formerly it was considered necessary, in all cases, that an oath, that is, a direct appeal to a divine power, should be made by the witness. Many conscientious persons have objected to this, and various sects have been established, part of whose religious creed it is that it is wrong to take an oath. In order to prevent the difficulty which arose from large classes of the community being thus rendered unavailable as witnesses, various statutes have, from time to time, been passed, exempting such persons from the necessity of taking an oath, and allowing them to substitute a solemn affirmation in its stead. Thus, by the 9 Geo. 4, c. 32, s. 1, "every Quaker, or Moravian, who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation, or declaration, in the words following:—'I, A. B., being one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be), do solemnly, sincerely, and truly declare and affirm,' which said affirmation, or declaration, shall be of the same force and effect in all courts of justice and other places, where by law an oath is required, as if such Quaker, or Moravian, had taken an oath in the usual form; and if any person making such declaration, or affirmation, shall be convicted of having wilfully, falsely, and corruptly affirmed, or declared any matter, or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures, to which persons convicted of wilful and corrupt perjury are, or shall be, subject."

By the 3 & 4 Will. 4. c. 49, Quakers and Moravians are permitted to make an affirmation, or declaration, instead of taking an

oath, "in all places and for all purposes whatsoever, where an oath is, or shall be, required, either by the common law, or by any Act of Parliament;" and any such affirmation, or declaration, if false, is punishable as perjury.

Where a prosecutor who had been a Quaker, but had seceded from the sect, and called himself an Evangelical Friend, stated that he could not affirm according to the form, either in the 9 Geo. 4. c. 32, or in the 3 & 4 Will. 4. c. 49, and he was allowed to give evidence under a general form of affirmation, the judges were unanimously of opinion that his evidence was improperly received; *R. v. Doran*, 2 *Lew. C. C.* c. 27; 2 *Mood. C. c.* 37. The law was, however, at once altered by the 1 & 2 Vict. c. 77, which enacts that "any person who shall have been a Quaker, or a Moravian, may make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form; and such affirmation or declaration, if false, is punishable as perjury. Every such affirmation or declaration is to be in the words following:—'I, A. B., having been one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be), and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm.'"

By the 3 & 4 Will. 4. c. 82, the class or sect of dissenters called Separatists, when required upon any lawful occasion to take an oath, in any case where by law an oath is or may be required, are also allowed to make an affirmation or declaration instead, in the words following:—"I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare, that I am a member of the religious sect called Separatists, and that the taking of an oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare." &c.

But besides the persons comprised within these sects, other persons called as witnesses not unfrequently refused to be sworn from what they asserted to be conscientious motives, it is, therefore, provided by the 24 & 25 Vict. c. 66, s. 1, that, "if any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required, or desiring to make an affidavit or deposition in any criminal proceeding, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court, or judge, or other presiding officer, or person qualified to take affidavits, or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, in the words following:—"I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of an oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely, and truly affirm and declare," &c.; which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. By s. 2, "if any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so

offending shall incur the same penalties as by the laws and statutes of this kingdom are, or may be enacted, or provided against persons convicted of wilful and corrupt perjury."

Incompetency.] A person whose understanding is manifestly and egregiously defective will not be allowed to give evidence. This defect may arise either from immaturity of intellect, or some species of insanity. Such a witness would, in legal consideration, be incompetent for two reasons; first, because he would not understand the religious obligation of an oath; secondly, because his mental power of distinguishing and relating the truth could not be relied on.

A person who, from defective education, does not understand the religious obligation of an oath, is also incapable of giving testimony.

A person who does not acknowledge an absolute divine power, or, acknowledging such a power, does not believe that it will punish perjury, is incapable of giving testimony.

When a witness is objected to upon either of these grounds of incompetency, it is for the judge to satisfy himself as to the validity of the objection; *R. v. Hill*, 2 Den. C. C. 254.

Objection on ground of incompetency, when and how taken.] The old practice was to require that the incompetency of a witness should be shown either by independent evidence, or on the *voir dire*, before he was examined in chief; and the party objecting might take either method at election; but not both; *R. v. Muscot*, 10 Mod. 193. But the objection may now be taken at any time while the witness is under examination; *Turner v. Pearte*, 1 T. R. 719; *Abrahams v. Bunn*, 4 Burr. 2256; *Jacobs v. Layborn*, 11 M. & W. 685; although the witness has denied the ground of incompetency on the *voir dire*: *Moore v. Howell*, 12 Vin. 48. When the witness has been examined and cross-examined, it is doubtful whether any objection can afterwards, and during the trial, be made to his competency:—that it is then too late, see *Beeching v. Gower*, Holt, N. P. C. 314, and *Oyle v. Pulesky*, *Ibid.* 485; *Abrahams v. Bunn*, 4 Burr. 2256;—that it is never too late, see *Stone v. Blackburn*, 1 Esp. 37; *Turner v. Pearte*, 1 T. R. 719; and *per Gibbs*, C. J., *Morish v. Foote*, 8 Taunt. 458. Where the objection is apparent, and the opposite party has permitted the examination to proceed, the court will not afterwards allow him to insist upon the incompetency because the testimony turns out unfavourable; and even where the incompetency of the witness was unknown during examination, his discharge from the box is said to preclude any further objection; *Fellingham v. Sparrow*, 9 Dowl. P. C. 141; *Dewdney v. Palmer*, 4 M. & W. 664. And this, although he be recalled for further examination; *Wolluston v. Hake-will*, 3 M. & G. 297. Yet in *Jacobs v. Layborn*, 11 M. & W. 685, it was said by Lord Abinger, C. B., that counsel are entitled to "lie by," till they see whether the witness speaks the truth; and it was considered in that case that a witness may, at any time, be sworn, "to make true answer to all questions that the court shall demand of him," and be thereupon examined as to his competency. The dictum of Lord Abinger seems to have been founded by his lordship on the supposed principle that "the law will not allow a verdict to stand which is obtained on the evidence of an incompetent person;" a doctrine which would seem to expose a verdict to be impeached by a party who has expressly consented to the examination of such a witness.

Incompetency from defective understanding.] It would be impossible to expose in any short compass the rules for deciding in what cases a witness should be rejected on the ground of defective understanding. It may be observed that here the question of competency will always turn solely on, whether, or no the witness will be likely to give truthful evidence, and if he is likely to do this he may be received, notwithstanding considerable defects of intellect, or even aberration of mind on certain subjects; *R. v. Hill*, 2 Den. C. C. 254. It makes no difference, whether the defect of understanding arises from imperfect education, from natural imbecility, or from failure of the mental powers.

Deaf and dumb persons were formerly presumed to have understandings so defective as to be in all cases incompetent; a presumption entirely contrary to experience, and one not likely now to be made. See *Harrod v. Harrod*, 1 Kay & Johnst. 9. The state of the intellect of such a witness might, of course, be reasonably inquired into before taking his testimony, as, the usual channels of information being cut off, the education of such persons is more than usually difficult. See *Tayl. Ev.* s. 1248.

Incompetency from defect of religious principle.] As already said, a person whom it is proposed to call as a witness may either deny the existence of a divine power, or, acknowledging the existence of such a power, may deny that it will punish perjury; or the witness's age or education, or both, may have been insufficient to enable him to understand the religious obligation of an oath.

The latter objection applies chiefly to children of tender years. Assuming that a child has sufficient intelligence to give evidence, it is still, no doubt, legally necessary that it should also understand enough of religion to satisfy the religious test. But the course of religious teaching which is usually adopted is such that the child, if it has learnt anything of religion at all, will be sure to have learnt, and in all probability accepted as true, just what the law requires, namely, the existence of a divine power, and that it will punish lying. If, therefore, the child is found to possess the necessary degree of intelligence, and has received some religious instruction, its evidence would probably be in all respects legally admissible without further inquiry into the particular nature of its religious belief. As a very young child is generally so frightened when put into the box that it is difficult to get it to answer any but the simplest questions, it is desirable to avoid, as much as possible, specific questions to the child as to the nature of its religious belief, which are generally difficult to answer, even for grown-up people. There seems no reason why the questions as to the education of the child should not be put to its parents or friends, so as entirely to avoid this difficulty. See *infra*.

The objection on the ground that the witness does not acknowledge a divine power, or that, acknowledging a divine power, he does not believe that he will punish perjury, is very difficult to deal with; because it is necessary here to fix the exact limits of the religious belief which will render a witness competent; which is a question by no means suitable for forensic discussion. It seems to be sufficient that the witness should believe in the existence of a supernatural being, which would be offended by perjury, and would be capable of punishing it. Whether the witness must also believe in a future state seems doubtful. The language of *Willes, C. J.*, in *Omichund v. Barker*, *Willes*, 549, would seem to indicate that

belief in the existence of a God, and that he will either reward or punish the witness *in this world or the next*, is sufficient.

There has also been some dispute as to the mode in which the state of the religious belief of the witness is to be ascertained: and this question becomes the more important from the occasional occurrence of cases in which persons assert their own incompetency on this ground, either because they consider the taking an oath would be hypocritical, or from vanity, or from a dishonest desire not to give evidence. The preponderance of authority is in favour of the witness being himself examined as to his religious opinion; *Ph. & Am. Ev.* 12; *The Queen's Case*, 2 B. & B. 284; *R. v. Taylor*, 1 Pea. 11; *R. v. White, Lea*. 430; *R. v. Serra*, 2 C. & K. 53. But some persons have doubted whether the witness himself ought to be questioned at all, and that recourse should be had to persons acquainted previously with him, who have had an opportunity of estimating his opinions from his behaviour and conversation. See *Best, Ev.* s. 161.

In the recent case of *Maden v. Cutnach*, 31 L. J. (Ex.) 118, 7 II. & N. 360, it was held that a witness who had taken the oath in the usual form might, before giving testimony, be examined by the opposing counsel as to the state of his belief, and that on its appearing to be inadequate he ought to be rejected. It would, however, be very much to be regretted, if this course were frequently taken.

Provided the religious belief reaches the necessary standard, the particular form of belief is universally held to be totally immaterial.

Incompetency on the ground of interest.] Formerly all persons having an interest in the suit were on that ground disqualified, as were also persons convicted of certain crimes. These disqualifications have been abolished. The change which admits parties as witnesses is a very great one. It is believed that those whose experience has made them acquainted with the working of both systems consider, on the whole, that the change is a good one. Still no one can help feeling that there is a vast amount of perjury committed by parties to the inquiry at the trial of the cause. It very often then becomes apparent for the first time where the pinch of the case really lies; the temptation is great, and the risk is, practically, very small: prosecutions for perjury being very rarely successful. A good deal of this might be remedied by making the parties state their case on oath at an early stage of the proceedings, the right of cross-examination being reserved to the opponent.

The following are the statutory provisions on this subject:—

By the 6 & 7 Vict. c. 85, it is provided "that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime, or interest, from giving evidence, either in person, or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter, or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by consent of parties, authority to hear, receive and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered—

as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence."

This act contained a provision that it should not render the actual parties to the suit, or the husband or wife of any such party, competent as witnesses. This exception was repealed by the 14 & 15 Vict. c. 99, s. 1, and by s. 2 the parties are rendered competent; the incompetency of the husband and wife to give evidence for or against each other in criminal proceedings, is, however, still preserved by s. 3.

But now, by the 16 & 17 Vict. c. 83, s. 1, "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce*, or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

By s. 2, nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.

By s. 3, no husband shall be compelled to disclose any communication made to him by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage.

Under this act the wife may prove her own adultery in an action against her husband for goods supplied to her. As to proof of non-access, see *infra*, tit. *Ejectment*.

By the 22 & 23 Vict. c. 61, s. 6, "on any petition presented by a wife in the Divorce Court for dissolution of marriage by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively are rendered competent and compellable to give evidence of, or relating to such cruelty or desertion.

Examination in chief.] On almost every trial a great deal of discussion arises as to putting leading questions. Leading questions are those which, from the form in which they are put, are likely to communicate to the witness a knowledge of what answer would be favourable to the person putting it; which would of course be dangerous with a dishonest witness. In some cases of critical inquiries also, it is very desirable to get the witness's own impression, which the most veracious witness might not, after another view had been once suggested to him, be able to recall.

The objections, therefore, to leading questions, apply by no means with equal force to all witnesses and to all parts of an inquiry. Some witnesses will adopt anything that is put to them, whilst others scrupulously weigh every answer. Moreover, innumerable questions are put for a mere formal purpose, the facts not really being in dispute, or simply in order to lead the mind of the witness to the real point of inquiry.

● As a great saving of time is effected by leading a witness, it would

be extremely undesirable to stop it, where it is otherwise unobjectionable.

There is no distinction recognised by the law between questions which are, and questions which are not leading. To object to a question as leading is only a mode of saying that the examination is being conducted unfairly. It is entirely a question for the presiding judge to say, in his discretion, whether or not the examination is being conducted fairly.

It is sometimes said that all questions capable of being answered by merely *yes* or *no*, are objectionable as leading. But this is a very fallacious test, even in the most critical parts of an inquiry. On the other hand, it is sometimes said that the objection that the question is leading may be got over by putting it in the alternative; but it is obvious that nothing would be easier than to suggest in this way a whole conversation to a dishonest witness.

If a witness when called displays a determination to speak as unfavourably as possible to the party calling him, or as it is sometimes called, proves hostile, then the party calling him may conduct the examination with the same latitude as we shall hereafter see a cross-examination may be conducted (*post*, p. 112); but he must confine himself to matters material to the issue. The party calling a witness cannot cross-examine him merely to test his credit, as his opponent may. On the other hand, the side to which the witness was favourable would not be allowed the usual latitude of cross-examination. These peculiarities only arise in the unusual case of a witness giving testimony which is wholly unexpected.

When a question is propounded the opposite party may object that it is one which transgresses the rules of evidence. If not objected to, or if the objection be over-ruled, the witness must answer it, unless he can show that he has some privilege which enables him to refuse to do so. If he refuses to answer the question, and can show no privilege, he will be liable to be fined and imprisoned by any court having power to fine and imprison for contempt, which the Court of Assize sitting at Nisi Prius has: *Ex parte Fernandez*, 10 C. B., N. S. 11; 30 L. J. (C. P.) 321.

Privilege.] There are some questions which a witness is not compellable to answer, though, if he choose to answer them, his evidence is to be received. The following are such cases:—

When a witness is privileged on the ground of injurious consequences of a civil kind.] It has generally been considered that a witness is privileged from answering any question, the answer to which might directly subject him to forfeiture of estate. And it is considered by Mr. Phillips (*Phill. & Arn. Ev.*, vol. ii. p. 492) that the existence of this rule is impliedly recognised by the 46 Geo. 3, c. 37, which, after reciting that doubts had arisen, whether a witness could by law refuse to answer a question relevant to the matter in issue, the answering of which had no tendency to accuse himself, or to expose him to any *penalty or forfeiture*, but the answering of which might establish, or tend to establish, that he owed a debt, or was otherwise subject to a civil suit at the instance of his majesty, or of some other person or persons, it was declared and enacted, “that a witness cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to accuse himself and to expose him to a *penalty or forfeiture* of any nature whatso-

ever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty, or any other person or persons."

It will be seen that this statute also recognises the privilege, when the witness is exposed to a penalty. A doubt might arise whether this exception extends to penalties to be recovered by a common informer, or otherwise in a civil manner.

When a witness is privileged on the ground of injurious consequences of an ecclesiastical kind.] It has generally been considered that a witness may decline answering questions, the answering of which would expose him to ecclesiastical penalties; as on a proceeding under the 2 & 3 Edw. 6, c. 13, s. 2, for not setting out tithes; *Jackson v. Benson*, 1 You. & Jer. 32; or for simony, *Brownwood v. Edwards*, 2 Ves. Sen. 245; or incest, *Chetwynd v. Lindon*, Id. 450.

But there cannot be a doubt that a judge, in deciding whether or no the witness is entitled to the privilege, would consider how far the danger suggested by the witness was real; *R. v. Boyes*, *infra*; and the mere chance of an obsolete jurisdiction being set in motion would probably not be considered a sufficient ground for refusing to answer.

When a witness is privileged on the ground of injurious consequences of a criminal kind.] That the witness may by answering be subjected to a criminal charge, however that charge may be capable of being prosecuted, is clearly a sufficient ground for refusing to answer. Thus a person cannot be compelled to confess himself the father of a bastard child, as he is thereby subjected to the punishment inflicted by the 18 Eliz. c. 3, s. 2; *R. v. St. Mary, Nottingham*, 13 East, 58, n. So a witness could not be compelled to answer a question which subjected him to the criminal charge of usury; *Cates v. Hardacre*, 3 Taunt. 424. But it was held that, if the time for the recovery of the penalty had expired, the witness might be compelled to answer, *Roberts v. Allnutt*, Moo. & M. 192.

In *R. v. Boyes*, 30 L. J. (Q. B.) 301, 1 B. & S. 311, it was held that a witness could not claim his privilege on this ground, if he had received a pardon for the offence of which he alleged that a charge was apprehended.

In this case an objection was taken by the witness that, though a pardon under the Great Seal might be a protection in ordinary cases, yet that, under the peculiar circumstances of that case, it was not so. The proceeding on which the witness was called to give evidence was a prosecution for bribery, and the witness objected to answer a question on the ground that, by doing so, he would expose himself to the charge of having received a bribe. A pardon under the Great Seal was thereupon handed to him by the Solicitor-General, who was prosecuting for the Crown; but the witness still refused to answer, on the ground that his privilege still existed, inasmuch as by the express provisions of the 12 & 13 Will. 3, c. 2, the pardon would not be pleadable to an impeachment for bribery by the House of Commons; but Hill, J., committed the witness for refusing to answer, and the Court of Queen's Bench held that this was rightly done, for that the danger to be apprehended must be real and appreciable, and that an impeachment was, under the circumstances, too improbable

a contingency to justify the witness in still refusing to answer on that ground.

Right to decline answering—how decided.] There has been considerable discussion as to how the question, whether the objection of the witness to answer is well-grounded, is to be decided. Some Judges have gone so far as to say that there should be no inquiry at all upon the subject, but that the statement on oath of the witness himself, that he apprehends injurious consequences of one or other of the kinds above-mentioned, should be conclusive. In *Fisher v. Ronalds*, 12 C. B. 765, it was unnecessary to decide the point, but Maule, J., said, "It is for the witness to exercise his discretion, not the Judge. The witness might be asked, 'Were you in London on such a day?' And though, apparently, a very simple question, he might have good reason to object to answer it, knowing that, if he admitted he was in London on that day, his admission would complete a chain of evidence against him which would lead to his conviction. It is impossible that the Judge can know any thing about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him." It was equally unnecessary to decide the point in *Osborne v. The London Dock Company*, 10 E. 701, but it was, nevertheless, a good deal discussed; and the opinion of Parke, B., clearly inclined to the view, that the Judge may require something more than the mere claim of the witness to satisfy him that the former is entitled to the privilege. The learned Baron stated that this was the opinion of the majority of the Judges, who considered the case of *R. v. Garbett*, Den. C. C. 236, though they expressly refrained from deciding the point; and he also cites the opinion of Lord Truro, who, in the case of *Short v. Mercier*, 3 Mac. & Gord. 205, said, "a defendant, in order to entitle himself to protection, is not bound to show to what extent the discovery sought might affect him, for to do that he might oftentimes of necessity deprive himself of the benefit he is seeking; but it will satisfy the rule, if he states circumstances consistent on the face of them with the existence of the peril alleged, and which also render it extremely probable." In *Sidebottom v. Adkins*, 3 Jur. N. S. 631, Stuart, V. C., would not allow a witness to refuse to answer questions, the answering of which, without giving any reason, he swore would subject him to a criminal prosecution. In *Adams v. Lloyd*, 3 H. & N. 351, 27 L. J. (Ex.) 499, Pollock, C. B., admits the right of the Judge to use his discretion, but seems to think he ought to be satisfied with the oath of the witness if there are no circumstances in the case which lead him to doubt the *bona fides* of the claim. In the last case on this subject, *R. v. Boyes*, *supra*, the Court of Queen's Bench, after consideration, held, that "to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer."

The preponderance of opinion, therefore, is in favour of the position that the Judge is to use his discretion, whether he will grant the privilege upon the bare claim of the witness, or whether he will investigate the claim by further inquiry. Of course, the witness must always pledge his oath that he will incur risk by answering the question, and there are innumerable cases in which this would satisfy the Judge that he is entitled to the privilege.

Privilege of husband and wife.] In civil proceedings a question is sometimes put to a husband the answering of which would tend to criminate his wife, or to a wife the answering of which would tend to criminate her husband. There has been some confusion here between incompetency and privilege, and it was at one time thought that a husband or wife was in every case an incompetent witness with respect to any fact which might have a tendency to criminate the other; *R. v. Cliviger*, 2 T. R. 268; but that decision is no longer law; all the subsequent cases, with one exception, treating the husband and wife, except on an indictment against either, as competent witnesses; *R. v. All Saints, Worcester*, 6 M. & S. 194; *R. v. Bathwick*, 2 B. & Ad. 617; *R. v. Williams*, 8 C. & P. 284. The case the other way is that of *R. v. Gleed*, 2 Russ. 983, in which, on a charge of stealing wheat, Taunton, J., after consulting Little-dale, J., refused to allow a wife to be asked whether her husband was not present when the wheat was stolen, although it does not appear that she claimed any privilege. But that opinion would hardly prevail against the decisions above referred to.

But though the husband and wife are, in such a case, competent, it seems to accord with principles of law and of humanity, that they should not be compelled to give evidence which tends to criminate each other; and in *R. v. All Saints, Worcester, supra*, Bayley, J., said that, if in that case the witness had thrown herself upon the protection of the Court, on the ground that her answer might tend to criminate her husband, he thought she would have been entitled to it. A similar opinion is expressed in *Phill. & Arn. Ev.* 10th ed. vol. i. p. 73.

Communications made by the husband to the wife, or by the wife to the husband during marriage are expressly privileged by the 16 & 17 Vict. c. 83, s. 3.

The communication must have been made *durante matrimonio*: *O'Connor v. Majoribanks*, 4 M. & G. 435, over-ruling *Beveridge v. Minter*, 1 C. & P. 364. Whether the privilege lasts after dissolution of the marriage, or the death of one of the parties, is doubtful; see *Monroe v. Twistleton*, Pea. Add. Ca. 221; *Aveson v. Lord Kinnaird*, 6 East. 192; *Tayl. Ev.* s. 831.

When a witness is privileged on the ground of confidence.] A witness is not bound to disclose matters which have come to his knowledge as a professional legal adviser; *Wilson v. Rustall*, 4 T. R. 758; *Duchess of Kingston's case*, 20 How. St. Tr. 575. Other professional persons, it is now said, either medical or clerical, have no such privilege. Lord Kenyon doubted whether a confession by a Roman Catholic to his priest was even admissible, *Peake, N. P. C.* 78; but such evidence was admitted in *R. v. Sparke*, there cited. In *R. v. Gilham, Ry. & Mood.* 198, it was conceded that a clergyman not only may disclose, but must disclose what has been revealed to him as a matter of religious confession.

If a communication passes between a client and his legal adviser through an interpreter, the interpreter is not bound to disclose it; *Du Barré v. Livette*, *Peake, N. P. C.* 77; 4 T. R. 756; 20 How. St. Tr. 575 (n). The same rule applies to a communication through the agent of the legal adviser; *Parkins v. Hawckshaw*, 2 Stark. N. P. C. 239; *Goodall v. Little*, 20 L. J. (Ch.) 132; or through his clerk; *Taylor v. Forster*, 2 C. & P. 195; *R. v. The Inhabitants of Upper Boddington*, 8 D. & R. 732; *Foot v. Hayne, Ry. & Mood.* 165.

Some doubt has been entertained, whether the legal adviser is privileged with respect to matters communicated to him in his professional character where they do not relate to a litigation either pending or contemplated. Lord Tenterden thought that, with respect to these, the legal adviser was not privileged. See *Clark v. Clark*, 1 *Mood. & Rob.* 4; *William v. Mundie*, *Ry. & Mood.* 34; but it seems to be at length settled, that all communications to a legal adviser in his professional character are privileged, whether made with reference to a litigation pending or contemplated or not. See all the cases commented on by Lord Brougham in *Greenough v. Gaskell*, 1 *My. & K.* 100; and *Walker v. Wildman*, 6 *Madd.* 47; *Mynn v. Joliffe*, 1 *Mood. & Rob.* 326; *Moore v. Tyrell*, 4 *B. & Ad.* 870.

The privilege extends not only to information conveyed directly by the client to his legal adviser, but to all deeds, papers, and documents entrusted by the client to his care; these the legal adviser is entitled to refuse to produce, or to give any information respecting them, *Robson v. Kemp*, 5 *Esp.* 54. In *Volant v. Sawyer*, 13 *C. B.* 231, 12 *L. J. (C. P.)* 83, an attorney refused to produce a document on the ground that it was his client's title-deed. He was then asked, what the deed was, but the Judge ruled that the attorney was not bound to answer the question; and the Judge also refused himself to examine the deed, and the Court held that he was right. Nor, where an attorney holds a document for a client, can he be compelled to produce it, though required to do so by a person who has an equal interest in it with his client; *Newton v. Chaplin*, 10 *C. B.* 356.

The information must have been obtained by the legal adviser in his professional capacity, *B. N. P.* 281; that is, he cannot refuse to state matters within his own knowledge independently of any communication with his client, merely because they affect his client; *Wheatley v. Williams*, 1 *M. & W.* 533. In the latter case it was held that an attorney cannot be compelled to state whether a document shown to him by his client during a professional interview was then stamped. In *Dwyer v. Collins*, 7 *Ex.* 639, 21 *L. J. (Ex.)* 225, it was held, that the right of an attorney not to disclose matters with which he has become acquainted in the course of his employment, as such, does not extend to matters of fact which he knows by any other means than confidential communication with his client, though, if he had not been employed as an attorney, he would probably not have known them; and upon this ground the attorney was, in that case, compelled to answer, whether a particular document belonging to his client was in his possession, and was then in court. See also *Coates v. Birch*, 2 *Q. B.* 252. In *R. v. Farley*, 1 *Den. C. C.* 197, where the wife of a prisoner took a forged will to an attorney at the prisoner's request, and asked for an advance of money upon the property mentioned in the will, it was held that this communication was not privileged. So, where a forged will was designedly sent to a solicitor, together with genuine documents, in order that it might be acted on, it was held that this was not a privileged communication; *R. v. Jones*, 1 *Den. C. C.* 166. See also *R. v. Avery*, 8 *C. & P.* 596; *R. v. Tuff*, 1 *Den. C. C.* 334. The criminal cases upon this part of the subject are not quite clear.

There is no doubt that the privilege may be equally claimed, whether the client be a party to the inquiry on which the legal adviser is called as a witness, or not, or whether the subject of the confidence relate to the matter then in litigation, or not.

There are a good many cases, especially those of an earlier date, in which language is used which would convey the idea that a legal adviser not only cannot be compelled, but will not be permitted to disclose matters of professional confidence: or, sometimes it is said, that the privilege is that of the client and not of the attorney, and that the attorney cannot waive it. The distinction between privilege and competency is so frequently lost sight of, that perhaps, notwithstanding these expressions, the true view may be that the legal adviser, though privileged, is competent in all cases.

If the client waives the privilege, the attorney cannot claim it; but it is not necessary that the client should be present in order to make his claim; it will be assumed that he insists upon it, until the contrary be shown; *Tayl. Ev.* 407; *Doe v. Gilbert v. Ross*, 7 M. & W. 102; *Newton v. Chaplin*, 10 C. B. 356; *Phelps v. Prew*, 3 E. & B. 430.

But if the legal adviser chose to take upon himself the risk of answering, it would be strange if the Court were to prevent him, though it might express its indignation at a manifest breach of professional confidence.

When a witness is privileged on the ground of public policy—disclosures by informers.] Questions on this branch of privilege arise generally in criminal and revenue cases. Such communications are undoubtedly to some extent privileged: *R. v. Hardy*, 24 How. St. Tr. 811; *Att.-Gen. v. Briant*, 15 M. & W. 169. See *Rosc. Cr. Ev.* 145.

When a witness is privileged on the ground of public policy—official communications.] There are some official communications relating to matters which affect the interests of the community at large, which may be withheld; such as communications between the governor and the law officers of a colony; *Wyatt v. Gore*, Holt, N. P. C. 299; between the governor of a colony and a secretary of state; *Anderson v. Hamilton*, 2 B. & B. 156; between the governor of a colony and a military officer; *Cooke v. Maxwell*, 2 Stark. 183. On a trial for high treason, Lord Grenville was called to produce a letter intercepted on its way through the post-office, but it was held that he was not bound to do so: the name of the case is not mentioned, but the facts were stated by Lord Ellenborough in *Anderson v. Hamilton*, 2 B. & B. 157. Lord Ellenborough also held that the Speaker of the Irish House of Commons was not bound to disclose what a member had there spoken; though he might be asked whether that member had spoken on a particular occasion; *Plunkett v. Cobbett*, 5 Esp. 136; 29 How. St. Tr. 71. In *R. v. Watson*, 2 Stark. N. P. C. 148, an officer of the Tower of London was allowed to refuse to say whether a plan of the Tower which was produced was accurate or not.

In *Dickson v. Lord Wilton*, 1 F. & F. 424, a clerk from the War-Office was sent with a paper which had been asked for, with instructions to object to its production and nothing more. Lord Campbell ordered it to be produced, not thinking the objection of a subordinate officer sufficient. In *Beatson v. Skene*, 29 L. J. (Ex.) 430, the Secretary of State for the Home Department had been subpoenaed to produce certain documents transmitted to him by an officer in the army. He attended at the trial, but objected to produce them, on the ground that his doing so would be injurious to the public service. Bramwell, B., thereupon refused to compel him, and a new trial was moved for upon this ground. It appeared, on

discussion, that the documents, even if produced, would not have been admissible; but Pollock, C. B., in delivering the judgment of the Court, said that they thought the ruling of Bramwell, B., was right. He said, "We are of opinion that, if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how this is to be determined? It is manifest it must be determined, either by the presiding Judge, or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was, and why the publication would be injurious to the public service—an inquiry which cannot take place in private, and which, taking place in public, may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the document would be injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the paper; and if he is in attendance, and states that, in his opinion, the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. . . . If, indeed, the head of the department does not attend personally to say that its production will be injurious, but sends the document to be produced or not, as the Judge may think proper, or, as was the case in *Dickson v. Lord Wilton*, where a subordinate was sent with the document, with instructions to object and nothing more, the case may be different."

Where for revenue, or other similar purposes, an oath of office has been taken by a person not to divulge matters which have come to his knowledge in his official capacity, he will not be allowed, if the interests of justice are concerned, to withhold his testimony. Thus, where the clerk to the commissioners of the property tax, being called to produce the books containing the appointment of a person as collector, objected on account of his oath, Lord Ellenborough said that it did not protect him from giving evidence in a court of justice upon a writ of *subpœna*; *Lee q. t. v. Birrell*, 3 Camp. 337.

Privilege—how claimed.] It is for the witness himself to claim, or to waive the privilege, as he sees fit; *Thomas v. Newton*, *Mood. & M.* 48 (n); *R. v. Adey*, 1 *Mood. & Rob.* 84; in both of which cases Lord Tenterden said that counsel ought not to be allowed to argue the question in favour of the witness. It may be proper for the Court to explain his position to an ignorant witness, but there can be no reason why a party interested in excluding the testimony, or his counsel, should be allowed to interfere. See as to an attorney waiving his privilege, *suprà*, p. 107.

It is now decided that the witness may claim his privilege at any part of the inquiry, and that he does not waive it altogether, by omitting to claim it, as soon as he might have done so; *R. v. Gurbett*, 1 *Den. C.* 258, by nine judges against six.

Contradicting party's own witness.] It has always been considered that a party may contradict the evidence of his own witness upon facts material to the issue. The doubt has been whether the party calling a witness can contradict him by showing that the witness *himself* has made on a previous occasion a statement contrary to that made at the trial. Upon this point it is provided by the Common

Law Procedure Act, 1854, s. 22, that a party producing a witness may, "in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but, before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked, whether or not he has made such statement."

It was held in *Greenough v. Eccles*, 28 *L. J. (C. P.)* 160, *C. B.*, *N. S.*, that a witness is not "adverse" within the meaning of this section, merely because his testimony is unfavourable to the party calling him; but that, in order to entitle the party calling to prove the inconsistent statement, he must, in the opinion of the presiding judge, be *hostile*.

Thus interpreted, this section is a very serious abridgement of the common law rule, for it makes the right to contradict the witness by other evidence than that of his own statements, depend upon the opinion of the judge as to whether the witness is adverse or not.

Under the 17 & 18 Vict. c. 125, s. 23, *infra* p. 113, it is not competent to a party to contradict his own witness, by the witness's previous statements in writing; *Ryberg v. Ryberg*, 32 *L. J. (P., M. & A.)* 112.

Opinion of witness when admissible.] In general the mere opinion of a witness as to any of the facts in issue is inadmissible as evidence. But it is admissible upon questions of science. Thus where the question was, whether a bank erected to prevent the overflowing of the sea had caused the choking up of a harbour, the opinions of scientific men as to the effect of such an embankment upon the harbour were held to be admissible; *Folkes v. Chadd*, 3 *Doug.* 157. And where the question was whether a seal has been forged, seal-engravers may be called to show a difference between a genuine impression and that supposed to be false; *Ibid.* per Lord Mansfield, C. J. So a physician, who has not seen the particular patient, may, after hearing the evidence of others at the trial, be called to testify as to the general effects of the symptoms described by them, and their probable consequences in the particular case; *Peake, Er.* 208; or he may be asked whether the facts proved are symptoms of insanity; *R. v. McNaughten*, 10 *Cl. & Fin.* 200; but he cannot be asked, generally, whether, upon the evidence on the cause, he is of opinion that a party is insane, or incapable of distinguishing between right and wrong; for this would leave him at liberty to find facts as well as to form an opinion on those facts, and in effect put him in the place of the jury; *R. v. Frances*, 4 *Cox, C. C.* 57; *R. v. Layton, Id.* 149. The opinion of a person conversant with the business of insurance, as to whether the communication of particular facts would have varied the terms of insurance, has been admitted in evidence on several occasions both in actions on the policy, and against insurance brokers for negligence; *Berthon v. Loughman*, 2 *Stark.* 258; *Rickards v. Murdock*, 10 *B. & C.* 527; *Chapman v. Wallon*, 10 *Bing.* 57. But in *Campbell v. Rickards*, 5 *B. & Ad.* 840, a new trial was granted because such evidence had been admitted, and it was held that the materiality of a fact concealed was a question for the jury alone, and that "witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be

influenced if the parties had acted in one way rather than another." The evidence of a ship-builder has been admitted on a question of seaworthiness, though he was not present at the survey; *Thornton v. Royal Exchange Assur. Co.*, Peake N. P. 25. And the opinion of a nautical witness on a question of skilful navigation, assuming the facts to be true; *Fenwick v. Bell*, 1 C. & Kir. 312. The opinions of persons versed in the laws of a foreign country are also admissible; *Chaurand v. Angerstein*, Peake, N. P. 44, and see the cases on this point, *ante*, p. 76. Persons conversant with old MSS. may be called to speak to the date of an old writing; *Tracy Peerage case*, 10 Cl. & Fin. 154. Where the question is as to the correct judgment of a captain in abandoning his ship, a witness may be asked the result of his personal observation of the "general habits" of the captain as to sobriety; *Alcock v. Royal Exchange Assurance Co.* 13 Q. B. 292.

As to calling persons skilled in handwriting to prove forgery or to establish the genuineness of ancient documents, see *ante*, pp. 88, 89.

Memorandum to refresh witness's memory.] A witness will be allowed to refer to an entry, or memorandum, made by himself at the time of, or shortly after the occurrence of the fact to which it relates, in order to refresh his memory; although the entry or memorandum would not of itself be evidence; *Kensington v. Inglis*, 8 East, 289. Even a receipt on unstamped paper may be used for this purpose; *Maugham v. Hubbard*, 8 B. & C. 14. Nor does the use of such a memorandum by a witness make it evidence in itself; *Alcock v. Royal Exchange Assurance Co.* 13 Q. B. 292. But he cannot refresh his memory by extracts from a book, though made by himself; *Doe v. Perkins*, 3 T. R. 749; nor speak from having refreshed it out of court; at least unless he produces the memorandum in court; *Beach v. Jones*, 5 C. B. 696; nor by copy of a book, unless the witness himself saw the copy made and checked it at the time by personal examination while the subject was fresh in his recollection; for then the copy is, in effect, an original entry by himself; *Burton v. Plummer*, 2 Ad. & E. 341. In the last case a sale was proved by a clerk who refreshed his memory from a ledger entered from a waste-book, the waste-book being kept by the clerk and the ledger copied by another party under the eye of the clerk. A surveyor may refer to a printed copy of a report made by himself to his employers, and compiled from his rough notes made on the spot; *Horne v. Mackenzie*, 6 Cl. & Fin. 628. So a witness may refresh his memory by reference to entries in a log-book, which he did not write with his own hand, but which he examined from time to time shortly after the events recorded; *Burrough v. Martin*, 2 Camp. 112. Where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing but by the book, but seeing my initials, I have no doubt that I received the money;" this was held sufficient evidence; *Maugham v. Hubbard*, *supra*; *R. v. St. Martin's Leicester*, 2 Ad. & E. 210. A printed form of lease, read over to a tenant as the terms of his tenancy, but not signed according to Statute of Frauds, may be used to refresh the memory of the witness who read it to him; *Bolton v. Tomlin*, 5 Ad. & E. 856. If the witness be blind, the paper or memorandum may be read over to him in court; *Cutt v. Howard*, 3 Stark, 4. A witness will be permitted to refresh his memory from a deposition made and signed by him shortly after the fact to be proved on examination before commissioners of bankrupts; *Smith v.*

Morgan, 2 Mood. & Rob. 257. In this case, Tindal, C. J., permitted it to be only so far used as to refresh the memory of the witness as to the date of a single transaction, on the authority of *Vaughan v. Martin*, 1 Esp. 440; but it is observable that in *Vaughan v. Martin*, the whole account of the act of bankruptcy seems to have been read to the witness, a very aged person, who was then asked "whether the matters there stated were true?" Such an examination was also allowed to be used by a witness in like manner by Pollock, C. B., in *Wood v. Cooper*, 1 C. & K. 645. The examination in both cases was taken recently after the facts, and this seems essential to the use of any memorandum or paper for refreshing memory; *Whitfield v. Aland*, 2 C. & K. 1015.

[*Right to inspect memorandum.*] Where the witness gives his evidence after having referred to a book, or other document, it must be produced; *Howard v. Canfield*, 5 Dougl. P. C. 417; *Beech v. Jones*, 5 C. B. 696; and the counsel on the other side has a right to inspect it, without being bound to read it in evidence; *Sinclair v. Stevenson*, 1 C. & P. 582; *R. v. Ramsden*, 2 C. & P. 603. He may cross-examine upon the entries referred to by the witness without making the book evidence *per se* for the party who produces the witness; but if he cross-examines as to other entries in the same book, he makes them part of his own evidence; *per Gurney, B.*, in *Gregory v. Tuccernor*, 6 C. & P. 281; and Wilde, C. J., in *Whitfield v. Aland*, 2 C. & K. 1015. Where a paper is put into a witness's hand only to prove the handwriting, and not to refresh his memory, the opposite party is not entitled to see it; *Sinclair v. Stevenson*, 1 C. & P. 582. And where the question founded on a document handed to witness to refresh his memory wholly fails in its object, it has been considered that the opposite party is not entitled to inspection; *R. v. Duncombe*, 8 C. & P. 369. The reason for permitting adverse inspection seems to be to check the use of improper documents;—to secure the benefit of the witness's recollection as to the whole facts;—and to compare his oral testimony with the written statement. If it fails to refresh his memory, or is not used for that purpose, the right of inspection fails.

[*Cross-examination.*] In cross-examination a witness may be asked questions relevant to the issue, without any regard to the consideration of whether they are leading or not, unless the witness, though called by his adversary, show a leaning in the cross-examining party's favour; see *supra*, p. 102.

But the cross-examining party is not confined to questions strictly relevant to the issue. He may test the credit of the witness by asking questions which are, otherwise, wholly irrelevant. Great latitude is allowed in this respect, and Judges seldom interfere, trusting to the honour of counsel not to abuse their liberty.

Sometimes questions are put in cross-examination which are relevant to the issue, but which would be inadmissible in chief, as being hearsay, not the best evidence, or for some similar reason. To such questions it is difficult to object, because the answer would be, that they are put for the purpose of testing the credit of the witness. Yet it is obvious that in this way much illegal evidence is, in effect, placed before the jury.

When the witness under cross-examination is a party to the cause,

this last question assumes a different aspect. It may here be urged that all objections to the informal nature of the evidence are cured by the fact of its coming from the mouth of a party to the cause, and that, therefore, as an admission, it is good evidence.

With respect to how far an inquiry may be made on cross-examination into the contents of a written document there has been some discussion, though the cases do not lead to any very direct result.

In the *Queen's case*, 2 B. & B. 286, the judges were asked, as an abstract question, "Whether a party would be allowed, in cross-examining a witness, to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown the witness the letter, and having asked that witness, whether the witness wrote that letter, and his admitting that he wrote such letter?"

It is remarkable that the form of this question assumes that, after the witness has seen the letter and admitted that he wrote it, he may be asked as to the contents of it, whereas the answer of the judges, delivered by Abbot, C. J., is that after this admission, "the cross-examining counsel may, at his proper season, *read the letter in evidence*," which is a very different thing. This naturally led to a further question, and the result was that the judges explicitly again state their opinion that the letter must be read by the cross-examining counsel as part of *his* evidence, and that this may be done at any stage of the proceedings.

No distinction is here made between inquiries which are, and those which are not relevant to the issue.

In *Macdonell v. Evans*, 21 L. J. (C. P.) 141, 11 C. B. 930, it was held that a witness could not be asked in cross-examination the contents of a letter supposed to have been written by himself, even although the only object of the evidence was to discredit the witness. It is not explicitly so stated, but it is probable that here, whatever might be the object with which the question was asked, the inquiry *was* relevant to the issue, and so it seems to have been assumed in the case next stated.

In *Henman v. Lester*, 31 L. J. (C. P.) 366, stated at length, *suprà*, p. 7, the Court of Common Pleas held that a witness could be asked on cross-examination, in order to test his credit, the contents of a written document. There the answer was not relevant to the issue.

In *Macdonell v. Evans*, Cresswell, J., said very decidedly that a witness could not be asked on cross-examination, in order to test his credit, whether he had been convicted of a crime, as that would appear by the record. This is not acceded to by Willes and Keating, J.J., in *Henman v. Lester*; Byles, J., on the other hand, considers the dictum of Cresswell, J., to be correct.

By the Common Law Procedure Act, 1854, s. 24, "A witness may be cross-examined as to previous statements made by him in writing, or rendered into writing, relative to the subject matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes

of the trial as he may think fit." See *Jackson v. Thomason*, 1 B. & S. 745; 31 L. J. (Q. B.) 11.

Where a witness is brought into court merely for the purpose of producing a written instrument, which is to be proved by another witness, he need not be sworn; and, unless sworn, the other party will not be entitled to cross-examine him. And where a person called to produce a document was sworn by mistake and was asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him; *Rush v. Smith*, 1 C., M. & R. 94. So if a wrong witness is called in consequence of a mistake in his name and is dismissed on the discovery of the mistake, the other side has no right to cross-examine him; *Clifford v. Hunter*, 3 C. & P. 16. So if he is called by error of the counsel and actually sworn, yet if dismissed before examination, he is not liable to be cross-examined; *Wood v. Mackinson*, 2 M. & Rob. 273.

Contradicting opponent's witness.] This, of course, may be done on all points material to the issue; but a witness cannot be contradicted upon any point not material to the issue, with a view of showing that his evidence, generally, is not worthy of credit. The case of *Palmer v. Trouer*, 8 Ex. 247, is a strong illustration of the rule. There the plaintiff sued the executor of A. on a joint and several note of A. and B.; the defence being that the note was forged by the plaintiff: the defendant being called as a witness denied, on cross-examination, that he had ever heard B. admit that he had signed the note: it was held, that the plaintiff could not call a witness to prove that B. had made such an admission in the defendant's hearing. It should seem that if the admission of B. had been in A.'s presence, and the note had been sued upon in A.'s lifetime as a joint note, the question would have been material and relevant. A witness, being asked on cross-examination whether he had not said that a bribe had been offered to him to give particular evidence in the case, denied that he had said so: it was held, that no evidence could be adduced to show that he *did* say so; *Attorney-General v. Hitchcock*, 1 Ex. 91. The rule seems to be, that if the witness's answer to a question would, if truly made, tend to qualify, or contradict, or discredit some other relevant part of his testimony, then other evidence may be received to contradict him; and a fact may be considered as "relevant," though not part of the transaction in issue, if the truth or falsehood of it may fairly influence the belief of the jury as to the whole case; *Semb. Melhuish v. Collier*, 15 Q. B. 878; but a merely irrelevant inquiry cannot be allowed. It is true that by showing the levity or falsehood of a witness even on irrelevant matters, his testimony would in some degree be discredited, yet the expediency of confining the field of inquiry at *Nisi Prius* within a reasonable compass has made it necessary to assign a limit to such collateral issues. Without such restraint the examination of each witness might give rise to different issues remote from the immediate issue on the record, which the parties have not come prepared to try, and by which both witnesses and parties might be unfairly prejudiced.

Evidence of character.] Evidence of general character is always excluded as irrelevant to the issue, except in the actions of libel, slander, and seduction, within certain limits. See those titles.

But, as the veracity of the witness is always a point in issue, his character for veracity may be impugned by the party interested in

discrediting him, by showing that he is unworthy of credit. If a witness's character for veracity be impeached, witnesses may be called in support of it.

Although evidence is admissible to show that a witness bears such a character and reputation, that he is unworthy of credit, yet it is not allowed (with the exception of facts which go to prove that the witness is not an impartial one, see *infra*) to prove particular facts in order to discredit him; *R. v. Watson*, 2 Stark. N. P. C. 152; *R. v. Lyster*, 14 How. St. Tr. 285. The question as to the witness's character for credibility must be put in a general form; *Mawson v. Hartsink*, 4 Esp. 102. The usual form of the question is as follows:—"From your knowledge of the witness do you believe him to be a person whose testimony is worthy of credit."

But this can only be done by the opposite party; the person calling a witness, having once put him forward as a person worthy of belief, though he may contradict him, cannot afterwards discredit him, if the testimony of the witness should turn out favourable, or even should the witness assume a position of hostility towards the party calling him; *Ewer v. Ambrose*, 3 B. & C. 749.

This is the rule at common law, and is affirmed by s. 22 of the Common Law Procedure Act of 1854, *supra*, p. 110.

As to a party contradicting his own witness, see *supra*, p. 109. As to cross-examining him, see *supra*, p. 102.

Evidence that a witness is not impartial.] What has been said as to not giving evidence of particular facts merely for the purpose of impeaching the credit of a witness, does not apply where the facts sought to be proved go to show that the witness does not stand indifferent between the contending parties; *Best*, Er. s. 647. Thus in *R. v. Tewing*, 2 Camp. 638, the witness was asked whether he had not said that he would be avenged upon the prisoner, and would soon fix him in gaol. This he denied, and Lawrence, J., allowed him to be contradicted. So also it may be proved that a witness has been bribed; *R. v. Langhorn*, 7 How. St. Tr. 446; or that he has endeavoured to suborn others; *R. v. Lord Stafford*, *Id.* 400; both which cases were recognised in *Attorney-General v. Hitchcock*, 1 Ex. 93.

Recalling witness.] It is in the discretion of the judge whether he will permit a witness to be recalled; *Adams v. Bankart*, 1 C., M. & R. 681; *Queen's case*, 2 B. & B. 301; *Catlin v. Barker*, 5 C. B. 201.

Re-examination.] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must be confined to the subject-matter of the cross-examination. The rule with regard to re-examination is thus laid down by Abbott, C. J., in the *Queen's case*, 2 B. & B. 297: "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. . . . I distinguish between a conversation with a party to a suit, whether criminal or civil, and a conversation with a third

person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion."

The language of Abbott, C. J., in the *Queen's case*, has, however, been qualified by the Court of Queen's Bench in *Prince v. Samo*, 7 *Ad. & E.* 627, where it was held that a witness of the plaintiff, cross-examined as to assertions of the plaintiff in a particular conversation, cannot be re-examined as to other *unconnected* assertions of the plaintiff in the same conversation, although connected with the subject of the suit. In that case the other part of the conversation was attempted to be shown for the plaintiff in order to prove the plaintiff's case by his own assertion; and it was observed by the court that, if such proof were admitted, it ought to go to the jury, and might thus obtain a verdict for the plaintiff on his own unsupported assertion out of the court. It must not therefore be assumed that cross-examination on part of a conversation necessarily lets in proof of the whole of it.

Where a witness of the plaintiff stated, on cross-examination, facts which were not strictly evidence, but might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. *Blewett v. Tregonning*, 3 *Ad. & E.* 554.

STAMPS.

The subject of stamps, though important and useful at Nisi Prius, is one that cannot be treated of at length in a work of this kind. The following summary only professes to contain some of the principal heads, and a selection of the most useful decisions on the acts.

Effect of want of stamp—stamp when presumed.] The several statutes for the imposition of stamp duties (of which 5 W. & M. c. 21, is one of the earliest) provide that no instrument requiring a stamp, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, until as well the duty, as the penalty (if incurred) shall be paid, a receipt under the hand of the proper officer produced, and the instrument marked, or stamped with the lawful stamp. We shall hereafter see that by a recent act (17 & 18 Vict. 125), instruments may sometimes be received in evidence on payment of the duty in court on the trial; *post*, *Time and mode of objecting to the stamp*, p. 122.

An instrument, therefore, requiring a stamp cannot, in general, be admitted in evidence without being stamped; and if there be an oral agreement, express or implied, to be bound by the same terms as

those contained in another written instrument, the latter cannot be given in evidence unless properly stamped; *Turner v. Power*, 7 B. & C. 625; *Walliss v. Broadbent*, 4 Ad. & E. 877; *Alcock v. Delay*, 4 E. & B. 660. When an unstamped instrument in writing has been lost (*R. v. Castle Morton*, 3 B. & A. 588), or destroyed, even by the party who objects to the want of the stamp (*Rippiner v. Wright*, 2 B. & A. 478), parol evidence of the contents is inadmissible. But in most cases in which an instrument has been lost, unless it is proved not to have been properly stamped, it is presumed to have been so; as where an indenture of apprenticeship executed thirty years before was lost, it was presumed to have been properly stamped, though an officer from the Stamp Office stated that it did not appear that any such indenture had been stamped; *R. v. Long Buckby*, 7 East, 45. So an order of payment given by the defendant to the plaintiff, and lost by the latter, which order was stated to have been written by the defendant in an affidavit sworn by him, will be presumed (in the absence of evidence to the contrary) to have been duly stamped; *Pooley v. Goodwin*, 4 Ad. & E. 94. But if the document be shown to have been at one time unstamped, the presumption is that it continued unstamped, until the presumption be rebutted by some evidence which either proves the stamping, or leaves it altogether uncertain; *Closmaduc v. Carrel*, 18 C. B. 36. See also *Blair v. Ormond*, 1 De Gez & Sm. 428. Where a party refuses to produce an agreement after notice, it will be presumed, as against him, to be properly stamped; *Crisp v. Anderson*, 1 Stark. 35. But the presumption may be rebutted; as where the witness, called to give secondary evidence, proves that it was not stamped; *Crowther v. Solomons*, 6 C. B. 758. An unstamped copy under the hand of the party against whom it is offered as primary evidence is admissible, and the due stamping of the original is presumed, unless disproved; *Smith v. McGuire*, 1 Fost. & Fin. 199.

Where the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence, if allowed by the pleadings, may be resorted to: thus, where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration; *Farr v. Price*, 1 East, 58; *Tyle v. Jones*, *id.* (n). In *Vincent v. Cole*, Mood. & M. 257, where a witness called by the plaintiff stated that the work, the payment for which formed the subject of the claim, was commenced under a written agreement, but that the items relied on by the plaintiff were extras and not contained in it, Lord Tenterden ordered the agreement to be produced, and as it was unstamped the plaintiff was nonsuited. But in *Reid v. Butte*, Mood. & M. 413, a distinct order by the defendant having been proved, Lord Tenterden thought that, though it was shown that the work was commenced under a written contract, the contract need not be produced. And a verbal admission of a debt and promise to pay it may be proved, though the party at the same time gave an unstamped admission and promise to pay; *Singleton v. Barrett*, 2 C. & J. 368. So, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by a witness who was present, and he may be allowed to use the unstamped receipt for the purpose of refreshing his memory; *Rambert v. Cohen*, 4 Esp. 213. Where an action is brought upon an instrument which ought to be stamped, and the form of the pleading is such that at the trial it is not necessary to produce it, a court of law will not examine whether it is legally available with reference to the

stamp laws. *Per Lord Eldon, C., Huddleston v. Briscoe*, 11 *Ves.* 596; *Thynne v. Protheroe*, 2 *M. & S.* 553. When a bill of exchange on a wrong stamp has been given for goods sold, the vendor, in suing for the price, need not prove notice of dishonour; *Cundy v. Marriott*, 1 *B. & Ad.* 696.

If a plaintiff succeeds in proving an oral contract, express or implied, and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of nonsuited the plaintiff; *Fielder v. Ray*, 6 *Bing.* 352; *R. v. Padstow*, 4 *B. & Ad.* 208; *Magnay v. Knight*, 1 *M. & G.* 944. But where the defendant, being called as a witness for the plaintiff proved that there was a written agreement, and on his being called on to produce it, it appeared to be unstamped, it was held that the plaintiff must be nonsuited; *Alcock v. Delay*, 4 *E. & B.* 660; for an unstamped agreement is not a nullity; *Ibid.*, and *R. v. Watts*, there cited. A party who executes the counterpart of a deed properly stamped, cannot object to its admissibility in evidence on the ground that the original is not properly stamped; *Paul v. Meek*, 2 *Y. & J.* 116.

Unstamped instrument, when evidence for collateral purposes.] In many cases an instrument, not legally stamped, is admissible to prove a collateral fact. And the fact seems to be collateral, if the instrument be offered not for the purpose of giving effect to it, but in order to prove something independent of, and unconnected with, the purpose for which the stamp is required to be impressed. Thus in an action of debt for bribery at an election, an unstamped promissory note payable to the defendant, which a witness said he had given for the repayment of money received by him, as a voter, from the defendant, is evidence to corroborate the testimony of the witness; *Dover v. Maestaer*, 5 *Esp.* 92. So an unstamped agreement has been admitted to prove usury; *Nash v. Duncomb*, 1 *Mood. & Rob.* 104; or to show that there was an illegal consideration of the plaintiff's debt; *Coppock v. Bowser*, 4 *M. & W.* 361; or to refresh a witness's memory, *ante*, p. 111; or to show fraud; thus an unstamped promissory note may be given in evidence to establish fraud by showing that it was written by the maker in a state of intoxication; *Gregory v. Fraser*, 3 *Cump.* 454; *Keable v. Payne*, 8 *Ad. & E.* 555; *R. v. Gompertz*, 9 *Q. B.* 824. And see *Holmes v. Sixsmith*, 7 *Ex.* 802. In *ex parte Wensley*, 1 *De G. J. & S.* 273, an unstamped and unregistered trust deed was received in proof of an act of bankruptcy. And an allegation that plaintiff delivered up a guarantee may be proved by delivery of an unstamped guarantee. *Haigh v. Brooks*, 10 *Ad. & E.* 309.

It has been held that the court cannot inspect an unstamped contract even for the purpose of ascertaining whether its contents preclude the admission of parol evidence of extras; *Burton v. Cornish*, 12 *M. & W.* 426. The dictum of Bayley, J., in *R. v. Pendleton*, 15 *East*, 449, and the decision in *Reed v. Deere*, 7 *B. & C.* 261, seem at variance with this ruling, but the cases may perhaps be reconciled by holding that where the work, the price of which is claimed, cannot be proved without disclosing the existence of a written and unstamped contract, the court cannot inspect that contract for the purpose of ascertaining whether the work actually in question does, or does not

come within its terms; but it is otherwise where such work can be proved by independent evidence which does not require the contract to be produced; see *infra*. Such an instrument cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues; *Jardine v. Payne*, 1 B. & Ad. 670. Yet in an action for goods sold, a bill of parcels, on which the seller has written an unstamped receipt when he made out the bill, may be put in by the defendant as evidence that another person, and not he, was debited by the plaintiff as buyer; for it is not used as a receipt, nor need that part be read; *Millen v. Dent*, 10 Q. B. 846. A statement of account is admissible against the party whose unstamped receipt for the balance is signed at the foot; *Mattheson v. Ross*, 2 H. L. C. 286. But if the payment had been in dispute in the cause, or had been material in the issue between the parties, so that it would have been necessary to instruct the jury to discharge the receipt from their minds, it is questionable whether the statement could then have been admitted, even for the collateral purpose of proving the account; *per Lord Campbell, Ib.*

On the trial of issues out of Chancery arising upon a suit for specific performance of a sale of real property, a writing in the following form was put in by the vendee:—"Received of A. B. the sum of —, being the amount of three tenements sold by me adjoining, &c. Signed, C. D." (the vendor). The two questions were, 1. Whether there was a contract of sale; 2. Whether there was any payment? The writing was stamped as an agreement only. Upon an appeal in Chancery, Lord Cottenham considered the paper inadmissible on the first issue, being an attempt to prove an agreement by proving the fact of payment. On a further trial and appeal, Lord St. Leonards held it admissible evidence of the contract of sale. It was not contended to be admissible as proof of payment, and it contained all the terms of the contract with the signature of the vendor subscribed; *Evans v. Protheroe*, 20 L. J. (Ch.) 448; 21 L. J. (Ch.) 772, 1 De G., M. & G. 572.

A party declared upon two written agreements, by the second of which variations were made in the first: There were counts upon each separately, and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: It was held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at by the court in order to ascertain whether the first was altered by it; and that, if it was, the plaintiff could not exclude the second agreement, and proceed upon the first only; *Reed v. Deere*, 7 B. & C. 261. Where, in an action against an acceptor, it appeared that, on the bill becoming due, his name had been erased and another bill (unstamped) drawn on the back of the first, it was held, that the unstamped bill could not be submitted to the jury for the purpose of drawing the conclusion that the first bill had been cancelled; *Sweeting v. Halse*, 9 B. & C. 365. But where the plaintiff proved a deposit of money on certain terms contained in a promissory note duly stamped, and the note was afterwards altered by consent so as to become invalid for want of a fresh stamp, it was held to be still admissible evidence of the terms of the deposit; *Sutton v. Towner*, 7 B. & C. 416. On a plea of payment to an action on a bill, where some proof appeared on the plaintiff's evidence that payment was made by another bill, he may put in the bill to show that it was unavailable for want of a stamp; *Smart v. Nokes*, 6 M. & G. 911. •

Several contracts with one stamp.] Where the subject matter of the instrument is joint, though several persons are interested in it, only one stamp is requisite. Thus, an assignment of the prize-money of several seamen on board a privateer, payable out of one fund, requires only one stamp; *Baker v. Jardine*, 13 *East*, 235 (n). So an agreement by several for a subscription to one common fund; *Davis v. Williams*, 13 *East*, 232. So an agreement of reference by all the underwriters on one policy; *Goodson v. Forbes*, 6 *Taunt.* 171. So a bond by several obligors in a penalty conditioned for the performance of certain acts by each and every of them; *Bowen v. Ashley*, 1 *N. R.* 274; 6 *Taunt.* 175; and see *Stead v. Liddard*, 1 *Bing.* 196. So an agreement by three persons, in consideration that A. would pay a certain debt and costs, to indemnify A. to the extent of 50*l.* to be paid separately by each with one fourth of the costs, requires only one stamp; *Ramsbottom v. Davis*, 4 *M. & W.* 584. A release by several commoners of their respective rights to make them competent witnesses requires only one stamp; *Carpenter v. Buller*, 2 *Mood. & Rob.* 298. And a single release of all encroachments by persons who had severally encroached on a common, made to the trustees of the commoners in general, was held to require only one stamp; *Doe v. Tidbury*, 14 *C. B.* 304. See also *Thomas v. Bird*, 9 *M. & W.* 68. So where the members of a mutual insurance club all executed the same power of attorney, severally authorising the persons therein named to sign the club policies for them; *Allen v. Morrison*, 8 *B. & C.* 565. So where several shareholders convey their interests by one deed, only one *ad eundem* stamp for the total amount is necessary; *Wills v. Bridge*, 4 *Ex.* 193.

When an agreement refers to another document, and the two papers form, in fact, but one agreement, it is sufficient if one of them only bears a stamp; *Peate v. Dicken*, 1 *C. M. & R.* 422. But where a paper contains several contracts, and consequently requires several stamps, and only one is impressed upon it, that stamp applies to the contract only on which the stamp is impressed; *Powell v. Edmunds*, 12 *East*, 6. Where a paper contains a number of independent contracts with different tenants, though under the same general terms of holding, and there is but one stamp upon it, it is matter of evidence to which contract the stamp applies, and the juxtaposition of the stamp is to be regarded; *Doe v. Day*, 13 *East*, 241. And if it is uncertain to which the stamp applies, the paper is inadmissible; *Shipton v. Thornton*, 9 *Ad. & E.* 331. The several admissions of five corporators, as freemen, were written on the same paper with only one stamp; such stamp was held to apply to the first admission only, and the others could not be read; *R. v. Reeks*, 2 *Ld. Raym.* 1445; and see *Perry v. Bouchier*, 4 *Camp.* 80; *Waddington v. Francis*, 5 *Esp.* 182. To a stamped agreement to refer a stamp to A. the parties some days afterwards added a memorandum appointing B. instead of A.; held that one stamp was sufficient; *Taylor v. Parry*, 1 *M. & G.* 604. Where the defendant made in his own name a single agreement as to goods of his own and also goods of himself and partners, the whole of the goods forming part of the cargo of one ship, and signed in the name of the firm; held, in an action on it against him alone, that only one stamp was necessary; *Shipton v. Thornton*, 9 *Ad. & E.* 314.

Number of words.] The stamp on an agreement, which incorpo-

rates by reference a clause in a former one, is properly regulated by the quantity of words in the second agreement, *not* including the clause referred to; *Attwood v. Small*, 7 B. & C. 390; for the stamp is regulated by the words in the instrument itself, or in something "indorsed thereon, or annexed thereto;" *Sneezum v. Marshall*, 7 M. & W. 417. Where an agreement and a writing described therein as annexed to it, contained together more than 1080 words, a 35s. stamp was required by 55 Geo. 3, c. 184, although in fact the writing was annexed to the agreement after it was executed; *Veal v. Nicholls*, 1 Mood. & Rob. 248. Where a map was annexed and referred to in the instrument, it was held that all the names on it must be counted; *Wickens v. Evans*, 4 C. & P. 359. But if the deed or instrument annexed, or referred to, or incorporated with the stamped document, be itself liable to duty and be duly stamped, the words contained in it need not be counted; 13 & 14 Vict. c. 97, s. 11; and this clause is *declaratory*: see *Fishmongers' Company v. Dimsdale*, 12 C. B. 557, decided without reference to this statutory provision. Signatures must be counted; and where there is a joint agreement to be responsible rateably according to the sum against each name, all the names and sums must be counted; *Linley v. Clarkson*, 1 C. & M. 437. But the name and description of the instrument, as indorsed on it, are not to be counted; *Winder v. Fearon*, 4 B. & C. 663.

Denoting stamp.] Under the Stamp Acts, 13 & 14 Vict. c. 97, s. 13, and 16 & 17 Vict. c. 9, s. 13, the Commissioners of Inland Revenue may be required, upon payment of a fee of 10s., to assess the proper duty, and affix a stamp denoting that the full amount of duty has been paid, or denoting that it is not liable to any duty. The stamp so affixed is conclusive as to amount and liability, and the instrument cannot be objected to in evidence; *Prudential Assurance &c. Co. v. Curzon*, 8 Exch. 97; *Morgan v. Pike*, 14 C. B. 473.

Proper denomination.] By the statute 43 Geo. 3, c. 127, s. 6, if the stamp is of a proper denomination, it shall not be ineffectual from its being of a greater value than the Stamp Acts require; and by statute 55 Geo. 3, c. 184, s. 10, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination, or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall be deemed valid and effectual in law, except in cases where the stamp or stamps used in such instrument shall have been specifically appropriated to any other instrument by having its name on the face thereof.

Time of stamping.] If an instrument bears a proper stamp when produced at the trial, it is sufficient, though it was not stamped when executed, provided the Commissioners of Stamps are not expressly prohibited from subsequently affixing a stamp; *R. v. Bp. of Chester*, 1 Stra. 624; and see *Rogers v. James*, 7 Taunt. 147. The court will not inquire whether the penalty has been paid, or whether the stamp has been affixed in proper time, but will receive the instrument in evidence, when the stamp is not required by statute to be affixed within a certain time; *R. v. Preston*, 5 B. & Ad. 1028;

Rose v. Tomblinson, 3 Dougl. P. C. 49. And with regard to an instrument to which a stamp cannot by law be subsequently affixed, such as bills, notes, &c., an inquiry as to the time of affixing is admissible; *Green v. Davies*, 4 B. & C. 235; explaining *Wright v. Riley, Peake, Cu.*, 173.

Time and mode of objecting to the stamp.] After proof of the due execution of an instrument, the rule was that it lies on the opponent to point any objection to the stamp, and, where founded on the number of words, to prove the number. If indications of an effaced stamp appear, it is for the judge to decide whether he is satisfied of its admissibility; *Doe v. Coombs*, 3 Q. B. 687; *Wilson v. Smith*, 12 M. & W. 401. And the objection must be made before the paper is read in evidence; *Foss v. Wagner*, 7 A. & E. 116. But where the objection does not appear except on extrinsic evidence, as where a cheque is post-dated, the objection may be made after it has been read; *Field v. Woods*, *Id.* 114. The fact that the defendant was a party to the fraud on the revenue will not estop him from objecting; *Steadman v. Duhamel*, 1 C. B. 888.

It has been hitherto competent for the parties to overlook the want of a stamp or of a proper stamp; but by the C. L. Procedure Act, 1854, it is provided, sect. 28, that upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the Court whose duty it is to read such document, to call the attention of the judge to any omission or insufficiency of the stamp; and the document if unstamped or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid.

By sect. 29, such officer of the Court shall, upon payment to him of the whole, or (as the case may be) of the deficiency, of the stamp duty payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty; and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds. . . . Provided always, that this enactment shall not extend to any document which cannot now be stamped after the execution thereof on payment of the duty and a penalty.

By sect. 31, no new trial shall be granted by reason of the ruling of the judge that the stamp upon any document is sufficient, or that the document does not require a stamp.

Since this act, it has been held, that, if the judge on the trial rules that the document is sufficiently stamped, or requires no stamp, he ought not to reserve the point for the Court above; though it is otherwise if he rejects it for want of a stamp; *Siordet v. Kuczincki*, 17 C. B. 251. That the ruling of a judge against the sufficiency of a stamp is not conclusive, *Sharples v. Rickards*, 2 H. & N. 57; and the Court may be moved, although counsel submitted to a nonsuit in deference to the opinion of the judge, and under an impression that the opinion was right; *S. C.* And in either case, the point may perhaps be reserved by consent of the parties (*Eames v. Smith*, cited in the former case); or at the express desire of the judge; *Heiser v. Grout*, 5 H. & N. 35.

Agreements.

By 55 Geo. 3, c. 184, sched. part 1, an agreement or any minute, or memorandum of an agreement, made in England [or Ireland, 5 & 6 Vict. c. 82] *under hand only*, or made in Scotland, without any clause of registration and not otherwise charged in the schedule to that act, nor expressly exempted from all stamp duty, where the matter thereof shall be of the value of 20*l.* or upwards, *whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument*, together with every schedule, receipt, or other matter *put or indorsed thereon, or annexed thereto*, shall bear a 1*l.* stamp, if not containing more than 1080 words; if more, then a 35*s.* stamp; and for every quantity of 1080 words over and above the first 1080, there shall be a further progressive duty of 25*s.* Provided that where divers letters are offered in evidence to prove an agreement between the writers, it shall be sufficient if any one bear a 35*s.* stamp, although the same shall contain twice 1080 words, and upwards. There are similar provisions in 44 Geo. 3, c. 98, and 48 Geo. 3, c. 149, upon which many of the cases cited below arose. The mode of counting the words is explained, *ante*, pp. 120, 121.

The 7 Vict. c. 21, provides, that for every agreement or minute, or memorandum of agreement, “now (6th June, 1844) chargeable with the duty of 1*l.*,” there shall be paid the stamp duty of 2*s.* 6*d.* By sect. 5 of the act the agreement may be stamped gratis within fourteen days after making:—afterwards, on a penalty of 10*l.* This act applies to an instrument made before the passing of it, but stamped afterwards; *Deakin v. Penniall*, 2 *Erch.* 320.

By 13 & 14 Vict. c. 97, a duty of 2*s.* 6*d.* is chargeable on every agreement, &c., as described in the schedule of 55 Geo. 3, c. 184, not containing 2160 words. Where it contains 2160, or more, then there is a further progressive duty of 2*s.* 6*d.* for every entire quantity of 1080 words over and above the first 1080 words. This applies to agreements signed or bearing date after 10th Oct., 1850.

By 23 Vict. c. 15, any agreement, minute, or memorandum, as above, where the matter thereof shall be of the value of 5*l.* or upwards, together with every schedule, as above, is to bear the stamp duty of sixpence; and if it contains 2160 words or more, there is a progressive duty of sixpence for every entire number of 1080 words over the first 1080, and if the agreement is proved by divers letters, it is enough if any of them be stamped with a duty of one shilling; though the words may exceed 2160. If the unstamped agreement shows that the matter is under the value of 20*l.*, the penalty for stamping shall be 20*s.* over and above the duty. This act came in force on 3rd April, 1860.

By the same act an agreement for a lease of hereditaments for a term not exceeding seven years, and an agreement, minute, or memorandum containing the terms on which lands, &c., are let or held for such term, is to pay the same duty as a lease on the like terms.

The following are the exemptions in the schedule of 55 Geo. 3, c. 184, besides the general exemptions specified at the end of sched. part 1; and these exemptions are continued in the later acts, so far as they are consistent therewith.

Agreements—first exemption.] Label, slip, or memorandum containing the heads of insurances to be made by the corporations of

the Royal Exchange Assurance, or London Assurance, or by the corporations of the Royal Exchange Assurance, of houses and goods from fire, and London Assurance of houses and goods from fire. .

Agreements—second exemption.] Memorandum or agreement for granting a lease or tack, at rack rent, of any messuage, land, or tenement, under the yearly rent of 5*l*. This is now qualified by the act 23 Vict. c. 15, cited above.

Under the earlier act, 55 Geo. 3, c. 184, an agreement for a building lease, though under 5*l*. per annum, was held not within this exemption, the interest being a beneficial one; *Doe v. Boulcot*, 2 Esp. 595. It is not to be inferred from this that agreements for leases at a higher rent than 5*l*. are to be charged with duty. If the rent be higher, the agreement will be charged, or not, according as the "matter" of agreement (of which the rent, and not the land, is the usual test) exceeds 20*l*. or not; *Doe v. Wiggins*, 4 Q. B. 367; *Mayfield v. Robinson*, 7 Q. B. 486.

Agreements—third exemption.] Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant.

An assignment of an apprentice is not within this exemption; *R. v. St. Paul's, Bedford*, 6 T. R. 452. Firemen and stokers on board foreign steamers are within it; *Wilson v. Zulueta*, 14 Q. B. 405; *Cornforth v. The Danube and Black Sea Railway Company*, 2 F. & F. 197. So a person hired to take charge of glebe, dairy, &c., at a salary and a share of clear profit; *R. v. Wortley*, 2 Den. C. C. 333. Contracts to serve as artificers, clerks, servants, either domestic or in husbandry, handicraftsmen, mechanics, gardeners, or labourers, are exempted by sect. 21 of 17 & 18 Vict. c. 83.

Agreements—fourth exemption.] Memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandises.

An undertaking to guarantee the payment of goods to be furnished to third persons; *Warrington v. Furber*, 8 East, 242; accord. *Sadler v. Johnson*, 16 M. & W. 775; *Chatfield v. Cox*, 18 Q. B. 321. An agreement by A. to take half of certain goods bought by B. on their joint account, and to furnish B. with half the price in time for payment; *Venning v. Leckie*, 13 East, 7. An agreement to cancel a former agreement relative to the sale of goods, and for the future sale of goods upon different terms; *Whitworth v. Crockett*, 2 Stark. 431. An agreement for the sale of rape oil, not yet expressed from the seed; *Wilks v. Atkinson*, 6 Taunt. 11. An agreement to make a chattel and deliver it within a certain time; *Pinner v. Arnold*, 2 C., M. & R. 613; though it was formerly held that a contract to make goods for sale was not within the exemption; *Buxton v. Bedall*, 3 East, 303. An agreement for the sale of chimney-pieces, the vendor "to finish them in a tradesman-like manner;" *Hughes v. Breeds*, 2 C. & P. 159. A receipt for the price of a horse containing a warranty of soundness; *Skrine v. Elmore*, 2 Camp. 407. An agreement for a crop growing in a close, and conferring no interest in the land; *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 M. & S. 205; *Evans v. Roberts*, 5 B. & C. 829; *Watts v. Friend*, 10 B. & C. 446; *Jones v. Flint*, 10 A. & E. 753. An agreement for the purchase of timber, though the trees are growing; *Smith v. Surman*, 9 B. & C. 561. An agreement to

supply a house with water; *West Middlesex Water Works v. Sucker-roppe*, *Mood. & M.* 408. Some of the above cases were decided on the fourth section of the Statute of Frauds; but they are authorities on the Stamp Act also. A memorandum by the defendant of an advance made to him by the plaintiff, an auctioneer, on receipt of books for sale by the plaintiff by auction, requires no stamp; *Southgate v. Bohn*, 16 *M. & W.* 34.

An agreement for the sale of goods and goodwill; *South v. Finch*, 3 *New Ca.* 506. A contract for the erection of fixtures, *semb. per Parke, B., Pinner v. Arnold*, 2 *C., M. & R.* 613; or for sale of railway shares, *Knight v. Barber*, 16 *M. & W.* 66. An agreement by a principal to provide for certain bills drawn upon his factor, if certain goods, then either in the factor's possession or about to be placed there, should remain unsold at the time of the bills falling due; for the exemption is confined to instruments whereof the sale of goods is the primary object; *Smith v. Cutor*, 2 *B. & Ald.* 778. So an agreement for the sale of growing crops, conferring an interest in the land; *Crosby v. Wadsworth*, 6 *East*, 602; *Waddington v. Bristow*, 2 *B. & P.* 453; *Emerson v. Heelis*, 2 *Tunt.* 38; or a sale of growing underwood, to be cut by the purchaser; *Scorell v. Borall*, 1 *L. & J.* 396 (decided on the fourth section of the Statute of Frauds). So a contract under seal for the sale of goods; *per Bayley, J., Clayton v. Burtenshaw*, 5 *B. & C.* 45.

Agreements—fifth exemption.] Memorandum or agreement made between the master and mariners of any ship or vessel, for wages, on any voyage coastwise from port to port in Great Britain. This exemption is greatly extended by the Merchant Shipping Act, 17 & 18 *Vict. c.* 104, s. 9.

Agreements—sixth exemption.] Letters containing any agreement (not before exempted) in respect of any merchandise, or evidence of such an agreement, which shall pass by the post between merchants and other persons carrying on trade or commerce in Great Britain [or Ireland] and residing, or actually being, at the time of sending such letters, at the distance of fifty miles from each other.

A letter by a son, who managed his mother's business, to a creditor of his mother residing above fifty miles from him, containing a promise to pay the debt of the mother, is within this exemption; *Mackenzie v. Banks*, 5 *T. R.* 176.

The 9 *Geo. 4, c.* 14, s. 8, exempts from stamp duty any agreement made necessary by that act to avoid the Statute of Limitations; thus a qualified promise to pay, put in evidence not to prove the debt but to rebut the statute, is exempt; *Morris v. Dixon*, 4 *A. & E.* 845.

Instruments within the limitations of the Stamp Acts as to value.] The statute only requires an agreement to be stamped when the matter thereof shall be of the value of 20*l.* or upwards, or (since 23 *Vict. c.* 15) of the value of 5*l.* It therefore only applies when the value of the contract is measurable. Thus a contract of marriage may be proved by unstamped letters; *Orford v. Cole*, 2 *Stark.* 351. The value must appear on the instrument, or be capable of being ascertained at the time of making; *per Parke, B., Taylor v. Steel*, 16

M. & W. 685; *Lloyd v. Mansel*, 19 *L. J. (Q. B.)* 192. Where the agreement relates to granting a lease, the rent is the matter on which the value is to be calculated; *Mayfield v. Robinson*, 7 *Q. B.* 486; *Burton v. Reeve*, 16 *M. & W.* 367. But if the period of tenancy be fixed, the rent multiplied by the time (except in case of rent under 5*l.*) is the test of value; *Doe v. Wiggins*, 4 *Q. B.* 366, 372, 377. Where the agreement was to give up a shop and goodwill for 7*l.*, and not to open a shop of the same description under a forfeiture of 20*l.*, it was held not to require a stamp, for the forfeiture is not the value of the matter; *Pemberton v. Vaughan*, 10 *Q. B.* 87. So an agreement to discount a bill for 100*l.*, to pay interest at 1*s.* per month, if not paid at maturity; *Semple v. Steinau*, 8 *Ex.* 622. The general regulations of a free-school under which the master is appointed, signed by him and the trustees, may be proved against him, though unstamped; *Browne v. Dawson*, 12 *A. & E.* 624. A memorandum by a wharfinger of the receipt of goods, worth 20*l.*, may be given in evidence to show the terms upon which they were received, without a stamp, the wharfage being of less amount; *Chadwick v. Sills, Ry. & Mood.* 15. So a memorandum relating to the warehousing of goods worth more than 20*l.*, if the warehouse rent be less; *Baldwin v. Alsager*, 13 *M. & W.* 365. An agreement to indemnify a bailiff who distrained for 1*l.* 4*s.* rent, was held to require no stamp, for the value is uncertain; *Cox v. Bailey*, 6 *M. & G.* 193. So an agreement to do work of uncertain quantity, at 1*l.* 14*s.* per rod; *Liddiard v. Gale*, 4 *Ex.* 816. But an agreement to indemnify A. from all costs, charges, damages, or other expenses which he may incur as bail for B., requires an agreement stamp, the arrest of B. being for more than 20*l.*, though the costs, &c., incurred do not amount to that sum; *Williams v. Jarrett*, 5 *B. & Ad.* 32. A lease void under 8 & 9 Vict. c. 106, s. 3, for want of execution as a deed, may nevertheless operate as an agreement; *Tidy v. Mollett*, 33 *L. J. (C. P.)* 235; and may therefore require an agreement stamp..

What are agreements within the meaning of the Stamp Acts.] Many documents, although they may be of assistance in the proof of an original or substituted contract, do not require to be stamped as agreements. Of this kind are directions and licences, which excuse what would otherwise be a trespass or a breach of contract. So also memoranda of agreements, the terms of which do not appear to have been mutually and finally approved of by the contracting parties, before or at the time when these memoranda were committed to writing, are regarded as mere proposals, and may be admitted in evidence without a stamp. In *Ingram v. Lea*, 2 *Camp.* 521, where a customer wrote down upon a slip of paper a description of the goods which he had ordered, which paper he signed and delivered to the shopkeeper, it was admitted in evidence without a stamp. In *Parker v. Dubois*, 1 *M. & W.* 31, where the defendant in answer to an application to that effect, wrote back authorising the plaintiff to pay a call upon shares which the defendant had agreed to purchase from him, it was held that the letter required no stamp. In *Bethell v. Blencowe*, 3 *M. & G.* 119, a memorandum allowing the defendant, a projected lodger, to leave lodgings without any notice if he saw reason to suspect embarrassment in the landlord, and signed by the landlord, was, though unstamped, admitted. In *Walker v. Roston*, 9 *M. & W.* 411, a letter written by the buyer of goods to his factors, authorising

them to appropriate the proceeds of the sale of the goods to the payment of bills accepted by the buyer, if these bills had not previously been honoured, was also, though unstamped, received. In *Hill v. Ramon*, 5 M. & G. 789, a memorandum signed by a tenant authorising his landlord, upon condition of withdrawing a distress, to re-enter and distrain in case of default in payment of the rent by a certain day, was held not to be an agreement requiring a stamp. In *Fishwick v. Milner*, 4 Ex. 825, a document signed by a tenant by which he requested a bailiff to forbear selling his goods, and consented that they should remain on the premises in his possession for a period of three months, when he, the tenant, would give them up, and pay all costs and charges attending the distress, was admitted without a stamp. In *Edgar v. Black*, 1 Stark. 464, a prospectus containing the terms upon which the plaintiff undertook to introduce applicants to partnerships or situations, was admitted unstamped, though these terms were adopted in the agreement upon which the action was brought. In *Clay v. Crofts*, 20 L. J. (Ex.) 361, a prospectus of the terms of a school had been shown to the father of two boys, upon which he agreed to place them in the school subject to a slight reduction in the terms of payment. It was held, that the prospectus might be put in evidence without a stamp. In *Ramsbottom v. Tunbridge*, 2 M. & S. 434, a lease of premises was sold by auction, and the auctioneer handed to the buyer a written paper specifying the term, the rent, and the extent of the premises. This paper not having been signed, the Court allowed it to be received in evidence unstamped. But in *Ramsbottom v. Mortley*, *Ib.* 445, where a similar paper was signed by the auctioneer, the Court thought that it must be stamped. In *Vollans v. Fletcher*, 1 Ex. 21, where a shareholder proved his title to shares by his letter of application and the letter of allotment in reply, in which was contained a power for the company, in default of payment of the deposit, to cancel the allotment, a term not alluded to in the first letter, an objection that the letters required a stamp, was overruled. See *Duke v. Andrews*, 2 Ex. 290; *Willey v. Parratt*, 3 Ex. 211. In *Chaplin v. Clarke*, 4 Ex. 403, a letter of allotment of shares, the letter of application having been lost, was admitted without a stamp. See also *Moore v. Garwood*, *Ib.* 681. Where the plaintiff made a memorandum in writing of an offer on his part to let to the defendant a piece of land upon the same conditions as those which had been agreed to by the defendant and a third person, to which offer the defendant afterwards verbally assented, the memorandum was admitted without a stamp; *Drant v. Brown*, 3 B. & C. 665; *Hawkins v. Warre*, *Id.* 690; *Hudspeth v. Yarnold*, 9 C. B. 635. In *Vaughton v. Brine*, 1 M. & G. 359, a resolution signed by the provisional committee of a company to employ the plaintiff as secretary, was received in evidence unstamped, as not amounting to an agreement. Where a minute was made at a meeting of a resolution, by the defendants and others, to make an alteration in the terms of a previous contract between them and the plaintiff, and to allow him an additional sum for extra trouble, and this minute was read over to the plaintiff, and assented to by him, Rolfe, B., held at Nisi Prius that the resolution could not be admitted without a stamp; *Lucas v. Beach*, *Id.* 417. And in *Knight v. Barber*, 16 M. & W. 67, the defendant, after having given the plaintiff a verbal order for fifty shares in a railway company, signed a memorandum that he had bought of the plaintiff fifty shares in the company at 10*l.* a share, which memorandum was handed to the plaintiff. It was

held that this memorandum required an agreement stamp. And *per Parke, B.*, a written instrument to come within the terms of this clause of the Stamp Act, must have been made with the intention of containing within itself the terms of an agreement between the parties. In *Chadwick v. Clarke*, 1 C. B. 700, a draft-agreement forwarded by the plaintiff to the defendant's solicitor, and sent back by him on the same day with certain alterations, to which the plaintiff did not object, was held inadmissible (although it had no signature) for want of an agreement stamp. And *per Curiam*, the words "under hand only" in this part of the Stamp Act, merely refer to instruments not under seal. But see 6 C. B. 700, n. An agreement to enlarge the time for performing another agreement requires a new stamp, where the former one required to be stamped; *Bacon v. Simpson*, 3 M. & W. 78.

An instrument, operating as an *attornment* only, requires no stamp; *Doe v. Edward*, 5 Ad. & E. 95; *Doe v. Smith*, 8 Ad. & E. 255. So a mere acknowledgment. Thus in an action against an attorney, the plaintiff gave in evidence the following unstamped letter:—"I have this day received a bill of exchange for 50*l.*, which I hold as your attorney, to recover the value on from the respective parties, or to make such other arrangement for your benefit as may appear to me in my professional capacity reasonable and proper;" held, that this letter was a mere acknowledgment of the duty which the party took upon himself to perform, and that it therefore required no stamp; *Langdon v. Wilson*, 7 B. & C. 640 (n); *Mullett v. Hutchinson*, 7 B. & C. 639; *De Porquet v. Page*, 15 Q. B. 1073. So a memorandum, "I acknowledge that you have for my accommodation, accepted a bill for, &c., and I will provide for the same when due;" *Notley v. Webb*, 5 C. B. 834. So an unstamped memorandum was allowed to be put in to show the assent of one of the parties to a departure from the terms of a previous agreement, which was itself duly stamped; *Marshall v. Powell*, 9 Q. B. 779. So an acknowledgment by the defendant of the deposit of goods with him requires no stamp, though given in evidence in an action against him for not redelivering them; *Blackwall v. McNaughtan*, 1 Q. B. 127. "Borrowed of A., 100*l.* for one or two months. Cheque for 100*l.* on — bank;" held an acknowledgment only, and not an agreement or promissory note; *Hyne v. Dowdney*, 21 L. J. (Q. B.) 278. But an acknowledgment signed by the defendant, that he holds the land as tenant to the plaintiff on certain terms, cannot be put in evidence by the defendant to show that a notice to quit was irregular, unless it be stamped as an agreement, or as evidence of one; *Doe v. Frankis*, 11 Ad. & E. 792. A broker's note of a purchase of shares, sent to his principal, requires no stamp; *Tomkins v. Savory*, 9 B. & C. 704.

Appraisement.

By 55 Geo. 3, c. 184, schedule, part 1, an appraisement or valuation of any estate or effects, real or personal, heritable or movable or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials or labour used, or to be used, in any buildings, or of any artificer's work whatsoever, must be stamped, where the amount of appraisement does not exceed 50*l.*,—2*s.* 6*d.*; where it exceeds 50*l.* and does not exceed 100*l.*,—5*s.*; 100*l.* and not 200*l.*,—10*s.*; 200*l.* and not 500*l.*,—15*s.*; above 500*l.*,—1*l.*

Where nothing is referred but the mere value of goods and the repairs of a farm, and the valuation is committed to writing, an appraisement stamp is required, and not an award stamp; *Leeds v. Burrows*, 12 *East*, 1. It seems that the words "appraisement or valuation" do not extend to such as are made merely for the private information of parties, but to such only as are intended to be binding between them; *Atkinson v. Fell*, 5 *M. & S.* 243; *Jackson v. Stopherd*, 2 *C. & M.* 361; *Collins v. Collins*, 26 *Beav.* 306.

Awards.

By 55 Geo. 3, c. 184, schedule, part 1, an award must be stamped with a 1*l.* 1*s.* stamp, and there is a further duty if it contains 2160 words.

The appointment of an umpire, made in writing by two arbitrators, requires no stamp; *Routledge v. Thornton*, 4 *Taunt.* 704. An agreement stamp is not necessary to an arbitration bond which, besides the usual covenants, contains an agreement as to the payment of costs; *Re Wansborough*, 2 *Chitty's Rep.* 40. A paper drawn up by a person appointed by two parties to ascertain the amount of an account requires an award stamp; *Jebb v. McKeirnan*, *Mood. & M.* 340. But not if the account is not intended to bind them; *Goodyear v. Simpson*, 15 *M. & W.* 16. Nor does a certificate by a referee, agreed on at the trial, as to the amount at which a verdict, taken at the trial, is to stand; *Salter v. Yeates*, 5 *Dowl.* 291; and see *Tomes v. Hawkes*, 10 *A. & E.* 32. An award of land by commissioners of inclosure only requires an award stamp and not an *ad valorem* stamp, as on a sale; *Doc v. Preston*, 7 *B. & C.* 392.

Bankers,—drafts or orders on.

By 55 Geo. 3, c. 184, schedule, part 1, amended by 9 Geo. 4, c. 49, s. 15, all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or person acting as a banker, who resided or transacted the business of a banker within fifteen miles of the place where such drafts or orders were issued (provided such place be specified in such drafts or orders, and provided the same bears date on or before the day on which the same is issued, and provided the same does not direct the payment to be made by bills or promissory notes), were exempted from stamp duty. But this exemption is now repealed (since 24th May, 1858) by the act 21 & 22 Vict. c. 20.

By 16 & 17 Vict. c. 59, schedule, the duty on a draft or order for payment of any sum of money to the bearer or to order on demand, is one penny. The stamp, denoting the duty, may be impressed on the paper or attached by an adhesive stamp; *sect.* 3.

By 17 & 18 Vict. c. 83, *sect.* 9, drafts on bankers may be drawn without any restraint as to amount.

By *sect.* 10, adhesive receipt stamps may be used for drafts payable to bearer or order, and *é converso*. Since the exemption of bankers' cheques or drafts has been repealed, the provisions against circulating them beyond fifteen miles, &c., contained in 17 & 18 Vict. c. 83, have become nugatory. The statute 21 & 22 Vict. c. 20, imposing a stamp of one penny upon a certain class of drafts that had been excepted out of the 16 & 17 Vict. c. 59, does not comprise all the instruments which were within the 16 & 17 Vict. c. 59, but only drafts or orders payable to bearer on demand, and it is with reference to these only

that the provisions and penalties contained in or imposed by the 55 Geo. 3, c. 184, apply. Therefore a draft payable to order given on the 3rd of October, but dated the 4th of October, is not rendered void by being thus post-dated; *Whistler v. Forster*, 14 C. B. N. S. 248; 32 L. J. (C. P.) 161.

By 23 Vict. c. 15 (passed 3rd April, 1860), all bills, receipts, or orders for payment by a banker, or person acting as such, of any money, though not made payable to bearer or order and whether delivered to payee or not, and all writings entitling a person to payment by a banker of any money, whether the person be named therein or not, or whether delivered to him or not, shall be deemed to be bills, drafts, or orders for payment chargeable with stamp duty as if made payable to bearer or order. Proviso, that any one writing directing payment of sums to different persons shall be charged as one order only. Drafts between bankers for clearance only and for some other purposes specified in the act, are exempt from it.

A draft payable generally is payable on demand; *Whitelock v. Underwood*, 2 B. & C. 157.

Bills of Exchange.

By 17 & 18 Vict. c. 83 (amended by 23 Vict. c. 15), the following stamps are imposed on bills of exchange throughout the United Kingdom:—

Inland bills.] Inland Bill of Exchange, Draft, or Order for payment to the bearer, or to order, at any time otherwise than on demand, of any sum of money.

		Duty.		
		£	s.	d.
Not exceeding	5 <i>l.</i>	. . .	0	0
Exceeding	5 <i>l.</i> and not exceeding 10 <i>l.</i>	. . .	0	2
„	10 <i>l.</i> „ „ 25 <i>l.</i>	. . .	0	3
„	25 <i>l.</i> „ „ 50 <i>l.</i>	. . .	0	6
„	50 <i>l.</i> „ „ 75 <i>l.</i>	. . .	0	9
„	75 <i>l.</i> „ „ 100 <i>l.</i>	. . .	1	0
„	100 <i>l.</i> „ „ 200 <i>l.</i>	. . .	2	0
„	200 <i>l.</i> „ „ 300 <i>l.</i>	. . .	3	0
„	300 <i>l.</i> „ „ 400 <i>l.</i>	. . .	4	0
„	400 <i>l.</i> „ „ 500 <i>l.</i>	. . .	5	0
„	500 <i>l.</i> „ „ 750 <i>l.</i>	. . .	7	6
„	750 <i>l.</i> „ „ 1000 <i>l.</i>	. . .	10	0
„	1000 <i>l.</i> „ „ 1500 <i>l.</i>	. . .	15	0
„	1500 <i>l.</i> „ „ 2000 <i>l.</i>	. . .	1	0
„	2000 <i>l.</i> „ „ 3000 <i>l.</i>	. . .	1	10
„	3000 <i>l.</i> „ „ 4000 <i>l.</i>	. . .	2	0
„	4000 <i>l.</i> and upwards—for every 1000 <i>l.</i> or part of 1000 <i>l.</i>	. . .	0	10

The above act came into force on 10th October, 1854; it professes to repeal the old duties, but leaves unrepealed the general provisions and directions of previous acts not inconsistent with the new act. The following directions are contained in the old act, 55 Geo. 3, c. 184:—

Inland bills, drafts, or orders for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall

be delivered to the payee or some person on his behalf, have the same duty as on a bill of exchange for the like sum payable to bearer or order.

Inland bills, drafts, or orders for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee or some person on his behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, bear the same duty as on a bill payable to bearer or order on demand, for a sum equal to such total amount. And where the total amount of the money thereby made payable shall be indefinite, the same duty as on a bill, on demand, for the sum therein expressed only.

And the following instrument shall be deemed and taken to be inland bills, drafts, or orders for the payment of money within the intent and meaning of this schedule; viz.—

All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require a payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his behalf.

All receipts given by any banker or other person for money received, which shall entitle the person paying the money, or the bearer of such receipts, to receive the like sum from any third person.

And all bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his behalf.

By 16 & 17 Vict. c. 59, schedule, the following instruments are to be deemed and taken to be drafts or orders within the intent and meaning of this act, and of any act or acts relating to the stamp duties on bills of exchange, drafts, or orders, and are to be chargeable with the stamp duties imposed by that act, or any such act or acts,—all documents or writings usually termed letters of credit, or whereby any person to whom any such document or writing is or is intended to be delivered or sent shall be entitled, or be intended to be entitled to have credit with, or to draw upon any other person for, or to receive from such other person any sum of money therein mentioned.

*What are bills, &c., within the schedule of 55 Geo. 3, c. 184.] It was the object in framing the above provision to treat as promissory notes and bills of exchange, and to subject to stamp duty, such instruments as being payable on a contingency or out of a particular fund could not in strictness fall under that denomination; per Lord Ellenborough, C. J.; *Firbank v. Bell*, 1 B. & A. 36. In that case a letter in these terms: "Messrs. B. and H.,—When the mahogany, per Regent, is sold, you will please pay over to Messrs. P. H. and W. fifteen hundred pounds, in such bills as you receive from the said sale. (Signed) S. M." which was stamped with an agreement stamp, and upon receipt of which Messrs. B. and H. wrote, promising to obey the directions in it, was rejected as evidence of a payment by the orders of S. M. In *Jones v. Simpson*, 2 B. & C. 318, an order to sell certain goods, which were stated to be of *about* the value of*

2000*l.*, and to pay the proceeds, was held not to be liable to a bill stamp, because there was no sum mentioned on which the duty could attach. In *Hutchinson v. Heyworth*, 9 *Ad. & E.* 375, a letter directing certain persons to pay one half of the remainder of the proceeds of certain shipments, provided the same should not exceed the sum of 5000*l.*, the court expressed an opinion that a stamp was required, as far as the amount was concerned, but as the document was not intended to be delivered to the payee, but to be retained by the party paying the money, it was held that it could be put in evidence unstamped. Where there was an authority by W. to S. to pay to the order of W. G. 6000*l.*, deducting the amount from the quarterly accounts, for goods supplied by W. to S., upon receipt of which S. wrote to the payee undertaking to make the payment, it was held that these documents amounted to an agreement, and might be given in evidence without a bill stamp; *Hamilton v. Spottiswoode*, 4 *Ex.* 200. Where the managing director of an assurance company wrote and signed this letter directed to the cashier: "Fifty-three days after date credit Messrs. P. and Co. or order with the sum of 500*l.*, claimed per Cleopatra, in cash on account of the corporation," it was held that this was a bill of exchange; *Eddison v. Collingridge*, 9 *C. B.* 570. In *Diplock v. Hammond*, 2 *Sm. & Giff.* 141, the following note, addressed by A. to B.: "I hereby authorise you to pay to C. the sum of 365*l.*, being the amount of my contract," was held to amount to an assignment of a debt, and not to require a stamp as an order for the payment of money.

Foreign bills.] By 17 & 18 Vict. c. 83, amended by 23 Vict. c. 15, a foreign bill or bill of exchange drawn in, but payable out of, the United Kingdom, if drawn singly or otherwise than in a set of three or more, bears the same duty as an inland bill of the same amount and tenour.

If drawn in sets of three or more, then for every bill of each set:—

Where the sum thereby payable shall		£	s.	d.
not exceed	25 <i>l.</i>	0	0	1
Exceeding 25 <i>l.</i> , but not exceeding	50 <i>l.</i>	0	0	2
„ 50 <i>l.</i> „ „	75 <i>l.</i>	0	0	3
„ 70 <i>l.</i> „ „	100 <i>l.</i>	0	0	4

The rest of the table of duties may be deduced from that on inland bills, the duty being in each case exactly one-third of the duty on inland bills. A foreign bill drawn out of the United Kingdom, and payable within it, is to pay the same duty as an inland bill. A foreign bill drawn out and payable out of the United Kingdom, but indorsed or negotiated within it, bears the same duty as a foreign bill drawn within the United Kingdom and payable out of the United Kingdom.

By sections 3 and 4 of the act, the duties made payable in respect of bills of exchange drawn out of the United Kingdom, shall attach and be payable upon all such bills as shall be paid, indorsed, transferred, or otherwise negotiated within the United Kingdom, where-soever the same may be payable, and these duties are to be denoted by adhesive stamps (23 Vict. c. 15, s. 13), to be provided by the Commissioners of Inland Revenue for that purpose, and every bill which shall purport to be drawn at any place out of the United Kingdom shall, for the purposes of the act, be deemed to be a foreign bill, though in fact drawn within the United Kingdom.

By section 5 the holder of a bill drawn out of the United Kingdom is directed before negotiating it to affix an adhesive stamp thereon denoting the proper duty, and it is enacted that the person who shall indorse, transfer, or negotiate such bill shall, before he parts with it, cancel the stamp so affixed by writing thereon his name or that of his firm, and the day and year of doing so. In default of this being done, the bill is not to be available in the hands of any person who shall afterwards receive it. In *Pooley v. Brown*, 31 *L. J. (C. P.)* 134, it was held that the duty of cancelling the stamp affixed to a foreign bill is equally imposed both on the transferor and the transferee. By the previous act, 16 & 17 Vict. c. 59, letters of credit, whether in sets or not, sent by persons in the United Kingdom to persons abroad authorising drafts on the United Kingdom, are exempted from the duties on drafts or orders.

Before the last Stamp Acts it was held that a bill sketched out and accepted here, and transmitted to a person abroad for his signature as drawer, is a foreign bill, and does not require an English stamp; *Boehm v. Campbell*, *Gow*. 56. So a bill drawn in England on a person abroad, and accepted by him payable in England, was held to be an inland bill, and must be stamped as such; *Amner v. Clark*, 2 *C. M. & R.* 468.

By stat. 19 & 20 Vict. c. 97, s. 7, every bill or note drawn in the United Kingdom or the adjoining islands (Man, Guernsey, &c.), and made payable in or drawn on a person resident in the said United Kingdom or islands, is to be deemed an inland bill; but this is not to affect the former stamp duty thereon.

By 27 & 28 Vict. c. 56 (passed the 25th of July, 1864), s. 2, any bill of exchange payable on demand, which shall be indorsed out of the United Kingdom, or purport to be so indorsed, wheresoever the same may have been drawn, shall, for the purpose of charging the stamp duty thereon, be deemed to be a foreign bill of exchange, but shall be chargeable with the same amount of stamp duty as an inland bill of exchange for the payment of money otherwise than on demand, according to the amount thereby made payable, and the provisions, regulations, and penalties contained in 17 & 18 Vict. c. 83, s. 5, are to be deemed to apply to any such bill so indorsed, or purporting to be indorsed as aforesaid, as if the same were a bill drawn out of the United Kingdom.

Stamp on re-issued bill.] A bill payable to the drawer's order, and taken up by him, may be re-issued without a fresh stamp, unless this would have the effect of rendering any of the indorsers liable to an action; *Cullow v. Lawrence*, 3 *M. & S.* 97; *Hubbard v. Jackson*, 4 *Bing.* 390. Where the bill is an accommodation bill, it would seem that it can only be re-issued with the consent of the acceptor, and therefore would require a fresh stamp; *Knell v. Parr*, 13 *C. B.* 909, 22 *L. J. (C. P.)* 253. But a bill payable to the order of a third person, indorsed by him and taken up by the drawer, cannot be re-issued by him, for it would wrongfully charge the payee; *Beck v. Robley*, 1 *H. Bl.* 89 (n).

What alteration of a bill requires a new stamp.] If a bill or note is altered in a material part by the consent of all parties, after it has been once issued, it requires a new stamp; *Bayl. on Bills*, 89, 4th ed.; see *Downes v. Richardson*, 5 *B. & A.* 680.

An alteration in the date of a bill payable after date (*Wilson v.*

Justice, Peake, Add. Ca. 96 ; *Outhwaite v. Luntley*, 4 *Camp.* 179), or by inserting words rendering a bill or note negotiable, which was not so originally (*Kershaw v. Cox*, 3 *Esp.* 246), or in the consideration (*Knill v. Williams*, 10 *East*, 437)—are material alterations, and require re-stamping. So, where the drawer without the consent of the acceptor added the words “payable at Mr. B.’s, C. Street,” to the acceptance, this alteration was held to be material ; *Cowie v. Halsall*, 4 *B. & A.* 197. And a similar alteration has been held to be material since the statute 1 & 2 *Geo.* 4, c. 78 ; for the right of an indorsee to sue his indorser would, according to the altered bill, be complete upon default made at the banker’s and notice thereof ; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment ; *Macintosh v. Haydon*, *Ry. & Mood.* 362 ; see *Marson v. Petit*, 1 *Camp.* 82 (n).

If the alteration be merely the correction of a mistake in furtherance of the original intent of the parties, as inserting the words “or order” in a bill intended to be negotiable, it will not require a new stamp ; *Byrom v. Thompson*, 11 *Ad. & E.* 31. So a mistake in the date may be corrected ; *Brutt v. Picard*, *Ry. & Mood.* 37 ; see *Hutchins v. Scott*, 2 *M. & W.* 809.

The subject of altering bills and notes will be further treated of under the head of *Actions on Bills*, to which it more properly belongs ; for, as above stated, the alteration of such an instrument, without consent, affects its validity without reference to the Stamp Acts. If made after issue or negotiation, even with consent, the bill is vitiated for want of a new stamp, for it is, in effect, substituting a new bill, and using a stamp already used for the old one. See 1 *Anne*, st. 2, c. 22, ss. 2, 3.

[What is such an issuing as to render an alteration fatal.] A bill is *prima facie* considered as issued as soon as it is passed away by the drawer or accepted by the drawee, and not before ; *Bayley on Bills*, 93, 4th ed. An exchange of acceptances is an issuing ; *Curdwell v. Martin*, 9 *East*, 190 ; but a bill is not issued so as to make an alteration fatal, until it is in the hands of a person entitled to make a claim thereon ; *Downes v. Richardson*, 5 *B. & A.* 674 ; *Tarleton v. Shingler*, 7 *C. B.* 812.

The onus of proving that the alteration was made *before* negotiation lies upon the party suing on it ; *Johnson v. Duke of Marlborough*, 2 *Stark.* 314 ; *Hennan v. Dickinson*, 5 *Bing.* 183. And where the alteration is visible, it cannot be left to the jury to say, on the mere inspection without further evidence, whether it was made at or after the original making of the bill ; *Knight v. Clements*, 8 *Ad. & E.* 215 ; and *Bishop v. Chambre*, *Mood. & M.* 116, there explained ; *Clifford v. Parker*, 2 *M. & G.* 909. Where there was an alteration by consent in a bill drawn abroad to which no stamp was necessary it was held to lie on the party who objected to the want of a stamp to show that it was altered in England ; *Hamelin v. Bruck*, 9 *Q. B.* 306.

Bills of Lading.

Bills of lading for goods, merchandise, or effects to be exported or carried coastwise, require a 6*d.* stamp in Great Britain and Ireland, by Act 5 & 6 *Vict.* cc. 79, 82.

Bonds.

The *ad valorem* scale of duties under 55 Geo. 3, c. 184, is altered by 13 & 14 Vict. c. 97. In the common money bonds the duty is *one-eighth per cent.*, and the scale rises by 50*l.* at a time, till it reaches 300*l.*, after which it rises by 100*l.* at each step; see *Chitty, Stamp Laws*, 122 (ed. 1850). The above applies only to bonds for payment of a "definite and certain sum of money."

Where the bond is for payment of future advances, or a sum to become due on an account current with or without past advances, then if the ultimate amount secured is limited, the duty is as on a bond for the maximum amount. Where there is no such limit, the duty is to be of the amount of the penalty, if there be one; or if no penalty, then the bond is to be available only for the amount covered by the stamp used.

Although many of the provisions and directions of the former acts of parliament remain in force, yet the alterations contained in the schedule of the last act are so numerous, that it has not been thought worth while to retain the decisions on the old acts, which can no longer be relied upon as safe guides to the exposition of the present law.

An *assignment* of such a bond as above, where the principal does not exceed 1400*l.*, bears the same duty as the bond itself. Where it exceeds that sum, the duty is 1*l.* 15*s.*, together with progressive duty.

The transfers of the bonds of public companies, given as securities for money borrowed under acts of parliament, are exempted from duty, if quadruple duty was paid on the issuing of them. 16 & 17 Vict. c. 59, s. 14.

Cognovit.

A cognovit requires no stamp, for it is a mere acknowledgment of an account, unless matter of agreement be contained in it; as if it contains an agreement to take the debt by instalments; *Ames v. Hill*, 2 B. & P. 150; *Reardon v. Swaby*, 4 East, 188. An agreement to grant time, entered into at the same time on a separate paper, does not render an agreement stamp on the cognovit necessary; *Morley v. Hall*, 2 Dowl. P. C. 494.

Conveyance.

By 55 Geo. 3, c. 184, as amended by 13 & 14 Vict. c. 97, *ad valorem* duties are imposed on every grant, disposition, lease, assignment, transfer, release, renunciation, or other conveyance on the sale of lands, tenements, annuities, or other property real or personal, or of any right, title, interest, or claim in, to, or upon any such property; that is, on the principal or only deed, instrument, or writing whereby the lands or things sold are conveyed or vested in the purchaser, an *ad valorem* duty after the rate of half-a-crown if the purchase-money does not exceed 25*l.*; 5*s.* if not exceeding 50*l.*; 7*s.* 6*d.* if not exceeding 75*l.*; 10*s.* if not exceeding 100*l.*: and so on at the rate of 10*s.* for every 100*l.*, ascending by half-crowns till the purchase-money amounts to 600*l.*, and then by 10*s.* at each step. See *Chitty, Stamp Laws*, p. 35, ed. 1850.

In order to be liable to this duty there must be a *conveyance*, on a *sale*, of *real or personal property*, and the true consideration must be set forth at length in the conveyance. The directions and exemptions from these duties are enumerated in the schedule of 55 Geo. 3, c. 184. There is also a progressive duty on the quantity of words; *post*, p. 144.

It was held under the old act, 55 Geo. 3, c. 184, that conveyances between English subjects of lands abroad (*e.g.* Australia), executed in England, must be stamped, although some of the directions in the schedule of 55 Geo. 3, c. 184, are expressly confined to lands in this country; *in re Wright*, 11 *Ex.* 458. The late act seems to make no difference in this respect.

The following decisions (partly under the old act) seem still applicable. An equitable conveyance, inoperative at law, is not chargeable under this head; *Wilmot v. Wilkinson*, 6 *B. & C.* 506. So an agreement for the sale of a bed of coals, without any legal transfer of the freehold, requires no conveyance stamp; *Phillips v. Morrison*, 12 *M. & W.* 740. There must be a sale for money [or for stock or securities, public or private]; *Coutes v. Perry*, 3 *B. & B.* 48. If for stock, &c., the mode of valuation is pointed out by the act 13 & 14 Vict. c. 97. The sale of a chose in action, as of a judgment debt (*Warren v. Howe*, 2 *B. & C.* 281), or interest in a partnership (*Belcher v. Sikes*, 6 *B. & C.* 234), has been ruled to be not liable to the *ad valorem* duty; but in *Caldwell v. Dawson*, 5 *Ex.* 1, an assignment of a policy by way of mortgage was held within the title "mortgage" in the schedule, and the ruling in *Warren v. Howe* was doubted; and in *Horsfall v. Hey*, 2 *Ex.* 778, a written sale of fixtures was held to be a conveyance of property requiring the *ad valorem* stamp. If the deed of conveyance contains other matter not incident to the sale or conveyance, it requires an additional stamp adapted to the added matter; but where the transfer of railway shares contained a covenant to abide by the rules of the company, which covenant was required in all transfers, it was held that no additional stamp was necessary beyond the *ad valorem* stamp; *Wolsley v. Cox*, 2 *Q. B.* 321. By 16 & 17 Vict. c. 59, s. 14, transfers of bonds or mortgages given by public companies under act of parliament are exempt from duty, if originally stamped with treble duty over and above the single duty. A certificate of the transfer and acceptance of shares in a mine, signed by both parties, may be received as an admission of the existence of a transfer without a transfer stamp; *Toll v. Lee*, 4 *Ex.* 230. A partition is not a *sale* within the Stamp Acts; *Henniker v. Henniker*, 1 *E. & B.* 54.

An *assignment* of any property, real or personal, not otherwise charged or exempted from stamp duty, is to bear a stamp of 1*l.* 1*s.* as well as progressive duty.

As to conveyances in consideration of an annuity or rent charge, or for several valuable considerations, see 16 & 17 Vict. c. 63, schedule; and 17 & 18 Vict. c. 83, s. 16, and schedule.

Copy.

By 55 Geo. 3, c. 184, a copy attested to be a true copy, or in any manner authenticated or declared a true copy, or made to be given in evidence as a true copy, of any agreement, contract, bond, deed, or instrument of conveyance, or other deed, together with a schedule or indorsement, if made for the security or use of a party or claimant

under it, requires the same duty as the original; if for a person *not* a party, or taking under it, a 1s. stamp with progressive duty.

An examined copy of a deed produced by a witness at a trial to prove the original, which the opposite party refuses to produce, requires no stamp; *Braythwayte v. Hitchcock*, 10 M. & W. 494. Copies of court rolls need not be stamped.

A certified copy of, or extract from, a register of birth, baptism, marriage, death, or burial, is to bear a stamp, to be paid by the person requiring the copy; and the stamp is to be cancelled at the time of delivery; 23 Vict. c. 15, sect. 9.

Cost-Book Mines—transfer of shares in.

By 23 Vict. c. 15, any note, instrument, or writing requesting or authorising the purser or other officer of a mining company conducted on the "cost-book system," to enter or register any transfer of any share or shares or part of a share in any mine, or any notice to such purser, &c., of such transfer, 6d. And by sect. 11 of this act, the person who writes or signs any such note, instrument, or writing, or shall give such notice as above, shall affix an adhesive stamp thereto to denote the duty, and shall cancel and obliterate the same by writing on it his name, or the name of his firm or principal, or initials thereof, and the date of the day and year on which he shall so write the same. *Ibid.* s. 9.

The cost-book mine companies referred to in this act are certain unregistered companies or partnerships, now chiefly to be found in Cornwall and Devon. Such companies elsewhere are no longer exempted from registration under the later Joint-Stock Companies Acts. Whether the company be such a cost-book company is a question of fact, and not a matter of law. See *ante*, p. 75. As to what constitutes such a company, see the *Introductory Notice to Procedure of the Stannary Court*, ed. 1856, and *Collier on Mines*, ch. 3, 2nd ed. The written request, or notice mentioned in the above act, is the usual (but not the only) form of transfer of shares in such a mine. See *Toll v. Lee*, 4 Ex. 230, cited *ante*, p. 136, where the mine was, in fact, a cost-book mine.

Counterpart.

By 13 & 14 Vict. c. 97, and 16 & 17 Vict. 59, s. 12, a counterpart or duplicate of any instrument chargeable with any stamp duty shall pay the like duty (*including* progressive duty) as the original, wherever such duty (*exclusive* of progressive duty) is less than 5s. Where the duty amounts to 5s. or more, the counterpart is to be charged 5s. together with a progressive duty of 2s. 6d. on every additional 1080 words after the first 1080, if the whole contains 2160 or upwards. See also 17 & 18 Vict. c. 83, s. 15.

Covenant.

By 13 & 14 Vict. c. 97, a new title of covenant is introduced in the schedule. A separate deed of covenant made on a sale or mortgage of real property, or right or interest therein (not being a deed chargeable as a conveyance), for the conveyance, surrender, or release of it, or for title, further assurance, production of title deeds, &c., shall pay a duty of 10s. where the *ad valorem* duty on the consideration or

mortgage money exceeds 10*s.*; and a progressive duty, calculated as under the title *Progressive duty*, *post*, p. 144. Where the *ad valorem* duty does not exceed 10*s.*, then a duty equal to the *ad valorem* duty is payable.

A covenant for payment of money, or transfer of shares in public funds, or the stock of any company or corporation, in cases where a mortgage for the like purpose would be chargeable with an *ad valorem* duty exceeding 1*l.* 15*s.*;—or for payment of an annuity or periodical sums, where a bond for like purpose would be chargeable with “any such duty;”—is to be charged with the same duty respectively as on a mortgage or bond for like purpose together with the progressive duty.

Provisions are added, so as to prevent such a covenant from being charged where the *ad valorem* duty is already chargeable in another shape in respect of the transaction.

Declaration of Trust.

A declaration of trust, if not by deed, or of or concerning any property real or personal, not otherwise charged,—35*s.*

Deeds.

A deed of any kind not otherwise charged, nor expressly exempted, requires a 35*s.* stamp, with a progressive duty (*post*, p. 144) on the number of words above 1080, if the whole number amounts to 2160.

An agreement under seal for a lease requires a 35*s.* stamp; for it is neither chargeable as a lease nor as an agreement not under seal. *Clayton v. Burtenshaw*, 5 B. & C. 41. A deed, indorsed on another deed, as a further security for advances to be made under the first deed, was held exempted by 48 Geo. 3, c. 149, from the *ad valorem* duty, the first deed being stamped with an *ad valorem* stamp. *Robinson v. Macdonnell*, 5 M. & S. 228. A conveyance by debtors to trustees in trust to sell and with the proceeds to discharge, first, debts due to the trustees and then debts due to other creditors, with a resulting trust for the original debtors, does not require an *ad valorem* stamp as upon a sale or mortgage under 55 Geo. 3, c. 184. *Coates v. Perry*, 3 B. & B. 48. *Semb.* a licence to use a patent though under seal, does not require a stamp; *Chanter v. Johnson*, 14 M. & W. 408.

The progressive duty is now lowered and differently charged under 13 & 14 Vict. c. 97. See *post*, p. 144.

Delivery Order and Dock Warrant.

By 23 Vict. 15, any writing or document, commonly called a delivery order, or by whatever name designated, entitling or meant to entitle a person or his assigns or holder to the delivery of goods, wares, or merchandise, of the value of 40*s.* or upwards, lying in any dock, or port, or warehouse where goods are stored or deposited on rent or hire, or on any wharf, the document being signed by or on behalf of the owner of the goods, &c., is to bear a stamp of 1*d.* on the sale or transfer of the property therein.

Any warrant or document, commonly called a dock warrant, or other writing or document, which shall evidence the title of any person therein-named, or his assigns, or the holder, to the property

in any goods, &c., lying in any dock or warehouse or any wharf, such writing or document being signed or witnessed by or on behalf of the company or person in whose custody such goods, &c., may be, is to bear a stamp of 3*d*.

Receipts given by inland carriers for goods delivered by them are exempted.

The stamps on the above may be impressed or adhesive. If the latter, they are to be cancelled by writing the name or initials and the date of writing them, in the manner prescribed by 23 Vict. c. 15, s. 9.

Foreign Instruments.

If a stamp is necessary to render an instrument valid in one of the British colonies, it has been held that it cannot be received in evidence without that stamp here; *Clegg v. Levy*, 3 Camp. 167; *Alves v. Hodgson*, 7 T. R. 241. So where a foreign contract is void for want of a foreign stamp, it will also be void in this country; *Bristow v. Secqueville*, 5 Ex. 275. These cases do not decide that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, and as a general rule our courts do not take notice of foreign revenue laws; therefore an unstamped receipt, given in France, will be evidence here, though the French law requires that it should be stamped; *James v. Catherwood*, 3 D. & R. 190. A deed, made in England to be carried into effect abroad, must be stamped; *Stonelake v. Babb*, 5 Burr. 2673. But a contract made in a British ship at sea requires no stamp; *Ximenes v. Jaques*, 1 Esp. 311.

Under 13 & 14 Vict. c. 97, s. 13, instruments executed abroad may be afterwards stamped in this country.

By 1 & 2 Vict. c. 85, deeds and instruments, liable to a stamp duty in one part of the United Kingdom, shall be valid and effectual, though stamped with stamps denoting a duty of equal or greater amount, payable in another part of the United Kingdom; provided the stamp be not specially appropriated on the face of it to another instrument. The stamps used in different parts of the United Kingdom are now generally assimilated by 5 & 6 Vict. c. 82.

Leases.

The acts now in force for regulating the stamp duty on leases are 55 Geo. 3, c. 184; 13 & 14 Vict. c. 97; 17 & 18 Vict. c. 83; and 24 & 25 Vict. c. 21.

By 23 Vict. c. 15, agreements for leases are to be charged as leases if for a term not exceeding seven years; and leases afterwards made in pursuance thereof are only charged a duty of 2*s*. 6*d*.

A lease of lands, tenements, and hereditaments, granted in consideration of a sum of money by way of fine or premium without any yearly rent, or a rent under 20*l*., pays the same duty as a conveyance on a sale for the same amount. Certain leases for lives, or determinable on lives, and leases for years not exceeding twenty-one years, by ecclesiastical corporations, are excepted, where the duty would amount to 35*s*. or upwards, by the act 13 & 14 Vict. c. 97.

By 17 & 18 Vict. c. 83, schedule, a lease of any lands, &c., for any

term exceeding thirty-five years, at a yearly rent with or without any fine or premium, is charged as follows:—

					Term not exceeding 100 years.			Term exceeding 100 years.		
					£	s.	d.	£	s.	d.
Rent not exceeding 5 <i>l.</i>					0	3	0	0	6	0
Exceeding 5 <i>l.</i> , not exceeding 10 <i>l.</i>					0	6	0	0	12	0
„ 10 <i>l.</i> ,	„	„	15 <i>l.</i>		0	9	0	0	18	0
„ 15 <i>l.</i> ,	„	„	20 <i>l.</i>		0	12	0	1	4	0
„ 20 <i>l.</i> ,	„	„	25 <i>l.</i>		0	15	0	1	10	0
„ 25 <i>l.</i> ,	„	„	50 <i>l.</i>		1	10	0	3	0	0
„ 50 <i>l.</i> ,	„	„	75 <i>l.</i>		2	5	0	4	10	0
„ 75 <i>l.</i> ,	„	„	100 <i>l.</i>		3	0	0	6	0	0

And at the same rate for every 50*l.*, or fraction of 50*l.*, rent above 100*l.*

Where the consideration is a fine and also rent, then the lease is also charged on the fine as upon a conveyance; *supra*, p. 135.

A lease of lands, &c., at a yearly rent without any fine or premium, is charged as follows, being 10*s.* per cent. on the rent:—

					£	s.	d.
Where the yearly rent does not exceed 5 <i>l.</i>					0	0	6
„ „ „ 10 <i>l.</i>					0	1	0
„ „ „ 15 <i>l.</i>					0	1	6
„ „ „ 20 <i>l.</i>					0	2	0
„ „ „ 25 <i>l.</i>					0	2	6
„ „ „ 50 <i>l.</i>					0	5	0
„ „ „ 75 <i>l.</i>					0	10	0
Where it exceeds 100 <i>l.</i> , then for every 50 <i>l.</i> or fraction of 50 <i>l.</i>					0	5	0
A lease of any kind not otherwise charged					1	15	0

Leases, in consideration of a fine, and also rent, are charged with both the *ad valorem* duties above mentioned. The act also provides for duties on leases of mines, reserving the produce; leases with corn-rents, penal-rents, rents and fines on leases by co-tenants, &c.

An assignment or surrender of a lease, not being on a sale or mortgage, is liable to the *ad valorem* duty on a similar lease; but cannot exceed 1*l.* 15*s.* Where the surrender is expressly in consideration of a renewal and money, the *ad valorem* duty alone shall be charged.

By 17 & 18 Vict. c. 83, sect. 23, leases for a less period than a year are charged with the same duty as a lease at a yearly rent of the same amount as the rent actually reserved.

The progressive duty on words is charged on all the above leases, under 13 & 14 Vict. c. 97; *post*, p. 144.

Decisions on lease stamps under 55 Geo. 3, c. 184.] The Stamp Acts make no distinction between leases under seal, or in writing not sealed; *Doe v. Way*, 1 T. R. 735.

An instrument purporting to grant a freehold lease, but which is

ineffectual for want of a seal, can only operate as an agreement, and therefore does not require a *lease* stamp; *Stone v. Rogers*, 2 *M. & W.* 443; see *ante*, p. 126, under *Agreement*. A mere attornment does not require a stamp; *Doe v. Edwards*, 5 *Ad. & E.* 95; *Barry v. Goodman*, 2 *M. & W.* 768. The stamp required is regulated by the consideration (whether fine or rent) *expressed* to be paid, and not by that which is actually paid. The mis-statement, though punishable, does not avoid it, or prevent it from being put in evidence; *Doe v. Lewis*, 10 *B. & C.* 673.

Where a lease contained a demise of two farms with two different *habendums* and separate reservations of rents, and covenants some of which applied to one farm and some to another, one *ad valorem* stamp for the amount of both rents was held sufficient; *Blount v. Pearman*, 1 *New Ca.* 408; *Parry v. Deare*, 5 *Ad. & E.* 551; see also *Schedule, tit. Lease or Tack*, 13 & 14 *Vict. c.* 97.

Where a lease refers to an expired lease for the covenants, the expired lease (stamped as such) is not "a schedule, catalogue, or inventory" requiring a stamp as such; *Strutt v. Robinson*, 3 *B. & Ad.* 395. When a lease, duly stamped as a lease, refers to the terms of an abandoned lease not stamped, the whole may be considered as one lease, and is admissible in evidence as such; *Pearce v. Cheslyn*, 4 *Ad. & E.* 225. A lease containing an agreement to take the fixtures cannot be given in evidence without a lease stamp, though only used in an action for the value of the fixtures, and though it has an agreement stamp; *Corder v. Drakeford*, 3 *Taunt.* 382. A lease containing a distinct agreement, not ancillary to the lease, requires stamps of both kinds; *Lovelock v. Franklin*, 8 *Q. B.* 371; *Coster v. Cowling*, 7 *Bing.* 457. But where the lease contains covenants incident to the demise, such as an agreement, giving the lessee the option of purchasing the premises within a certain time, only a lease stamp is necessary; *Worthington v. Warrington*, 5 *C. B.* 536. Where there was a parol lease to A., and an agreement at the end of it by a third person, B., to guarantee to the lessor the payment of moneys to become due from A. to him under the provisions of the lease, a lease stamp and also an agreement stamp were held necessary, B. not being a party to the rest of the instrument; *Wharton v. Walton*, 7 *Q. B.* 474.

● A lease made by a landlord to a vendee of the party, to whom he has agreed to grant, must recite and be charged upon the consideration paid on the sale to the vendee; *Atty.-General v. Brown*, 3 *Ex.* 662. Under 13 & 14 *Vict. c.* 97, it is liable to double duty; i. e., the duty as on a lease to the vendor, and the duty as on a sale by him to the vendee.

Letter of Attorney.

By 27 & 28 *Vict. c.* 56, s. 3, passed the 13th of May, 1864, in lieu of the stamp duties payable for or upon any letter or power of attorney for the receipt of dividends, or interest of any of the government or parliamentary stocks or funds, or of the stocks or funds of the Secretary of State in Council of India, or of India promissory notes, or registered promissory notes, the interest of which is payable by bills of exchange on the governments of India, Madras, or Bombay respectively, or of the stocks, funds, or shares of or in any joint-stock company, or other company or society whose stocks or funds are divided into shares and transferable, the following duties are payable:—

	£	s.	d.
Where such letter or power of attorney shall be for the receipt of one payment only, the duty of	0	1	0
And where the same shall be for continuous receipt, or for the receipt of more than one payment, the duty of	0	5	0

Mortgage.

The duties on mortgages are now regulated by 13 & 14 Vict. c. 97.

By the schedule of that act, a mortgage of real or personal property to secure definite sums is subject to duties on the same scales as bonds, *ante*, p. 135. If the sum secured be indefinite, the security is good only for the amount covered by the stamp. An agreement accompanying a deposit of title deeds, by way of security, is a mortgage within the act; but an instrument made *alio intuitu* reciting a past deposit is not within it; *Pyle v. Partridge*, 15 M. & W. 20; *Fancourt v. Thorn*, 9 Q. B. 312. A memorandum of the deposit of goods with a contingent power of sale does not require a mortgage stamp; *Re Attenborough*, 11 Ex. 461. A pledge of goods, as a bill of lading, is not within it; *Harris v. Birch*, 9 M. & W. 591. Mortgages given to the trustees of building societies established under 6 & 7 Will. 4, c. 32, are exempt from stamp duty.

Policies of Insurance.

Marine Insurance.] The duties payable in respect of marine insurances are now regulated by 3 & 4 Will. 4, c. 23; 7 Vict. c. 21, and 7 & 8 Vict. c. 21; and 27 & 28 Vict. c. 56.

	£	s.	d.
Where the premium does not exceed 10s. per cent.	0	0	3
" " 20s. per cent.	0	0	6
" " 30s. per cent.	0	1	0
" " 40s. per cent.	0	2	0
" " 50s. per cent.	0	3	0
Where it exceeds 50s. per cent.	0	4	0

The above duties are payable where the amount insured does not exceed 100*l*. If it exceeds 100*l*., then it is paid on every 100*l*., and also on any fractional part of 100*l*.

Where the policy is for mutual insurance without premium, then the duty on every 100*l*., and every fraction of 100*l*., is 2*s.* 6*d.*

Alterations.] By 35 Geo. 3, c. 63, s. 13, "Nothing in that act shall be construed to extend to prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance duly stamped after the same shall have been underwritten; or to require any additional stamp duty by reason of such alteration; so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for exceed the rate of 10*s.* per cent. on the sum insured; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period

allowed by that act; and so that no additional or further sum shall be insured by reason or means of such alteration."

A mere extension of the time of sailing is within the above clause, and the alteration requires no new stamp; *Kensington v. Inglis*, 8 *East*, 273; *Brockelbank v. Sugrue*, 1 *B. & Ad.* 81. So a memorandum waiving the warranty of sea-worthiness; *Weir v. Aberdeen*, 2 *B. & A.* 325. But where a policy on "a ship and outfit" was altered by inserting, "ship and goods," it was held to require a new stamp, and to be void against the underwriters, though they had assented to the alteration; *Hill v. Patten*, 8 *East* 373.

By 27 & 28 *Vict. c. 56*, s. 1, passed the 25th of July, 1864, (after reciting that by 19 *Geo. 2*, c. 37, s. 4, it is prohibited to make re-assurance, except in the cases therein mentioned,) it shall be lawful to make re-assurance upon any ship or vessel, or upon any goods, merchandize, or other property on board of any ship or vessel, or upon the freight of any ship or vessel, or upon any other interest in or relating to any ship or vessel which may lawfully be insured, and such re-assurance shall be deemed to be the assurance of interests which may lawfully be insured, within the meaning of the acts imposing stamp duties on policies of sea insurance: Provided always that if within three calendar months next after the termination of the risk on any policy of re-assurance application shall be made to the Commissioners of Inland Revenue, and it shall be proved to their satisfaction that any such re-assurance as aforesaid has been made on the same property or interest and risk which shall have been previously assured to the same, or some greater amount, by one or more lawful and valid policy or policies existing at the time of making such re-assurance, and duly stamped for denoting the full and proper duties chargeable thereon, it shall be lawful for the commissioners to make allowance for the stamp duty impressed on the policy of re-assurance in like manner as in the case of spoiled stamps in policies of insurance under 54 *Geo. 3*, c. 133, and the several provisions of that act, so far as they are applicable, are to be observed with respect to the allowance of stamps in policies of re-assurance.

Fire Insurance.] The duties are regulated by 55 *Geo. 3*, c. 184, and by 3 & 4 *Will. 4*, c. 23, s. 5.

A policy of insurance of buildings, goods, &c., or other property, made by a *public company* or other *person licensed* under 22 *Geo. 3*, c. 48, pays 1s.; for every such insurance made, renewed, or continued by such company or person, 3s. per cent. per annum; and at the same rate for every fraction of 100*l.* insured, or fraction of a year. Separate insurances of agricultural produce, farm stock (live or dead), implements, or animals on a farm, are exempt from duty. The duty must be paid whether the insurance be by a foreign company or an English company; 19 & 20 *Vict. c. 22*.

When an insurance company reinsures with another company by way of guarantee, the duty of 1s. on the policy, but no per-centage duty is payable; *Id.* sect. 6.

By 27 & 28 *Vict. c. 18*, ss. 9, 10, the duties in respect to "Stock in Trade," are reduced, on and after the 25th of June, 1864, to 1s. 6*d.* per centum per annum.

Life Insurance.] These duties are now regulated by the schedule of 16 & 17 *Vict. c. 59*, and c. 63. The duty is 6*d.* for every 50*l.* or

fraction of 50*l.*, where the sum insured does not exceed 500*l.*; 1*s.* for every 100*l.*, or fraction of 100*l.*, where the sum does not exceed 1000*l.*; 10*s.* for every 1000*l.*, or fraction of 1000*l.*, where the sum exceeds 1000*l.*

Progressive Duty.

This is a new head in 13 & 14 Viet. c. 97, where it is used to signify the duty on the quantity of words, and not the *ad valorem* progressive duty. Where any deed or instrument chargeable by this or any other act with duty, together with a schedule, receipt, or other matter put or indorsed on it, or annexed to it, contains 2160 words or more, then for every 1080 words after the first 1080, there shall be charged as follows:—

An instrument, chargeable with an *ad valorem* duty not exceeding 10*s.*, shall be charged with a progressive duty of equal amount.

In every other case, a further progressive duty of 10*s.*; except where any other progressive duty is expressly charged by the schedule of *that* act.

This progressive duty does not apply where any act charges a duty on each “skin, sheet, or piece of vellum, parchment, or paper;” or where no such progressive duty was chargeable by any previous act in force; nor does the act extend to charge any instrument with a *higher* progressive duty or amount than was theretofore charged on it by any former act in force.

The general effect of the act is to charge 10*s.* on each skin of 1080 words, wherever the progressive duty comes into operation. By sect. 11, the words of any document indorsed, annexed, incorporated, or referred to, are not to be counted, if it be itself liable to duty and be duly stamped.

Promissory Notes.

The duty on notes is now regulated by 17 & 18 Viet. c. 83, schedule; and sects. 11, 12.

A promissory note for the payment in any other manner than to the bearer on demand, of any sum of money

					£	s.	d.
Not exceeding	5 <i>l.</i>				0	0	1
Exceeding	5 <i>l.</i>	and not exceeding	10 <i>l.</i>		0	0	2
„	10 <i>l.</i>	„	„	25 <i>l.</i>	0	0	3
„	25 <i>l.</i>	„	„	50 <i>l.</i>	0	0	6
„	50 <i>l.</i>	„	„	75 <i>l.</i>	0	0	9
„	75 <i>l.</i>	„	„	100 <i>l.</i>	0	1	0

A promissory note for the payment either to the bearer on demand, or in any other manner than to the bearer on demand, of any sum of money

					£	s.	d.
Exceeding	100 <i>l.</i>	and not exceeding	200 <i>l.</i>		0	2	0
„	200 <i>l.</i>	„	„	300 <i>l.</i>	0	3	0
„	300 <i>l.</i>	„	„	400 <i>l.</i>	0	4	0
„	500 <i>l.</i>	„	„	500 <i>l.</i>	0	5	0
„	500 <i>l.</i>	„	„	750 <i>l.</i>	0	7	6
„	750 <i>l.</i>	„	„	1000 <i>l.</i>	0	10	0
„	1000 <i>l.</i>	„	„	1500 <i>l.</i>	0	15	0

			£	s.	d.
Exceeding 1500 <i>l.</i> and not exceeding 2000 <i>l.</i>	.	.	1	0	0
„ 2000 <i>l.</i> „ „ 3000 <i>l.</i>	.	.	1	10	0
„ 3000 <i>l.</i> „ „ 4000 <i>l.</i>	.	.	2	0	0
„ 4000 <i>l.</i> and upwards	.	.	2	5	0

It will be seen that the scale up to 4000*l.* is the same as for inland bills of exchange.

Notes for less than 5*l.*, payable to bearer on demand, are prohibited by 7 Geo. 4, c. 6; and all notes or bills for less than 20*s.* are void. See 26 & 27 Vict. c. 105.

The provisions relating to notes issued by private banks will be found in 7 & 8 Vict. c. 32; 8 & 9 Vict. cc. 37 and 38; and 17 & 18 Vict. c. 83, ss. 11 and 12.

The directions and exemptions contained in the earlier acts, applicable to stamps on notes, are in force (so far as they consistently can be) as to the duties on the schedule of the last act. See s. 2.

A promissory note for 40*l.* payable to A. B., or bearer, is in law payable on demand, and requires to be stamped accordingly; *Whitelock v. Underwood*, 2 B. & C. 157. A promissory note payable to M. M., without the words “order” or “bearer,” and without any indication of the time of payment, is not a promissory note payable to the bearer on demand within the statute; *Cheetham v. Butler*, 5 B. & Ad. 837. So a note whereby A. promised to pay B. on demand 20*l.*, with lawful interest until payment; *Dixon v. Chambers*, 1 C. M. & R. 845; and *Keates v. Whieldon*, 8 B. & C. 7, is there said to be overruled. The reservation of interest is not to be considered an addition to the sum advanced so as to require a larger stamp; thus a stamp, applicable to a note not exceeding 30*l.*, is applicable to a note for the payment of 30*l.* at three months after date with interest from the date; *Pruessing v. Ing*, 4 B. & A. 201. Where a joint and several note for securing the repayment of a loan was signed first by one, and some days afterwards by the other, party, it was held not to require an additional stamp if the last signature was put before the money was advanced, or if the party last signing had promised to sign the note before the advance, notwithstanding it may not have been signed till afterwards; *Ex parte White*, 2 Deac. & Chit. 341.

A memorandum in the form of a promissory note, offered in evidence for the purpose of taking a case out of the Statute of Limitations, is inadmissible, unless stamped; although 9 Geo. 4, c. 14, s. 8, exempts memorandums made for that purpose from stamp duty; *Jones v. Ryder*, 4 M. & W. 32; and in *Parniter v. Parniter*, 1 John. & Hem. 135, it was held that a promissory note for 1110*l.*, with four per cent. interest, made on a penny receipt stamp, was not admissible to take a debt out of the Statute of Limitations. It is to be observed that the schedule of 55 Geo. 3, c. 184, exempting instruments in the form of notes from the note stamp, if deemed to be agreements, was not cited in *Jones v. Ryder*, *supra*. An instrument in this form: “Received of A. B. 100*l.* which I promise to pay on demand,” is a promissory note, and requires a stamp as such; *Green v. Davies*, 4 B. & C. 235. “I. O. U. 20*l.*, to be paid on the 22nd inst.,” dated and signed, is an instrument requiring to be stamped either as a note or an agreement; *Brooks v. Elkins*, 2 M. & W. 74. But the words “value received” will not render an I. O. U. liable to a stamp; *Gould v. Coombs*, 1 C. B. 543. “I. O. U. 40*l.* which I borrowed of

M., and to pay 5*l.* per cent. till paid,—R. T.," is neither an agreement nor a note; *Melanotte v. Teasdale*, 13 *M. & W.* 216. See also *Sibree v. Tripp*, 15 *M. & W.* 23; *Cory v. Davis*, 14 *C. B.*, *N. S.* 370. "I have received the sum of 20*l.*, borrowed of you, and am accountable for it with interest," was held to be an agreement, and not a note; *Horne v. Redfearn*, 4 *New Ca.* 433. So "borrowed of Mr. J. W. 200*l.* to account for at . . . months' notice if required," &c.; *White v. North*, 3 *Ex.* 689. But a note for money payable on demand to H., "and I have lodged with H. the counterpart leases signed, &c., as a collateral security for the sum," is a note, and need not be stamped as a mortgage; *Fancourt v. Thorne*, 9 *Q. B.* 312.

Protests.

Protest of any bill of exchange, or promissory note, for any sum of money

	£	s.	d.
Not amounting to 20 <i>l.</i>	0	2	0
Amounting to 20 <i>l.</i> , and not amounting to . . 100 <i>l.</i>	0	3	0
„ 100 <i>l.</i> „ „ 500 <i>l.</i>	0	5	0
„ 500 <i>l.</i> or upwards	0	10	0

Protests of any other kind, 5*s.*; and for every further sheet, or piece of paper, or parchment, on which it is written, a progressive duty of 5*s.*

Proxy.

By 27 & 28 Vict. c. 18, sched. C, a duty of 1*d.* only is payable on a letter or power of attorney, commission, factory, mandate, or like instrument, made for the sole purpose of appointing a proxy to vote at a meeting in the United Kingdom of proprietors or shareholders of any joint-stock company, or the members of any other company, or society, or any body exercising a public trust.

Schedule C also fixes the rate of duties on voting papers, and different kinds of powers attorney.

Receipts.

Receipts or discharges, given for or upon the payment of money, require the following stamp by 16 & 17 Vict. c. 59, schedule:—

Amounting to 2*l.* or upwards 1*d.*

A note, memorandum, or writing, given on payment of money, whereby any money, debt, or demand, or part of any debt or demand therein specified, and amounting to 2*l.*, shall be acknowledged to be paid, settled, balanced, discharged, or satisfied, or which shall import such acknowledgment, whether signed or not, is a receipt within the act. And payment by bills, notes, drafts, or other securities, is to be taken as payment of money.

If an adhesive stamp is used, it must be obliterated by the person giving it, before the delivery, by writing his name or initials on it so as to show that it has been used. *Sect. 4.*

The following are, among others, exempt from the above duty:—

Receipts written on bills, notes, or drafts, duly stamped; or on bills drawn out of, but payable in, Great Britain.

Receipts on any bond, mortgage, or other security, or on any conveyance, deed, or instrument duly stamped, acknowledging the receipt of consideration money, principal, or interest.

Releases by deed duly stamped.

By former stamp acts, letters by post acknowledging the safe arrival of bills, notes, or securities for money were exempt; but the exemption is repealed by sect. 13 of the last act, 17 & 18 Vict. c. 83.

The following are exempted by the schedule of 16 & 17 Vict. c. 59:—Receipts for money deposited in any banker's hands to be accounted for, with or without interest, if not expressed to be received from any one other than the person to be accounted to; provided that this exemption shall not extend to receipts or acknowledgments for money paid on letters of allotment of shares, or on calls, of or in any joint-stock or other company; which receipts or acknowledgments shall be liable to receipt duty. The decisions under the former acts are still applicable to the new duties.

An acknowledgment of having received acceptances, with an undertaking to provide for them, has been held to require a receipt stamp; *Scholey v. Walsby, Peake, Ca.* 24. So a bill of parcels subscribed "settled by two bills, one at nine, the other at twelve months," was held by Lord Ellenborough to be an acquittance which could not be evidence unless stamped; *Smith v. Kelly, Peake, Ca.* 25 (n). So the word "settled" under a bill; *Spawforth v. Alexander, 2 Esp.* 621. "Memorandum. That any demand we have against G. W. for ironwork is this day discharged in consideration of services rendered by him to us: our account shall be delivered with a stamped receipt,"—requires a stamp; *Livingston v. Whiting, 15 Q. B.* 722. An account containing acknowledgments of sums received, made at successive times upon the payment of the money, requires a stamp; it differs from an account current, where the sums stated to be received are not written in the account at and upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent time; *Wright v. Shawcross, 2 B. & A.* 501 (n); see *Jacob v. Lindsay, 1 East,* 460; *Hawkins v. Warre, 3 B. & C.* 696. A mere acknowledgment, not of the payment of money, but of a sum due and owing (as an I. O. U., signed by the party), requires no receipt stamp; *Fisher v. Leslie, 1 Esp.* 426; *Israel v. Israel, 1 Camp.* 499; *Childers v. Boulnois, D. & R.* 8. And in *Taylor v. Steele, 16 M. & W.* 665, the following document, stamped with a 2s. receipt stamp, was received in evidence—"Received from B. T. the sum of 170*l.* for value received, for which I promise to pay her at the rate of 5*l.* per cent. from the above date (signed), A. N. T."—the Court holding that it was not a receipt, because it was not given at the time the money was lent—that it was not a promissory note, as it was for the payment of an indefinite sum, and contained no promise to pay the principal, and thirdly that it was not an agreement of the value of 20*l.* So a receipt given by the banker of a company to a shareholder for deposit paid in, needs no stamp; *Clarke v. Chaplin, 1 Ex.* 26; see also *Chaplin v. Clarke, 4 Ex.* 403. This, however, was decided before 16 & 17 Vict. c. 59 (cited above), which provides for receipts by bankers. But such an instrument may, by the addition of other matter, amount to a note or agreement; see cases, *suprà*, p. 145. Where it is made solely to avoid the Statute of Limitations, it is expressly exempted from an agreement stamp; 9 Geo. 4, c. 14, s. 8. An instrument in these terms, "Mr. T. has

left in my hands 200l," (*Tomkins v. Ashby*, 6 B. & C. 541); or in these, "I have in my hands three bills which amount to 120l. 10s. 6d., which I have to get discounted or return on demand" (*Mullett v. Huchison*, 7 B. & C. 639); or in these, "Mr. M. has this day left with me 10l. on account of debt, interest, and costs" (*Levy v. Alexander*, 4 Ex. 485), requires no stamp. So the acknowledgment of the correctness of an account containing a statement of sums advanced and disbursements made, has been held to require no stamp; *Wellard v. Moss*, 1 Bing. 134. So, "balanced up to this day. S. F. 19 Nov.," written on the back of an unstamped receipt, is evidence against S. F. of an admission of the state of account on that day, though the receipt itself is not admissible; *Finney v. Tootel*, 5 C. B. 504. And an unstamped receipt at the foot of a debtor and creditor account, signed by the party who received the balance, is evidence against him of the state of the account, the payment not being disputed; *Mattheson v. Ross*, 2 H. L. C. 286. A receipt is not inadmissible as such, because it notices the terms and consideration upon which the money was paid; *Watkins v. Hewlett*, 1 B. & B. 1. Nor because it contains subsequent matter of agreement, and has no agreement stamp: *Odye v. Cookney*, 1 Mood. & Rob. 517; unless the agreement controls or qualifies what goes before, when the paper will be inadmissible without an agreement stamp; *Grey v. Smith*, 1 Camp. 387. Where the indorsements of receipts on a bond have left no blank space for receipts of subsequent payments, such receipts written on an unstamped piece of paper annexed to the bond are within the exemption of 55 Geo. 3, c. 184, schedule, part 1, and admissible; *Orme v. Young*, 4 Camp. 336.

Release.

Any deed or instrument of release and renunciation of lands or other property real or personal, or of any right or interest therein (such deed not being otherwise charged in the schedule 55 Geo. 3, c. 184, nor expressly exempted from all duty), requires a stamp of 35s. and a progressive duty on the number of words, as in deeds.

Surrender.

By 55 Geo. 3, c. 184, a surrender of a term of years, or of any freehold or uncertain interest in lands, &c., not being of copyhold or customary tenure, requires a 35s. stamp, and a progressive duty on words. The surrender of a lease is provided for by 13 & 14 Vict. c. 97. Under that act the duty may be less than 35s.; see *ante*, *Stamp on Leases*, p. 140. The progressive duty must now be calculated as provided by the later act; *ante*, p. 144.

Where some of the executors of a tenant from year to year signed an instrument, "renouncing and disclaiming, and also surrendering and yielding up" to the landlord all right, title, &c., in the premises; and the landlord thereupon brought ejectment: held that such instrument was a surrender, and not a disclaimer, and therefore could not be put in evidence for the plaintiff without a surrender stamp; *Doe v. Stagg*, 5 New Ca. 564.

Schedule.

By 55 Geo. 3, c. 184, a schedule, inventory, or catalogue of lands, furniture, fixtures, goods, or effects, or containing the terms of sale,

lease, or cultivation of farm or property leased, or containing any other "matters of contract or stipulation whatsoever" referred to in, or by, *and* intended to be used or given in evidence as part of, or material to, any agreement, lease, deed, or other instrument charged with duty, but which is separate from, and not indorsed on, or annexed to, such agreement, &c., is charged 1*l.* 5*s.*, and a progressive duty after 2160 words of 1*l.* 5*s.* for every 1080 words after the first 1080.

This duty is reduced by 13 & 14 Vict. c. 97, which provides as follows:—

Where the schedule is referred to in an instrument chargeable with a duty not exceeding 10*s.* (exclusive of progressive duty), it shall be charged the same duty (exclusive of progressive duty).

Where the schedule is referred to in an instrument charged with a higher duty than 10*s.* (exclusive, &c.), the duty is 10*s.*

In both cases a further progressive duty of the same amount as that charged on the schedules respectively is charged on each skin, or 1080 words, if the whole number is 2160 or upwards.

By 17 & 18 Vict. c. 83, s. 22, where the schedule, inventory, or catalogue referred to is a public map, plan, survey, allotment, award, or other parochial or public document or writing, made in pursuance of an act of parliament, and kept for reference in a registry, public office, or with parish books, &c., the stamp duties shall not extend to them; provided such document or writing be not indorsed on or annexed to the deed or instrument.

If a bill of sale refers to a schedule of things sold, but is complete and intelligible without it, it may be read, though the schedule, being unstamped, may be inadmissible; *Dyer v. Green*, 1 *Ex.* 71; *Daines v. Heath*, 3 *C. B.* 938; *aliter*, if insensible without the schedule; *Weeks v. Maillardet*, 14 *East*, 568.

PART II.

EVIDENCE IN PARTICULAR ACTIONS.

ACTIONS FOUNDED ON SIMPLE CONTRACT.

ACTION ON SALE OF REAL PROPERTY.

Vendor against Vendee.

IN an action by the vendor of real property on the purchaser's default in completing the contract, the plaintiff may be called upon by plea to prove the contract; the performance by himself of all conditions precedent; and the defendant's default.

Proof of the contract.—Statute of Frauds.] It will be necessary to prove a contract in writing; for, by the Statute of Frauds, 29 Car. 2, c. 3, s. 4, no action shall be brought, whereby to charge any person upon *any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them*, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

It has been intimated by judges though not decided, that where the contract is by deed, it is not within the statute, and therefore requires no signature; *Cherry v. Heming*, 4 Ex. 631; 19 L. J. (Ex.) 63. The point has rarely occurred, because such contracts are not usually under seal, and because deeds are usually signed.

A question often arises as to what is an "interest in or concerning" land, &c., within this section. It seems settled that where crops sold are not natural, as grass, but industrial, as potatoes or wheat, the sale is not of an interest in land within sect. 4, though it may be within sect. 17; and it is immaterial whether the crop is ripe or not at the time of sale, and whether the cutting or gathering is to be by the buyer or seller; *Parker v. Staniland*, 11 East, 362; *Evans v. Roberts*, 5 B. & C. 829; *Jones v. Flint*, 10 Ad. & E. 753. But if the crop be of grass or growing fruit, and the terms of the sale imply the grant of an interest in the land, and not of a mere easement or right of entry, then the contract is within sect. 4; *Crosby v. Wadsworth*, 6 East, 602; *Rodwell v. Phillips*, 9 M. & W. 501. Where timber was sold at so much per foot, to be cut by the seller, it has been held to be the sale of a chattel; *Smith v. Surman*, 9 B. & C. 561; and in *Washbourn v. Burrows*, 1 Ex. 115, 16 L. J. (Ex.) 269, Rolfe, B., delivering the judgment of the court, says: "When the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples,

or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land and then deliver them to the purchaser, the latter acquires no interest in the soil, which is only in the nature of a warehouse for what is to come to him merely as a personal chattel." Where the contract relates to an interest in land, any collateral contract, such as to provide additional furniture, cannot be enforced if the agreement be not in writing; *Mechelen v. Wallace*, 7 *Ad. & E.* 49; *Vaughan v. Hancock*, 3 *C. B.* 766. So, on a parol contract to give up a house and fixtures for a certain sum, payment of the sum agreed cannot be enforced; *Kelly v. Webster*, 12 *C. B.* 283; 21 *L. J. (C. P.)* 163. But where there was an agreement between landlord and tenant that the landlord, at the expiration of the tenancy, would take at a valuation the fixtures, which the tenant had power to remove during his term: this was held not within the statute; *Hallen v. Runder*, 1 *C. M. & R.* 266. An agreement to take furnished lodgings is within the 4th section; *Inman v. Stamp*, 1 *Stark*, 12; *Edge v. Strafford*, 1 *C. & J.* 391. In those cases the contract, if carried out, would have amounted to a demise, and the occupier could have maintained trespass or ejectment; but if the contract is merely for board and lodging as an inmate of the house, although the inmate is to have a separate room, such contract is not within the 4th section; *Wright v. Stavert*, 29 *L. J. (Q. B.)* 161; 2 *E. & E.* 721. A contract to retire from a milk-walk in favour of the defendant, and to give up the premises occupied by the plaintiffs and stock to him, is within the fourth section; *Smart v. Harding*, 15 *C. B.* 652; 24 *L. J. (C. P.)* 76. So on a parol agreement to give up a brick-yard and bricks on it to the plaintiff at a valuation, defendant undertaking to pay to the landlord the rent then due, though plaintiff has taken possession and paid for the bricks, he cannot sue defendant for not paying the landlord: the contract and consideration being entire; *Hodgson v. Johnson*, 28 *L. J. (Q. B.)* 88; *E. B. & E.* 685. For although the plaintiff's part of the agreement be performed, it cannot be enforced against the defendant if not in writing; *Cocking v. Ward*, 1 *C. B.* 858; 15 *L. J. (C. P.)* 245. But an agreement as to land, if entirely performed on both sides, may be given in evidence, though not in writing, for a collateral purpose; thus, under a parol agreement that plaintiff should pay 37*l.* for defendant's interest in premises and for the fixtures, defendant to return 10*l.* if plaintiff were refused a licence to use the premises as a slaughter-house, the plaintiff had possession of the premises and fixtures, and paid the defendant the 37*l.*; and it was held by Wightman and Erle, JJ. (Crompton, J., dissenting), that the plaintiff could recover the 10*l.* on the licence being refused, although the contract was not in writing; *Green v. Saddington*, 7 *E. & B.* 503. A contract relating to the expenses of investigating the title to land is not within this section; *Jeakes v. White*, 6 *Ex.* 873; 21 *L. J. (Ex.)* 265.

A share in a mine actually in work was held by the Court of Queen's Bench in Ireland to be within sect. 4; *Boyce v. Greene, Batty*, 608. But in *Watson v. Spratley*, 10 *Ex.* 222, 24 *L. J. (Ex.)* 53, a parol sale of shares in an unincorporated mine company in Cornwall formed on what there is called the "cost-book" principle was held valid; and this case was acted on by the Common Pleas in *Pouell v. Jessop*, 25 *L. J. (C. P.)* 199, 18 *C. B.* 336. These decisions are founded on the principle, that a shareholder has an interest, not in the land, but only in the adventure and profits thereof.

If he be a co-tenant, in law or equity, of the land, the case would be different. The same principle seems to apply to all joint-stock companies possessing land, in which the shareholders have no direct interest in the land necessarily occupied for carrying on the business, but only a right to the profits of the business itself; see *Bulmer v. Norris*, 30 *L. J. (C. P.)* 25; 9 *C. B., N. S.*, 19; and *Bennett v. Blain*, 33 *L. J. (C. B.)* 63, 15 *C. B., N. S.*, 518.

The note, or writing, must specify the terms; for otherwise all the danger of perjury, which the statute intended to guard against, would be let in. Thus, where an auctioneer's receipt for the deposit was set up as an agreement, it was rejected because it did not state the price to be paid for the estate; neither had it any reference to the conditions of sale, so as to entitle the court to look at them for the terms; *Blagden v. Bradbear*, 12 *Ves.* 466. If a letter, properly signed, does not contain the whole agreement, yet if it refers to a writing that does, it will be sufficient, though the latter writing is not signed; and parol evidence is admissible to identify the writing referred to; *Allen v. Bennet*, 3 *Tuunt.* 169. Where a contract in writing exists which binds one party to the contract under the statute, any subsequent note, signed by the other, is sufficient to bind him, provided it either contains the terms, or refers to any other writing that contains them; *Dobell v. Hutchinson*, 3 *Ad. & E.* 355. Subject, terms, and names of the parties must appear; *Williams v. Lake*, 29 *L. J. (Q. B.)* 1; 2 *E. & E.* 349. But it is not necessary that the names or terms should appear in any single paper; the contract may be collected from several connected papers; *Kennedy v. Lee*, 3 *Meriv.* 441. The connexion must appear on the papers, and not by extrinsic parol evidence only; *Boydell v. Drummond*, 11 *East*, 142; see 1 *Sm. L. C.* 271. But this connexion need not be by express or specific description of one paper in the other; thus where a memorandum for a lease for twenty-one years was signed by the intended lessee, with no mention of the lessor's name, and the lessee afterwards wrote to the lessor's attorneys, withdrawing "the memorandum you affect to consider a contract," and referring to the lessor by name, this was held sufficient to bind the intended lessee; *Warner v. Willington*, 25 *L. J. (Ch.)* 662; 3 *Drew.* 523. But a letter, "I agree to let to A. the stables in G. for the same rent, and subject to the same conditions that I hold them myself," accepted by writing signed by A., is not sufficient, as it does not state the duration of the term; *Bayley v. Fitzmaurice*, 8 *E. & B.* 664; 27 *L. J. (Q. B.)* 143; 9 *H. L. C.* 78.

If an offer to buy is made, to be accepted within a certain time, the offer may be retracted before acceptance; per *Best*, C. J., in *Routledge v. Grant*, 4 *Bing.* 653. If an offer to buy be accepted by letter, the vendor is bound from the time of posting the acceptance; *Potter v. Sanders*, 6 *Hare*, 1. So an offer to sell, made and accepted by letter, binds both parties from the time the acceptance was posted; *Adams v. Lindsell*, 1 *B. & A.* 681. If an offer to sell is refused by letter, but accepted in a subsequent letter, the vendor is not bound, though he had not expressly withdrawn his original offer; *Hyde v. Wrench*, 3 *Beav.* 334. Where the offer is made by an agent of the vendor, to be accepted within a given time, and the acceptance is by letter to such agent within the time, the principal is bound, though the agent has neglected to notify it to him; *Wright v. Bigg*, 15 *Beav.* 592. See further as to contracts by interchange of letters, *post*, *Action for not Accepting Goods*.

With regard to the *signing*, it has been held that a printed name is sufficient; *Saunderson v. Jackson*, 2 B. & P. 238; if recognised by, or brought home to, the party, as having been printed by his authority; *Schneider v. Norris*, 2 M. & S. 286; and it is immaterial in what part of the agreement the name appears; *S. CC. v. Johnson v. Dodgson*, 2 M. & W. 653; *Knight v. Crockford*, 1 Esp. 190; *Cox's note* to 1 P. Wms. 771. Thus "A. B. agrees with J. R. B. to take the property situate, &c., for 248*l.*," in J. R. B.'s writing, is sufficient signature by him as vendor; *Bleakley v. Smith*, 11 Sim. 150. So, "Messrs. E. bought of A. B.," in the writing of Messrs. E.'s agent, binds them; *Durrell v. Evans*, 31 L. J. (Ex.) 337; 1 H. & C. 174. But the mere drawing of an instrument with the name of the defendants put as one of the contracting parties by their agent, is not sufficient, if the instrument is evidently incomplete; as where it ends with "witness our hands" without any further signature following; *Hubert v. Treherne*, 3 M. & G. 743. If a person is to be bound by an instrument, a signing by him as witness has been held sufficient, if he is cognisant of the contents of the instrument; *Welford v. Beazely*, 3 Atk. 503; or by his agent; *Coles v. Trecothick*, 9 Ves. 231. But this doctrine was doubted by the Court of Queen's Bench, in *Gosbell v. Archer*, 2 Ad. & E. 500, unless the person signing as witness be a principal or expressly acting as agent of the principal.

The statute requires the agreement to be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. It is good as against the party to be charged, though only signed by him, and not by the other party; *Seton v. Slade*, 7 Ves. 265; see also *Saunderson v. Jackson*, 2 B. & P. 238; *Egerton v. Mathews*, 6 East, 307; *Allen v. Bennet*, 3 Taunt. 169 (on the 17th sect.); *Laythoarp v. Bryant*, 2 N. C. 735; and the observations on this point in a note to *Sweet v. Lee*, 3 M. & G. 462. Thus a proposal containing the terms of a contract, signed by defendant and accepted by the plaintiff by parol, binds the defendant; *Smith v. Neale*, 2 C. B., N. S., 67; 26 L. J. (C. P.) 143. And although the agreement purport to be *inter partes*, and the party suing on it has accepted by parol but has never signed it, it binds those who have signed; *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139; 28 L. J. (Ex.) 123.

With regard to the person authorised by the party to sign, it is settled that such person need not be authorised in writing; *Coles v. Trecothick*, 9 Ves. 250.

A sale by auction is within the Statute of Frauds; *Blagden v. Bradbear*, 12 Ves. 466; and the auctioneer is for this purpose the agent for both vendor and vendee, and his writing down the name of the highest bidder in the auctioneer's book or catalogue, is sufficient signature; *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; but this is not a sufficient memorandum if the conditions of sale are not attached to the book; *Kenworthy v. Schofield*, 2 B. & C. 945. If the highest bidder be agent for another, the writing by the auctioneer of the agent's name as purchaser binds the principal; by *Holroyd, J.*, in *Kenworthy v. Schofield*, 2 B. & C. 948; *White v. Proctor*, 4 Taunt. 209; in the latter case the principal was present though his agent bid. On a sale by the auctioneer after the auction, there is no such implied agency in the auctioneer as to bind the vendee; *Meus v. Carr*, 1 H. & N. 484; 26 L. J. (Ex.) 39. The agent must be a third person, and not one of the parties; *Wright v. Dannah*, 2 Camp. 203; therefore, if the action is brought against the

purchaser by the auctioneer himself, the signing of the defendant's name by the auctioneer has been held insufficient to satisfy the statute; *Farebrother v. Simmons*, 5 B. & A. 333 (on the 17th sect.). But the principle of those cases was doubted in *Bird v. Boulter*, 4 B. & Ad. 443; in which the entry by the auctioneer's clerk was held to be sufficient in an action by the auctioneer, where the clerk, as each lot was knocked down, named the purchaser aloud, and, on a sign of assent from him, made a note of the name accordingly in a book. A subsequent recognition of the authority of the agent by the principal is sufficient; *Maclean v. Dunn*, 4 Bing. 722. Where the auctioneer's clerk put his name, "Witness T. N.," without more, to the contract signed by the purchaser; this was held not to be a signing by an agent of the vendor, though the deposit was paid over by the auctioneer to the vendor's attorney, who wrote a letter to the vendee's attorney advising the purchase to be relinquished; for such facts did not amount to a ratification of the agency of T. N. nor of the contract, even supposing the signature as witness to be sufficient; *Gosbell v. Archer*, 2 Ad. & E. 600. See further cases, under the 17th section, title—*Action for not Accepting Goods*.

[*Performance of conditions precedent.*] The declaration in an action against a vendee for not completing the purchase is a special one, and the performance of conditions precedent must, if the defendant intends to dispute it, be traversed, if specially alleged in the declaration; or be specially negatived by plea, if performance of them is alleged generally by the plaintiff. The record, therefore, sufficiently indicates the proofs necessary at Nisi Prius.

An alleged delivery of an "abstract" is not satisfied by proof of a delivery of the deeds themselves; *Horne v. Wingfield*, 3 M. & G. 33. But an alleged delivery of a "full and sufficient abstract of title" is satisfied by a delivery of a full statement of all the vendor's title deeds, though they may not constitute a good title, *semble*: *Blackburn v. Smith*, 2 Ex. 783; 18 L. J. (Ex.) 187.

If the title of the plaintiff is put in issue, he must prove it. Where the plaintiff sold a lease, and by the conditions of sale he was "not to produce any title prior to the lease," it was held that he was bound to prove the lease itself; *Laythorp v. Bryant*, 1 N. C. 421. The court put the case on the ground that the plaintiff, having declared that he was "possessed of a lease," was bound to prove that allegation in the ordinary manner.

If the purchaser has not made an application for the title before the commencement of the action, and no time is fixed for completing the contract, it is said to be sufficient if the plaintiff can show a good title in himself at the time of trial; *Thomson v. Miles*, 1 Esp. 185. And in Equity the vendor may make good his title at any time; but at common law this depends on the terms of the contract and pleadings; and where the contract can be shown to have been in fact broken at any time before action brought by want of a title to convey when the conveyance ought to have been made, the defendant cannot afterwards cure the defect at law by obtaining a good title; *Roper v. Coombes*, 6 B. & C. 534. An averment of readiness to convey, if traversed, is negatived by proof of a defective title; for it negatives ability to convey; *De Medina v. Norman*, 9 M. & W. 820. See further on the evidence under a traverse of readiness, *post*, *Action for not accepting Goods*. An averment of readiness at the steward's office, on a certain day, to complete the conveyance of copyhold by

surrender, &c., is proved by the plaintiff's readiness to go to the office, though he omitted to do so because the defendant had just before that day told him that he should not be ready; *Perry v. Smith, Cur. & M.* 554, *per* Patteson, J.

Indebitatus count.] This count cannot be sustained unless the conveyance is complete, and nothing remains to be done but to pay the money; *Hallen v. Runder*, 1 C. M. & R. 271, *per* Parke, B. It is therefore of little use in practice, as the execution of the deed and payment of money are usually concurrent acts.

Where the contract is not in writing as required by the Statute of Frauds, plaintiff may sometimes recover on an account stated; as by proving that the defendant, after he had been let into possession of a farm by the plaintiff under a parol agreement to give him 100*l.* for it, had acknowledged that he owed and had promised to pay the plaintiff that sum; *Cocking v. Ward*, 1 C. B. 858. So where the plaintiff and defendant met and went through their cross accounts, and ascertained that the plaintiff owed to the defendant 111*l.*, and the defendant to the plaintiff 67*l.*, leaving a balance of 44*l.* in the defendant's favour, and it was then verbally agreed between them that the defendant should purchase of the plaintiff his interest in some land for 70*l.*, and ultimately that the balance in the plaintiff's favour should be taken at 22*l.*, the defendant having obtained possession of the land accordingly: it was held the plaintiff could recover the agreed balance on an account stated; *Laycock v. Pickles*, 33 L. J. (Q. B.) 43; 4 B. & S. 497.

Damages.] Where the action is brought before conveyance, the vendee having taken possession and dispensed with the execution of the conveyance, and ultimately refusing to complete the purchase, the vendor cannot recover the whole purchase money, but only the damages actually sustained, for the land continues to belong to him; *Laird v. Pim*, 7 M. & W. 474. By the conditions of sale, if the purchaser should fail to comply with the conditions, the deposit was to be actually forfeited to the vendor, who was to be at liberty to resell, and any deficiency upon re-sale with expenses made good by the defaulter; default having been made, and the property resold at a reduced price; it was held that the vendor could recover, in addition to the deposit, only so much of the difference between the two prices and of the expenses as the deposit did not cover; *Ockenden v. Henly*, 27 L. J. (Q. B.) 261; *E. B. & E.* 485. Accidental deterioration after the date of the contract is a loss which must fall on the vendee; *Robertson v. Skelton*, 12 Beav. 260; *Paramore v. Greenslade*, 1 Sm. & Giff. 541. Hence it would seem that such loss may be claimed as part of the vendor's damages occasioned by the vendee's non-completion.

Defence.

Denial of contract.] The want of a writing may be shown under this plea; *Eastwood v. Kenyon*, 11 Ad. & E. 438. And this is not dispensed with even where the plaintiff has performed his part of the contract, and only sues for the price; *Cocking v. Ward*, 1 C. B. 858; *Kelly v. Webster*, 12 C. B. 283. The performance of a condition precedent, if alleged, must be traversed, as non-delivery of an

abstract; *Horne v. Wingfield*, 3 M. & G. 33: but if performance is stated generally by the plaintiff, the condition must be specified in the plea and non-performance averred by the defendant; sect. 57 of Common Law Procedure Act, 1852.

Fraud—misdescription.] Fraud must be specially pleaded; *Icely v. Grew*, 6 C. & P. 671: except in cases where the alleged fraud is a misrepresentation of title, in which case it may be shown under a denial of the title. The plea of fraud is sometimes general, and sometimes particular and special, as to which see *post*, *Defences to Actions on Simple Contracts,—Fraud*.

It is a defence that a misdescription has been wilfully introduced into the particulars of sale, to make the land appear more valuable; *Duke of Norfolk v. Worthy*, 1 Camp. 340. The result of the decisions on this point is thus stated by Tindal, C. J., delivering the judgment of the Court, in *Flight v. Booth*, 1 N. C. 376:—"All the cases concur in this, that when the mis-statement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But with respect to mis-statements which stand clear of fraud, it is impossible to reconcile all the cases: some of them laying it down that no mis-statements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Duke of Norfolk v. Worthy*, 1 Camp. 340; *Wright v. Wilson*, 1 Mood. & Rob. 207: whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale; *Jones v. Edney*, 3 Camp. 285; *Waring v. Hoggart*, Ry. & Mood. 39; *Stewart v. Alliston*, 1 Meriv. 26. In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that when the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser would never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of sale; as in *Jones v. Edney*, 3 Camp. 285, where the subject-matter was described to be a free public-house, and the lease contained a proviso that the lessee and his assignees should take all their beer from a particular brewery, in which case the misdescription was held to be fatal."—Where premises were *mala fide* described as "a substantial brick building," which were not such, and a plot of land, mentioned in the particulars, did not exist at all, the sale was held voidable; *Robinson v. Musgrove*, 2 Mood. & Rob. 92. So, where they were described as an "eligible investment," and they were, in fact, liable to be taken under a local public Act: held, that the purchaser might rescind the contract, and that the Act was not notice *per se*; *Ballard v. Way*, 1 M. & W. 520. And where the premises, including a yard, were said to be held for a term of twenty-three years, when, in truth, the yard, which was an essential part, was held under a yearly tenancy, the purchaser was allowed to rescind the sale, though a lease of the yard for the same term was afterwards procured by the seller, and though there was a clause in the conditions for compensation in the case of erroneous description, and a provision that the contract should not be annulled

by it; *Dobell v. Hutchinson*, 3 *Ad. & E.* 355. But where it was provided by the conditions of sale, that "if any mistake should be made in the description of the premises, or if any other material error should appear in the particulars of sale, such mistake or error should not annul the sale, but a compensation should be made," the vendee was held not to be released from the contract by reason of a misdescription in the particulars of sale obvious on inspection of the premises, unless such misdescription was wilful and designed; *Wright v. Wilson*, 1 *Mood. & Rob.* 207. So a specific performance for the purchase of a meadow, was decreed, where a visible footway went across it, of which no notice was given; *Bowles v. Round*, 5 *Ves.* 508. Where ground was sold as building land, without notice of a right of way reserved across it by a lease of another portion of it, it was held that the contract was voidable, and the purchaser was permitted to avoid it as to two lots separately bought at an auction, though the defect applied only to one lot, the seller having afterwards united both in a single contract of sale at an entire sum; *Dykes v. Blake*, 4 *N. C.* 463; *Accord. Shackleton v. Sutcliffe*, 1 *De G. & Sm.* 609. A vendee of land described as copyhold is not compellable to accept freehold, notwithstanding a provision that errors in description should not vitiate the sale; *Ayles v. Cox*, 16 *Beav.* 23.

When more than one person are employed by the vendor to bid at a sale by auction, this will be deemed a fraud; *Crowder v. Austin*, 3 *Bing.* 368; *Wheeler v. Collier*, *Mood. & M.* 126. And the employment of a single puffer when the sale is "without reserve," will avoid it at law; *Thornett v. Haines*, 15 *M. & W.* 367. And where the sale is not advertised as "without reserve," the employment of a single puffer unknown to the bidders, is evidence for the jury to sustain a plea of fraud; *Green v. Baverstock*, 14 *C. B., N. S.*, 204; 32 *L. J. (C. P.)* 181. In *Warlow v. Harrison*, in *Ex. Ch.*, 29 *L. J. (Q. B.)* 14, 1 *E. & E.* 309, it was considered that, where the auctioneer after the bidding of the plaintiff knocked down the lot to the owner's bidding, it having been advertised by the auctioneer as a sale "without reserve," this rendered the auctioneer liable to an action by the bidder, for not having sold without reserve according to his contract.

Dental of title.] The defendant may insist upon a defect in the plaintiff's title; and a court of law will enter into equitable objections to it; *Maherley v. Robins*, 5 *Taunt.* 625; *Elliott v. Edwards*, 3 *B. & P.* 181. It is said that the purchaser may reject a questionable title; for he may call for a "clear title," and is not bound "to buy a lawsuit;" *Hartley v. Pehall, Peake, N.P.* 131. But *Hartley v. Pehall* was well decided without establishing this proposition. It is true that equity will not enforce acceptance of a questionable title; but at law the vendee must be satisfied with a title which the court adjudges to be good; *Romilly v. James*, 6 *Taunt.* 263; *Boyman v. Gutch*, 7 *Bing.* 379. But in *Jeakes v. White*, 6 *Ex.* 873, 21 *L. J. (Ex.)* 265, the majority of the court were of opinion that a purchaser might repudiate, in an action at law, as not "a good title," a title on which a court of equity would not decree specific performance. *Boyman v. Gutch* was not, however, cited in that case. Where the title is dependent on a question of fact on which a reasonable doubt exists, *e.g.*, whether a piece of the land purchased had been before conveyed to a stranger, the vendee may repudiate the sale; *Simmons v. Heseltine*, 28 *L. J.*

(C. P.) 129; 5 C. B., N. S., 554; in which *Jeakes v. White* and *Boyman v. Gutch* are discussed.

Where the property consisted of several parcels sold by auction in distinct lots to one vendee, Lord Kenyon is said to have held that, the vendor having made out a title to a single lot only, the whole contract might be rescinded, considering the purchase of the several lots as having been made with a view to a joint concern; *Chambers v. Griffiths*, 1 Esp. 150. But it has been held that, where several lots are knocked down to a bidder at an auction, and his name is marked against them in the catalogue, a distinct contract arises on each lot; *Roots v. Lord Dormer*, 4 B. & Ad. 77; and *Chambers v. Griffiths* cannot be maintained as an authority, except where it can be shown that there was an agreement that the purchaser was not to take any of the lots unless he should obtain them all. See the cases collected and discussed in *Casamajor v. Strode*, 2 Myl. & K. 724. In *Dykes v. Blake*, 4 N. C. 463, the vendee was allowed to repudiate two lots, bought separately, because they were made the subject of one entire contract by a written agreement signed at the auction.

The purchaser may refuse to take a conveyance executed under a power of attorney; for it multiplies his proofs; *Anonymous case*, cited by Lord Kenyon in *Coore v. Callaway*, 1 Esp. 115. And, except under special circumstances, the vendee may reasonably require that the vendor shall execute the conveyance in his presence, or in presence of a witness named by vendee; *Viney v. Chaplin*, 27 L. J. (Ch.) 434; 2 De G. & J. 468; 4 Drew. 237.

Vendee against Vendor.

If the vendor refuses, or is unable, to complete his contract, the purchaser may either declare specially on the contract; or, in case he has made a deposit or paid part of the purchase money, and has not taken possession, may recover it back in an action for money had and received. So if a fraud has been practised on him by the vendor to induce him to buy, the vendee may rescind the contract, and sue for the deposit; *Thornett v. Haines*, 15 M. & W. 367.

In a special action on the contract by the purchaser, he must prove the contract on a plea of non-assumpsit, or other appropriate denial; and by other pleas he may be put to prove the performance of conditions precedent, and all other matters denied by the defendant. When the defendant's title is objected to, it will not be enough to prove that the title has been deemed by conveyancers to be insufficient; the title must be proved to be bad; *Cumfield v. Gilbert*, 4 Esp. 221. When an abstract is delivered by the vendor, he must be able to verify it by the title deeds in his possession; and time is, at law, of the essence of the contract, and unless a good title is made out at the day fixed, the purchaser will be entitled to rescind the contract; *Cornish v. Rowley*, Selw. N. P. 203; *Berry v. Young*, 2 Esp. 640 (n). If no time is mentioned for the vendor to make out a good title, he must be allowed a reasonable time; *Sansom v. Rhodes*, 6 N. C. 261; but Lord St. Leonards (*V. & P.* 259) adds *sed quære*. Unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as the title of the vendor to the lease; *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 M. & G. 410. And where, on a sale by auction of leasehold property,

one of the conditions of sale was, "that the vendor should not be obliged to produce the lessor's title," it was held that the vendee, having discovered *aliunde* certain defects in the lessor's title, might insist on those defects; *Shepherd v. Keatley*, 1^o C. M. & R. 117. So if the vendor stipulate that he shall not be bound to produce title prior to the last conveyance, if he produce an earlier title bad on the face of the abstract, the vendee may reject it; *Sellick v. Trevor*, 11 M. & W. 722. But there is no implied contract on the sale of an agreement for a lease, that the lessor has power to grant it; for this is only a sale of the vendor's interest such as it is; *Kintrea v. Preston*, 1 H. & N. 357; 25 L. J. (Ex.) 287. When the title, as stated in the abstract, is objected to, the vendor may compel delivery of a particular of every matter of fact relied upon as an objection; but not of matter of law; *Roberts v. Rowlands*, 3 M. & W. 543. If no particular has been given, and the pleadings are general, the plaintiff will be at liberty to prove any infraction of the conditions of sale; *Squire v. Tod*, 1 Camp. 293; see *Todd v. Hoggart*, M. & Mood. 128, *post*, p. 160.

When the plaintiff seeks to recover the deposit, he must prove payment of it to the defendant. A payment to the agent of the vendor is, in law, a payment to the principal, and, in an action against the latter for the recovery of the money, it is immaterial whether it has actually been paid over to him or not; *Duke of Norfolk v. Worthy*, 1 Camp. 337. But if the deposit has been paid to the auctioneer, an action for it will lie against him *before* payment over to his principal, for he is in the nature of a stakeholder; *Burrough v. Skinner*, 5 Burr. 2639; or if he has paid it over after notice of the defect in the title; *Edwards v. Hodding*, 5 Taunt. 815; and even, it would seem, *after* payment over to the principal without notice; for he ought to keep the deposit until the sale is complete and it appears to whom it ought to be paid; *Burrough v. Skinner*, 5 Burr. 2639; *Gray v. Gutteridge*, 1 M. & R. 614. Where an auctioneer does not disclose the name of his principal, an action will lie against him for damages for the breach of contract; *Hanson v. Roberdeau, Peake*, N. P. 120. And after the purchaser has recovered the deposit only from the auctioneer, he may, in a special action against the vendor, recover interest and the expenses of investigating the title; *Farquhar v. Farley*, 7 Taunt. 592.

To enable the purchaser to maintain an action for money had and received to recover the deposit, the contract must be disaffirmed *ab initio*. Some of the grounds upon which it may be rescinded are stated *suprà*, under the head of defences in action by vendor against vendee. If the purchaser has taken possession of the premises under the contract, he has adopted the contract, and cannot disaffirm it afterwards by quitting the premises; as the parties cannot be put in the same situation in which they before stood; his remedy is then on the contract itself; *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Ex. 783. If the original contract be void, as if it be a parol agreement for the sale of land, the purchaser can only recover his deposit; for he cannot sue upon the special contract; *Walker v. Constable*, 1 B. & P. 306. Where the vendor was unable to complete his contract on the day named, and it also appeared that the purchaser was not prepared to pay the purchase-money on that day, Best, C. J., held that the agreement was entirely vacated and the purchaser entitled to recover his deposit; *Clarke v. King, Rye & Mood*.

394. If no time is appointed for completion, the vendee, after unreasonable delay, may rescind the contract upon notice to the defendant; *Benson v. Lamb*, 9 *Beav.* 502.

As a general rule, it is the vendee's duty to tender a conveyance to the vendor for execution by him; *Poole v. Hill*, 6 *M. & W.* 835. Yet, even when he is bound by the express terms of the contract to tender one, if a bad title be produced he may maintain an action for the recovery of his deposit without tendering it; *per* Lord Ellenborough, in *Seaward v. Willock*, 5 *East* 202, and in *Lowndes v. Bray*, *Sugd. V. & P.* 364. So where the vendor has, by selling the estate, incapacitated himself from executing a conveyance to the purchaser, further trouble and expense on the plaintiff's part are unnecessary, and he may maintain an action without tendering a conveyance, or the purchase money; *Lovslock v. Franklyn*, 8 *Q. B.* 371. And if the vendor, when called upon for an abstract of his title, though before the time when the conveyance was to be made, appears to have no title, the vendee may rescind the contract; *Roper v. Coombes*, 6 *B. & C.* 534. The plaintiff cannot, at the trial, insist upon any objection to the title as stated in the abstract, which he neglected to take at the time of rescinding the contract, and which might have been remedied by the vendor if taken before; *per* Lord Tenterden, *C. J.*, in *Tholl v. Hoggart*, *Mood. & M.* 128.

Damages.] With regard to the damages, it seems that the purchaser may recover, in a special action against the vendor, the deposit with interest, and the expenses of investigating the title, searching for judgments, &c.; *Hodges v. Litchfield*, 1 *N. C.* 492; *Turner v. Beaurain*, *Sugd. V. & P.* 362; *Farquhar v. Farley*, 7 *Taunt.* 592. And such expenses as a solicitor's bill may be recovered under an averment that plaintiff "has been put to great expenses, to wit, &c. in and about investigating the title," &c., although not actually paid; *Richardson v. Chasen*, 10 *Q. B.* 756. If the purchase money has been lying ready without any interest being made of it, and it was reasonable to keep it so lying, interest may be recovered as damages; *Sherry v. Oke*, 3 *Dowl.* 361. But a person, who has agreed to advance a sum on a mortgage, cannot recover interest on it where the negotiation fails for want of title, unless there be a special contract to pay it; *Sweetland v. Smith*, 1 *C. & M.* 585.

The purchaser cannot recover expenses incurred previously to entering into the contract; nor the expenses of a survey of the estate made before he knows the title; nor the expense of a conveyance drawn in anticipation; nor the extra costs of a suit for specific performance brought by the vendor; nor losses on the resale of stock prepared for the farm; *Hodges v. Litchfield*, 1 *N. C.* 492. Nor can the vendee recover any expenses incurred in preparing a conveyance after the defect in title was discovered; *Pounsett v. Fuller*, 17 *C. B.* 660; 25 *L. J. (C. P.)* 145; or in further fruitless negotiations; *Skies v. Wild*, 1 *B. & S.* 587; 30 *L. J. (Q. B.)* 325; *S. C.* in *Ex. Ch.*, 32 *L. J. (Q. B.)* 375; 4 *B. & S.* 421. And where a lessee, with power to alter and improve, had an option to purchase, and, after laying out money in improvements, elected to purchase, and the title proved bad, he was held not entitled as damages to the expense of the improvements; *Worthington v. Warrington*, 8 *C. B.* 134; 18 *L. J. (C. P.)* 350. Where the defendant agreed to demise lands to the plaintiff and to deduce a good title thereto, and the

plaintiff had formed a company to establish certain works on it, and the title proved to be a bad one: it was held, that the plaintiff might recover the expenses of the agreement, of investigating the title and endeavouring to procure a good one and to obtain the lease; but not the expense of raising the purchase money with interest, nor of forming, establishing, and registering the company, nor the profits that would have accrued either to the company from the lease, or to the plaintiff as their solicitor in carrying their project into effect; the latter heads of expense being either premature or speculative; *Hanslip v. Padwick*, 5 Ex. 615.

The vendee is not in general entitled to recover compensation for loss of the goodness of his bargain, where there has been no fraud, and the vendor is incapable of making a title; *Fleureau v. Thornhill*, 2 W. Bl. 1078; *Walker v. Moore*, 10 B. & C. 416. But where a person, who had contracted for the purchase of an estate, but had not obtained a conveyance or possession, put it up for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do because his vendor never made a conveyance to him, it was held that the purchaser of certain lots might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss he had sustained by not having the contract carried into effect; *Hopkins v. Grazebrook*, 6 B. & C. 31. In that case the vendor was in fault, by representing himself to be the owner of the property, when, in fact, and to his own knowledge, he was not so; by which it has been distinguished from the case of *Walker v. Moore*, 10 B. & C. 416. The Court of Exchequer, in *Robinson v. Harman*, 1 Ex. 850, 18 L. J. (Ex.) 202, followed the decision of *Hopkins v. Grazebrook*. But the propriety of the exception which these cases engrafted on the rule in *Fleureau v. Thornhill*, has been questioned by Lord St. Leonards (see V. & P. 14th edit. p. 359), under any circumstances short of fraud: and the same doubts have been expressed by Williams, J., in *Pounsett v. Fuller*, 17 C. B. 660, 25 L. J. (C. P.) 145, and by the Courts of Queen's Bench and Exchequer Chamber, in *Sikes v. Wild*, 1 B. & S. 587, 30 L. J. (Q. B.) 325, 4 B. & S. 421, 32 L. J. (Q. B.) 375. In *Pounsett v. Fuller*, it was held that the defendant, who had contracted to sell a right of shooting to the plaintiff, but was unable to complete the sale by reason of his own right not having been by a conveyance under seal, had reasonable grounds for supposing he had title, and was therefore not liable to compensate the plaintiff for the loss of his bargain; and in *Sikes v. Wild*, the general proposition was affirmed, that in no case is a vendor, acting *bonâ fide*, and having reasonable grounds to believe that he can make a title, on failing to do so, liable to the vendee for the loss of the bargain.

Where the vendee filed a bill in Chancery for specific performance, which was dismissed in consequence of the defective title, without costs, he was not permitted to recover these costs by an action against the vendor for breach of contract; *Madden v. Fyson*, 11 Q. B. 292.

The expenses of investigating the title cannot be recovered under a count for money paid; *Camfield v. Gilbert*, 4 Esp. 222. The money counts are, in general, only available to recover back a deposit or part payment. Where such action is brought against an auctioneer, as stakeholder, no previous notice to him is necessary; *Duncan v. Cufe*, 2 M. & W. 244.

ACTION FOR USE AND OCCUPATION.

This action is generally considered as grounded on stat. 11 Geo. 2, c. 19, s. 14, by which it is enacted, that it shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments *held or occupied* by the defendants, in an action *on the case* [i.e., *assumpsit*] for the use and occupation of what was so held or enjoyed; and if, on the trial of such action, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered. But the action of *debt* for rent on a contract for use and occupation lies at common law and not upon this statute; *Egler v. Marsden*, 5 Taunt. 25; *Gibson v. Kirk*, 1 Q. B. 850; and *per* Bramwell, B., in *Churchward v. Ford*, cited *infra*.

On the plea of *nunquam indebitatus* the plaintiff must prove an occupation of premises of the plaintiff by the defendant with the permission of the plaintiff, and the amount of rent either expressly reserved, or due on the footing of a *quantum meruit*; see 6 R. H. T. 1853.

Plaintiff's title.] If the defendant has come in under the plaintiff, or has acknowledged his title, by the payment of rent to him or otherwise, he will not be permitted to impeach it at the trial; *Syllivan v. Stradling*, 2 Wils. 208; *Cooke v. Loxley*, 5 T. R. 4; *Phipps v. Sculthorpe*, 1 B. & A. 50; and it is not material in such case that the plaintiff should have the legal estate; *Hull v. Vaughan*, 6 Price, 157. Thus, if *cestui que trust* demises, he is the person to sue for the rent, and not the trustee, though the latter may have given notice to defendant to pay to him; *Churchward v. Ford*, 26 L. J. (Ex.) 354; 2 H. & N. 446. But where the defendant did not come in under the plaintiff, the plaintiff can only recover rent from the time that the legal estate vested in him; *Cobb v. Carpenter*, 2 Camp. 13 (n). Where A., after letting defendant into possession on an agreement for a future lease and receiving rent from him, mortgaged the premises to the plaintiff, who gave notice to the defendant of the mortgage, it was held that the plaintiff might recover in this form of action rent accruing due for a half-year, subsequent to the mortgage and during the currency of which the notice was given; *Rawson v. Eicke*, 7 Ad. & E. 451. A defendant, whose tenancy began under A., and who has since paid rent to the *cestui que trust* under A.'s will, cannot set up the want of the legal estate to an action for use and occupation by the *cestui que trust*, though the fact is disclosed by the plaintiff's evidence; *Dolby v. Iles*, 11 Ad. & E. 335. The assignee of the landlord of A., who holds under a lease not under seal for a term certain, may sue A., in this action, although there has been no recognition of tenancy or promise as between him and the assignee; at least where the grant by the assignor was "for himself and assigns;" *Standen v. Christmas*, 10 Q. B. 135. There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attained by mistake to one who has no title; in the former case the tenant cannot, except under very special circumstances, dispute the title; in the latter he may; *per* Bayley,

J., in *Cornish v. Searell*, 8 B. & C. 475; citing *Rogers v. Pitcher*, 6 Taunt. 202, and *Gravenor v. Woodhouse*, 1 Bing. 38; and see the cases cited *post*, Title,—*Replevin*; *Evidence on plea of non demisit or non tenuit*. Thus where a tenant took premises from "A. and B., for and on behalf of the trustees of the joint estate of C. and D.;" and it appeared at the trial, on the evidence of the plaintiffs (who described themselves in the declaration as joint trustees), that they were trustees of C. only; it was held that the tenant was estopped from taking advantage of this variance; *Fleming v. Gooding*, 10 Bing. 549. So where A. hired apartments by the year from B., and B. afterwards let the entire house to C., who sued A. for use and occupation, it was held that A. could not impeach C.'s title, by showing that B. had no title; *Rennie v. Robinson*, 1 Bing. 147. But where land, belonging to a parish, was occupied by A., and he paid rent to the churchwardens, who executed a lease of the same land for a term of years to B., and gave A. notice of the lease; in an action for use and occupation by B. against A., it was held that A. was not precluded from disputing B.'s title, by objecting that B. could not derive a valid title from the churchwardens; *Phillips v. Pearce*, 5 B. & C. 433.

In general the title of the plaintiff is established by the production of a writing or agreement, which is proved in the usual manner, &c.; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him, or submitted to a distress by him; *Panton v. Jones*, 3 Camp. 372. Notice to produce the receipts for rent, or the notice of distress, if any, should in such cases be given by the plaintiff. Where the defendant occupied the plaintiffs' land under doubtful powers of a local act, and, upon a dispute respecting the right of the plaintiffs to demand rent, a decree for payment was made in an amicable suit in Chancery, in which the defendant acquiesced for several years, it was held that he could not afterwards dispute his liability to rent in an action for use and occupation; *Allason v. Stark*, 9 Ad. & E. 253. Payment of an annual sum by defendant and his predecessors, occupiers, to the overseers of the parish for a century, as for "rent of common lands," is evidence of a rent service and not a rent charge, especially if the defendant has his title deeds in court and declines to produce them; *Hardon v. Hesketh*, 4 H. & N. 175; 28 L. J. (Ex.) 137. See however *Doe v. Johnson*, Gow, 173; in which Holroyd, J., held that such payment is evidence only of a right to the rents, and not to the land, and that the presumption is that they were quit rents; this case was not cited in *Hardon v. Hesketh*. If it appears from the plaintiff's witnesses that the defendant holds under a written agreement not produced, or which, when produced, cannot be read for want of a stamp, the plaintiff will not be allowed to give parol evidence of the holding; *Brewer v. Palmer*, 3 Esp. 213; *Ramsbottom v. Mortley*, 2 M. & S. 445. But if the plaintiff has made out a *prima facie* case, and the defendant seeks to show that he holds under a written agreement, he must produce the instrument duly stamped, or his objection is untenable; *Fielder v. Ray*, 6 Bing. 332; *R. v. Padstow*, 4 B. & Ad. 208. A parol demise for all the residue of the lessor's term, it being the intention of the parties to create the relation of landlord and tenant, will operate as a lease so as to enable the lessor to maintain an action for use and occupation, or debt for rent; *Poultney v. Holmes*, 1 Str. 405; *Baker v. Gostling*, 1 N. C. 19; *Pollock v. Stacy*, 9 Q. B. 1033.

Defendant's occupation.] It is *primâ facie* sufficient for the plaintiff to prove that the defendant occupied the premises during the preceding quarter: and the continuance of the occupation or holding will be presumed till the contrary appears; *Harland v. Bromley*, 1 Stark. 455; *Ward v. Mason*, 9 Price, 291. A constructive occupation, or holding, of the premises by the defendant is sufficient; an occupation which he might have had, if he had not voluntarily abstained from it; *Per Gibbs, C. J., in Whitehead v. Clifford*, 5 Taunt. 519; *Pinero v. Judson*, 6 Bing. 206; *Pollock v. Stacy*, 9 Q. B. 1033. The assignee of the reversion cannot, it would seem, maintain this action for rent in part incurred before the assignment; for there was then no occupation of the plaintiff's property by his permission; *Mortimer v. Preedy*, 3 M. & W. 602. An adverse occupation by the defendant will not entitle the owner to sue in this form of action; as where the vendor remains in possession after the sale, without any agreement with the vendee; *Tew v. Jones*, 13 M. & W. 12. Indeed, the stat. 11 Geo. 2, c. 19, s. 14, contemplates the relation of landlord and tenant, and there must be some evidence of a holding by the plaintiff's permission. And where a trespasser entered on land after a mortgage of it to the plaintiff, who had never taken possession nor obtained a judgment in ejectment, it was held that he could not recover rent in this form of action, as at all events he was not in a position to maintain trespass; but whether he could have waived the trespass and brought use and occupation* the court considered as doubtful; *Turner v. Cameron's Coal Co.*, 5 Ex. 932; 20 L. J. (Ex.) 71. But a tenancy at sufferance is enough to support this action; *Hellier v. Sillcox*, 19 L. J. (Q. B.) 295; and where a lessee under a lease from the plaintiff continues to hold after the expiration of it, claiming to hold as tenant to a stranger, whose title however is not shown, the plaintiff may treat him as tenant at sufferance, and sue him for use and occupation; *Bayley v. Bradley*, 5 C. B. 396; 16 L. J. (C. P.) 206. If A. agrees to let lands to B., who permits C. to occupy them, B. may be sued by A. for use and occupation; *Bull v. Sibbs*, 8 T. R. 327. After an agreement between the plaintiff and defendant for a lease, the receipt by the defendant of the rents and profits, or an attornment from an under-tenant, is proof of use and occupation by the defendant; *Neal v. Swind*, 2 C. & J. 377. And where an under-tenant held over after the end of the lessee's term against the lessee's will, who however afterwards distrained upon him for rent due before the end of the term, the lessee was held liable to the lessor for use and occupation for such time as the under-tenant actually occupied; *Ibbs v. Richardson*, 9 Ad. & E. 849; see *Lery v. Lewis*, 6 C. B., N. S., 766; 28 L. J. (C. P.) 304; S. C. in Ex. Ch., 30 L. J. (C. P.) 141; 9 C. B., N. S., 872. But there must be an occupation or holding actual or constructive; therefore a tenant who had agreed to take premises but has not entered, is not liable to an action for use and occupation; *Edge v. Stafford*, 1 C. & J. 391; *Lowe v. Ross*, 5 Ex. 553; 19 L. J. (Ex.) 318; *Towne v. D'Heinrich*, 13 C. B. 892; 22 L. J. (C. P.) 219.

A tenant, who has quitted in pursuance of a parol licence from his landlord, remains liable as occupier; *Mollett v. Brayne*, 2 Camp. 103; *Matthews v. Sawell*, 8 Taunt. 270; or after an insufficient notice to quit, although at first acquiesced in by the landlord; *Johnstone v. Huddleston*, 4 B. & C. 922; *Bessell v. Landsberg*, 7 Q. B. 638; even though the landlord, on the tenant leaving the house vacant, puts

up a bill in the window for the purpose of getting another tenant for the premises; *Redpath v. Roberts*, 3 *Esp.* 225. But not so, if the landlord has, with the assent of the tenant, accepted another person as tenant, and he has entered, for this operates as a surrender in law of the first tenant's term; *Thomas v. Cook*, 2 *B. & A.* 119; *Nickells v. Atherstone*, 10 *Q. B.* 944; 16 *L. J. (Q. B.)* 371. And the operation of such acceptance as a surrender applies where there was a lease under seal; *Darison v. Gent*, 1 *H. & N.* 744; 26 *L. J. (Ex.)* 122; and possession of the premises by the new tenant, and the fact of a new lease having been granted and the old one delivered up and cancelled, is evidence of the assent of the first tenant; *S. C.*; *Walker v. Richardson*, 2 *M. & W.* 882. If the landlord has accepted the key of the premises, this in itself is a surrender, and the acceptance of another tenant is immaterial; *Dodd v. Acklom*, 6 *M. & G.* 672; so if after refusal of the key which the tenant leaves behind, the landlord make use of it and enters the premises and puts up a board "to let;" *Phené v. Popplewell*, 31 *L. J. (C. P.)* 235; 12 *C. B., N. S.*, 334; see *Lyon v. Reed*, 13 *M. & W.* 285, and the notes to *Duchess of Kingston's case*, 1 *Sm. L. C.* 713, *seqq.* A., the tenant of a house, three cottages, and a stable and yard, at an entire rent for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house and cottages being in the possession of under-tenants. The landlord accepted from A. a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. The occupiers of the cottages having left them after the assignment and before the expiration of the term, the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold. It was held that this was a surrender by A. by operation of law of all the premises; *Reeve v. Bird*, 1 *C. M. & R.* 31. Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of the current year without giving a notice to quit, and the landlord, before the expiration of the next half-year, let the premises to another tenant; it was held that the landlord was not entitled to recover rent from the first tenant, from the expiration of the current year to the time when they were relet to the second tenant; *Hall v. Burgess*, 5 *B. & C.* 332; *Walls v. Atcheson*, 3 *Bing.* 462. So where rent is payable quarterly, if the tenant quits by consent in the middle of a quarter, the landlord cannot recover rent *pro rata*, either for the subsequent portion of the quarter or for that part of it during which the tenant occupied; *Whitehead v. Clifford*, 5 *Taunt.* 518; *Grimman v. Legge*, 8 *B. & C.* 324. Where a tenant, whose lease expired on Lady Day, paid a quarter's rent, after deducting a sum for repairs, on Midsummer Day, and was not afterwards seen on the premises, and a third person afterwards came into possession, and paid rent at irregular periods, a jury may presume that the landlord has accepted the latter as his tenant; *Woodcock v. Nuth*, 8 *Bing.* 170. Although the premises are burnt down, and remain unoccupied, the tenant still continues liable in this action for the rent subsequently accruing; for the premises continue to be "held" by the defendant; *Baker v. Holtzaffell*, 4 *Taunt.* 45; *Izon v. Gorton*, 5 *N. C.* 501. And the fact of the premises having been insured, and the landlord having received the insurance money and not applied it to reinstating the premises, affords no equitable defence to the action; *Lofft v. Dennis*, 1 *E. & E.* 474; 28 *L. J. (Q. B.)* 168.

Under the old Bankrupt Acts it was held that assumpsit for use and occupation lay against a lessee upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy and the occupation of the assignees during part of the time for which the rent accrued; *Boot v. Wilson*, 8 *Edst.* 311. But by 6 Geo. 4, c. 16, s. 75, and by 12 & 13 Vict. c. 106, s. 145, a bankrupt having or being entitled to any lease or agreement for a lease, shall not, if the assignees accept the same, be liable to pay any rent accruing after the date of the fiat, or petition; and, if the assignees decline it, shall not be liable in case he delivers up such lease or agreement to the lessor, or person agreeing to grant it, within fourteen days after he shall have had notice that the assignees have declined it. The Insolvent Debtors Acts contained similar provisions, but they are repealed by the 24 & 25 Vict. c. 134, s. 230, and sch. G.; and by sect. 69, the distinction between traders and non-traders is abolished. Rent being payable half-yearly under a parol demise, a fiat issued against the tenant in the middle of a half-year, and he offered to deliver up the premises to the landlord the day before the half-year expired, being within fourteen days of the refusal of the assignees to accept the lease; and it was held that the bankrupt could not be sued *pro ratâ* for use and occupation; the rent not being due till the last day, and an offer to deliver up the premises held under a parol demise being equivalent to a delivery of the lease; *Sluck v. Sharpe*, 8 *Ad. & E.* 366; but in *Briggs v. Sovey*, 8 *M. & W.* 729, it was doubted whether the then statute (6 Geo. 4, c. 16, s. 75) applied to a parol demise. Where the assignees entered and occupied premises in the middle of a year, it was adjudged that the action could not be maintained against them for the bankrupt's occupation as well as their own, unless the bankrupt's occupation was at their request; *Naish v. Tutlock*, 2 *H. Bl.* 319; but *Gibson v. Courthorpe*, 1 *D. & R.* 205, seems directly contrary to that case, which was not however cited.

Use and occupation does not lie against a husband for a half year's rent due in respect of premises occupied for part of that time by his wife before marriage, and which continued to be occupied by her for a short time after her marriage; *Richardson v. Hall*, 1 *B. & B.* 50. Where one of two executors of a deceased tenant for years enters into the premises, such entry does not enure as the entry of both so as to make them both liable in an action for use and occupation; *Nation v. Tozer*, 1 *C. M. & R.* 172. And where one only of two joint lessees occupies and holds over, the other cannot be charged for use and occupation after the end of their term; *Draper v. Crofts*, 15 *M. & W.* 166. But where two persons signed an agreement to become tenants, and one entered at the time named in it, it may be presumed that he entered under a parol demise from year to year upon the terms contained in the agreement, that is, on a demise to the two jointly, and therefore that he entered in respect of both; and use and occupation will lie against both; *Glen v. Dungey*, 4 *Ex.* 61; 18 *L. J. (Ex.)* 359.

If, after the determination of a lease, the tenant holds over and pays two quarters' rent, such payment is conclusive evidence of a new tenancy for a year; and he will be liable in an action for use and occupation for the whole year whether he occupies the premises or not; *Bishop v. Howard*, 2 *B. & C.* 100; and see *Bayley v. Bradley*, 5 *C. B.* 396, *ante*, p. 164. So executors of a tenant from year to year, holding on and paying rent, will hold on the terms of the former demise, and be personally liable, their continuing to occupy,

and the landlord abstaining from giving notice to quit, raising an implied promise on their part to abide by the terms of the original contract; *Buckworth v. Simpson*, 1 C. M. & R. 834. But where a tenant from year to year after the expiration of his landlord's title, of the duration of which he was aware, continued in possession for one quarter, and paid rent for that quarter to the party entitled in reversion, but quitted at the end of it, the payment is not evidence of a new or continuing tenancy from year to year, and the reversioner cannot sue the tenant for use and occupation beyond the quarter; *Freeman v. Jury*, M. & Mood. 19.

Use and occupation lies at the suit of a corporation; *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466; *Mayor of Stafford v. Till*, 4 Bing. 75; and against a corporation which has actually occupied under a parol contract; *Lowe v. London and North-Western Railway Company*, 18 Q. B. 632; 21 L. J. (Q. B.) 361; but if such a corporation ceases to occupy and quits without notice, it cannot be charged as on an implied engagement to hold from year to year; for such a contract must be by deed; and payment of a quarter's rent after quitting does not affect the question of further liability; *Finlay v. Bristol and Exeter Railway Company*, 7 Ex. 409; 21 L. J. (Ex.) 117. But where the corporation is a company within the Companies' Clauses Consolidation Act, 1845 (8 Vict. c. 16), sect. 97, which authorises parol contracts on behalf of the company by the directors, such contract may be implied; *Lowe v. London and North-Western Railway Company*, *supra*.

The relation of landlord and tenant may be implied. Thus where the defendant has entered under a contract for purchase which ultimately goes off, and his occupation has been a beneficial one, Lord Kenyon seemed to think that he might be liable in this action; *Hearn v. Tomlin*, 1 Peake, N. P. 192; and see the note, *Ibid*;—and he was held liable for the period since the contract was put an end to, in *Howard v. Shaw*, 8 M. & W. 118; but he is not liable, if the sale goes off for want of title, for use and occupation for the previous period, where there is no agreement about paying for such occupation; *Winterbottom v. Ingham*, 7 Q. B. 611. Where defendant entered into an agreement to take possession at a certain rent, the landlord to put the premises in repair, and the rent not to commence till the completion of the repairs, and he entered into immediate occupation of the premises, but quitted after six months in consequence of the repairs not being done; this was held evidence from which a jury might infer an implied agreement to pay what the occupation was worth; *Smith v. Eldridge*, 15 C. B. 236. A receiver in chancery put defendant into possession under an agreement with *himself*, as agent, for a term of years: The plaintiff, the *cestui que trust* of the estate, refused to sanction the agreement except as a yearly tenancy; and thereupon defendant said he should quit at a time named by him, and he did in fact quit at that time after five months' possession:—Held that the plaintiff could neither maintain an action for use and occupation nor for trespass; for there was no contract as between plaintiff and defendant, express or implied; nor was the plaintiff legal owner of the property; *Sloper v. Saunders*, 29 L. J. (Ex.) 275. The receiver in this case was agent for the trustees as well as receiver in chancery, and he professed to demise as "agent on behalf of the estate." If the plaintiff is a co-director with the defendant of a company which occupies the plaintiff's premises, he cannot sue defendant on an implied contract for use and occupation; *Chadwick*

v. *Clarke*, 1 C. B. 700. One tenant in common, who occupies a house alone, but without excluding his co-tenants, is not liable to pay rent to them; *Mahon v. Burchell*, 2 Phillips, 127.

Where A. agreed by letter with B. to take a lease of B.'s iron ore for forty years at a certain rent, engaging to work the veins in a certain manner; it was held that this was not a mere licence, but constituted an hereditament within 11 Geo. 2, c. 19, s. 14, in respect of which use and occupation would lie against A., who had worked under it; *Jones v. Reynolds*, 4 Ad. & E. 805. So this action lies against one who has used a fishery under an agreement or licence to fish with a rod and line; *Holford v. Pritchard*, 3 Ex. 793.

Damages.] Where a rent is mentioned in the lease or agreement, though the lease be void by the Statute of Frauds, it may be resorted to for the purpose of calculating the rent; *De Medina v. Polson*, Holt, N. P. 47. But where there is no express agreement as to rent; or where the terms of the agreement have been so far departed from that the stipulated rent is no just criterion of value, the value of the premises must be proved; *Tomlinson v. Day*, 2 B. & B. 680; and though a tenant, who holds over after the end of his term, is presumed to hold at the old rent, yet where a new tenant is substituted by consent, under an agreement for an increased rent at the end of the term, and this agreement is afterwards abandoned, but the new tenant continues to occupy after the term, no such inference arises, and it is for the jury to find the real annual value; *Mayor of Thetford v. Tyler*, 8 Q. B. 95.

Defence.

The plea of *never indebted* is now generally used for the old plea of *non-assumpsit*, and the distinction between the form of *assumpsit* and of debt seems to be practically abolished by the Common Law Procedure Act, 1852.

Under such general plea the express or implied contract upon which the action is tenable, or the facts which make the defendant liable, are put in issue.

When the action was brought in the form of *assumpsit*, proof of a lease under seal was held to defeat the action; but where the form was *debt*, it is not clear that such lease would have the same effect; for debt lay at common law; *Gibson v. Kirk*, 1 Q. B. 850. Since the Common Law Procedure Act, 1852, ground of special demurrer only is no longer tenable, and the declaration need not show whether it be in the form of a debt or *assumpsit*. It is, therefore, probable that the existence of a demise by deed will now be no objection on this issue at Nisi Prius. Even before the Act, it was held that an executory agreement, under seal, for a *future* lease, would not prevent the lessor from suing in this form; *Banister v. Usborne, Peake*, Add. Ca. 76.

Plaintiff's title expired.] Although the defendant cannot impeach the title of the plaintiff under whom he holds (*ante*, p. 162), yet he may show that it has expired; *England v. Slade*, 4 T. R. 682; *Doe v. Ramsbotham*, 3 M. & S. 516. Ouster of the plaintiff's title by sequestration is also a defence on the general issue, in an action for use and occupation during the sequestration; *Powell v. Hibbert*, 15 Q. B. 129; 19 L. J. (Q.B.) 347. Where the defendant had come in

under the plaintiff, it was held not competent for him to show that the plaintiff's interest had been forfeited to the lord of the manor, to whom the defendant had since paid rent upon notice and demand made, unless he has expressly disclaimed the plaintiff's title, and commenced a fresh holding under the new landlord; *Balls v. Westwood*, 2 Camp. 11. See *post*, *Replevin, Evidence on Non Demisit*, &c. In *Waddilore v. Barnett*, 2 M. C. 538, it was held that the defendant might give in evidence, on non-assumpsit, that the plaintiff had mortgaged the premises before the defendant became tenant, and that the mortgagee had claimed rent becoming due *after* notice; but that payment, on such notice, of rent due *before* the notice (if a defence at all, as to which see the judgment at p. 543; and *per* Patterson, J., in *Wilton v. Dunn*, 17 Q. B. 300), must be specially pleaded; *Newport v. Hardy*, 2 Dougl. & L. 921; 14 L. J. (Q. B.) 242; *accord*. And it is settled now that a mere *claim* of possession or rent is no defence at all, if the defendant has not, under compulsion, either actually given up possession, or paid the rent to the owner of the legal estate; *Emery v. Barnett*, 4 C. B., N. S., 423; *Hickman v. Machin*, 4 H. & N. 716; 28 L. J. (Ex.) 310; *Wilton v. Dunn*, 17 Q. B. 294; 21 L. J. (Q. B.) 60.

Defendant's occupation determined.] As to notice to quit, see *post*, *Ejectment by Landlord*. An agreement, that on the tenant's quitting the rent shall cease, and an acceptance of the key by the landlord, or a letting of the premises by him to a third person, is (as already stated, *ante*, p. 165) a sufficient defence under non-assumpsit; *Whitehead v. Clifford*, 5 Taunt. 518; *Hall v. Burgess*, 5 B. & C. 332; *Grimston v. Legge*, 8 B. & C. 324; *Walls v. Atcheson*, 3 Bing. 162. But delivery of the keys by an agent of the defendant to a servant at the plaintiff's house, is not alone sufficient to prove an acceptance by the plaintiff; *Harland v. Bromley*, 1 Stark. 455; *Cannan v. Hartley*, 9 C. B. 634; 19 L. J. (C. P.) 323.

Eviction.] An eviction by the landlord determines the occupation, and may, for that reason, be shown under *non-assumpsit*; *Prentice v. Elliott*, 5 M. & W. 606; and where the premises are let at an entire rent, an eviction from part, if the tenant quits the residue, is a complete defence; *Smith v. Raleigh*, 3 Camp. 513. If the tenant continues in possession of the residue, it has been said that he is liable *pro tanto* on a *quantum meruit*; *Stokes v. Cooper*, 3 Camp. 514, n.; but eviction from any part by the lessor is a suspension of the whole rent while the eviction lasts; see *dict. per* Parke, B., in *Reeve v. Bird*, 1 C. M. & R. 36; *Neale v. Mackenzie*, 1 M. & W. 747; *Co. Litt.* 148 b., and other authorities cited, 1 Wms. Sand. 204, n. (2); *Morrison v. Chadwick*, 7 C. B. 266; 18 L. J. (C. P.) 189; but the tenant is not discharged from covenants other than for the payment of rent; *Ibid.* An eviction of the under-tenant is an eviction of the tenant; and the landlord having given notice to an under-tenant of the defendant to quit, who quitted accordingly, and the premises having remained unoccupied for a year, the landlord cannot recover for that year against the defendant, although he has again under-let the premises; *Burn v. Phelps*, 1 Stark. 94. But a forcible expulsion of a man put into the plaintiff's house to keep possession of apartments for the defendant (tenant), and who was personally objectionable to the plaintiff as being an improper and unfit person, was held no eviction

of the defendant from the apartments; the jury finding that plaintiff did not intend to dispossess the defendant; *Henderson v. Mears*, 28 *L. J. (Q. B.)* 305.

Defendant treated by plaintiff as a trespasser.] If the landlord has treated the tenant as a trespasser, he cannot afterwards recover against him in this action. Thus if he has *recovered* against him in ejectment, he cannot sue, in this action, for the rent accruing *after* the day of the demise; for, by suing for the tort, he has precluded himself from suing *ex contractu*; *Birch v. Wright*, 1 *T. R.* 378; *Bridges v. Smyth*, 5 *Bing.* 410. And the mere bringing of an ejectment by service of the declaration for a forfeiture will prevent the lessor of the plaintiff from suing for rent subsequently due, this being an election on the part of the lessor to determine the lease; and this defence is open under the general issue; *Jones v. Carter*, 15 *M. & W.* 718; *Accord. Dendy v. Nicholl*, 4 *C. B., N. S.*, 376; 27 *L. J. (C. P.)* 220.

No beneficial occupation.] Where the defendant proved, that he took possession as administrator, that the premises had been productive of no profit to him, and that eight months after the intestate's death he had offered to surrender them to the plaintiff,—this was held a good defence on the general issue, in an action against the defendant in his own right; *Remnant v. Bremridge*, 8 *Taunt.* 191; 2 *B. Moore*, 94. This case has, however, been doubted; see *Hornidge v. Wilson*, 11 *Ad. & E.* 652. Non-compliance by the landlord with an agreement to do repairs, whereby the premises had become unfit for profitable occupation, and the defendant quitted them on that account, is no defence; *Surplice v. Farnsworth*, 7 *M. & G.* 576. If a furnished house be let in an untenable state by reason of vermin, so that the plaintiff is obliged to leave, this is a defence under the general issue; *Smith v. Marrable*, 11 *M. & W.* 5. But if land be let for pasturage, and the grass turns out to have been poisoned, but without the landlord's knowledge, the tenant is liable for the whole rent agreed, although he occupied for only a part of the time; *Sutton v. Temple*, 12 *M. & W.* 52; *Smith v. Marrable* being distinguished as a letting of a mixed nature,—a house and furniture.

Payment.] Payment by the defendant to his lessor, before he had notice of an assignment of the premises by him to the plaintiff, is a good plea; *Cook v. Moylan*, 1 *Ex.* 67; 16 *L. J. (Ex.)* 253.

Statute of Limitations.] The statute of limitations is a good defence in an action against a person who has been tenant from year to year, but who has not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy can be inferred; though no notice to quit has been given; *Leigh v. Thornton*, 1 *B. & A.* 625.

Illegality.] It is a good defence that the premises have been knowingly let by the plaintiff to the defendant for an immoral purpose; *Crisp v. Churchill*, cited 1 *B. & P.* 340; or the occupation knowingly allowed to continue for such a purpose; *Jennings v. Throgmorton, Ry. & Mood.* 251. And this defence must now be pleaded specially.

Distress.] Parke, B., expressed an opinion that it was no defence that the landlord has distrained goods to the full value of the rent, if he has sold them for a less sum; if he has sold them at too low a rate, the tenant's remedy is by action on the case; *Efford v. Burgess*, 1 *Mood. & Rob.* 23. And it is no defence that the tenant quitted, without giving notice, in the fear of a distress by the superior landlord; *Rickett v. Tullick*, 6 *C. & P.* 66.

ACTION FOR WASTE, BAD HUSBANDRY, ETC.

This action lies, where there is a tenancy, on a contract, express or implied.

The demise. Statute of Frauds.] By 29 Car. 2, c. 3, ss. 1, 2, all leases and terms, whether freehold or for years, not in writing and signed by the party making them, or their agents authorised by writing, shall have the effect of leases at will only, except leases not exceeding three years from the making, whereon the reserved rent is equal to two thirds of the improved value.

Section 4 of the same statute is stated *ante*, p. 150, and applies to contracts for creating a tenancy as well as to sales; but contracts for three years at rack rent are excepted out of section 4, as well as out of section 1, by the second section; *Bolton v. Tomlin*, 5 *Ad. & E.* 856.

The three years must be from the *making*, and not from the *commencement* only; *Tress v. Savage*, 4 *E. & B.* 36; *Baker v. Reynolds*, *Hill MSS. Sch. N. P.* tit. *Frauds (Statute of)*, p. 830. Special terms, not necessarily implied in a tenancy, may yet be incorporated with a parol demise by implication. Thus where a parol lease is bad for want of proper formalities required by section 1, yet if the lessee enters and pays rent, he becomes tenant from year to year on such of the terms of the invalid lease as are not inconsistent with such a tenancy; *Doe v. Bell*, 5 *T. R.* 471; *Richardson v. Gifford*, 1 *Ad. & E.* 52. Upon entry under a parol lease for more than three years, the lessee is strict tenant at will, and only becomes a yearly tenant on payment of rent; *Berrey v. Lindley*, 3 *M. & G.* 512; 2 *Sm. L. C.* notes to *Doe v. Bell*, and *Clayton v. Blakey*, pp. 93-105. The Act 8 & 9 Vict. c. 106, s. 3, now requires a *deed* wherever the Statute of Frauds requires a writing, otherwise the instrument is void as a lease. See the Statute, *post*, tit. *Ejectment by Landlord*. On an implied promise to hold on the terms of a former lease, in order to prove the terms the old lease must be produced duly stamped; *Walliss v. Broadbent*, 4 *Ad. & E.* 877; *ante*, pp. 116-7; and it is sufficient if the stamp be the proper one at the time of stamping, though at the time of execution a larger one was required; *Buckworth v. Simpson*, 1 *C. M. & R.* 834.

Waste.] The general rule as to waste at common law is that, in order to constitute it, there must be a consequent diminution of value of the estate; or an increased burden upon it; or an impairing of the evidence of title; *per* Patteson, J., delivering the judgment of the court, in *Huntley v. Russell*, 13 *Q. B.*, 588. It is not waste for a tenant to dig gravel from pits, or work mines already open on the

land when leased, if they are not excepted; *Co. Lit.* 54 *b*; *Bac. Ab. Waste (C.)* 3.

By 14 & 15 Vict. c. 25, s. 3, the tenant of a farm, who shall erect any buildings on the farm for agricultural or trade purposes with written consent of his landlord, will be at liberty to remove them, if the lessor shall not buy them within a month after notice of removal at a valuation fixed by referees, so that he do no injury to other buildings, or reinstate them as before.

Non-repair.] An obligation to repair is implied in every tenancy for years, whether the waste be permissive or wilful; 3 *Steph. Com.* 503—5. But the obligation of a strict yearly tenant is not so well defined. He is, at all events, bound to keep and leave the premises wind and water tight, and to use them in a “tenantlike” manner; *Horsefall v. Mather*; *Holt, N. P.* 7; *Ferguson’s case*, 2 *Esp.* 590; and, see generally, note (x) to *Pomfret v. Ricecroft*, 1 *Wms. Saund.* 323 *d*. If a tenant holds over after a lease with a covenant to keep in repair, he presumably continues liable in assumpsit for the same amount of repair; *Digby v. Atkinson*, 4 *Camp.* 275; *Arden v. Sullivan*, 11 *Q. B.* 832. But where A. held for a term two messuages of B., with a covenant to keep and leave them in repair, and during the term the two had been converted into a single house, and the whole was out of repair at the end of the term, and A. continued to occupy without a fresh lease, paying rent,—it was held that A. was not liable on an implied contract to put the premises in the same state as at the beginning of the term; *Johnson v. St. Peter, Hereford*, 4 *Ad. & E.* 520. An express contract to repair supercedes implied obligations of the like nature; *Standen v. Christmas*, 10 *Q. B.* 135. The law with regard to the obligation to repair, is further stated, *post*, under tit. *Action on Covenant*.

Good husbandry—Custom.] The obligation to good husbandry arises either from contract, or the mere relation of tenant, or from local custom, or other circumstances.

The custom is not necessarily excluded by proof of express agreement, if the two be consistent; *Hutton v. Warren*, 1 *M. & W.* 466. But a custom that an outgoing tenant should leave the manure, *being paid for it*, is excluded by an express stipulation that he should leave it without any mention of payment; *Roberts v. Barker*, 1 *C. & M.* 808. A tenant who holds over after a lease has expired, or enters under an agreement for a lease, holds subject to the terms of the lease as to the course of husbandry; *Roberts v. Barker*, 1 *C. & M.* 808; *Doe v. Amey*, 12 *Ad. & E.* 476. Though it is generally treated as a custom for the incoming tenant to pay the value of fallows, &c., to the outgoing tenant, yet when there is no incoming tenant, the contract implied by the custom is that the landlord shall pay the value; *Fariell v. Galskoin*, 7 *Ex.* 273; 21 *L. J. (Ex.)* 85. Where a tenant holds on the general terms of cultivating according to good husbandry, drainage may be part of it, and a custom for the outgoing tenant to charge his landlord with part of the expense of such drainage, though done without his knowledge, is reasonable and consistent with the terms; *Mousley v. Luddam*, 21 *L. J. (Q. B.)* 64.

Action by assignee of lessor.] The 32 *H.* 8, c. 34, does not extend to parol contracts; *Standen v. Christmas*, 10 *Q. B.* 135; but where the assignee can determine the tenancy, the continued holding of the

tenant is evidence of a fresh agreement between the parties to hold on the old terms; *Buckworth v. Simpson*, 1 C. M. & R. 844; *Arden v. Sullivan*, 14 Q. B. 632. In other cases the action must be in the name of the original lessor; *Bickford v. Parson*, 5 C. B. 920; 17 L. J. (C. P.) 192.

Breach.] As to proof of breach of contract to repair or to use good husbandry, see *post*, tit. *Action on Covenant*. To a breach for not keeping premises in good repair it is material and relevant for the defendant to show the bad state of the premises when demised; *Burdett v. Withers*, 7 Ad. & E. 136; and cases *post*, *Action on Covenant for not repairing*.

ACTION ON BILLS OF EXCHANGE.

Most of the following notes of evidence and decisions apply also to promissory notes, on which, however, a separate head will be found immediately after the present.

Form of bill.] The only restriction now in force as to a bill is, that it must not be for less than 20s.; 48 G. 3, c. 88, s. 2; see *post*, p. 214.

Production of the bill.] It is generally necessary for the plaintiff to produce the bill or note on which he has declared, whenever the form of pleading puts it in issue; and even when not in issue, interest due before action is not recoverable without production; *Hutton v. Ward*, 15 Q. B. 26. But where it appears that the bill has been lost or destroyed, as where the defendant tore his own note of hand, a copy is admissible; *Anon.* 1 Ld. Raym. 731; or other secondary evidence may be given where the issue is merely on the making or accepting, and there is no special plea that the instrument is lost or destroyed; *Blackie v. Pidding*, 6 C. B. 196; *Charnley v. Grundy*, 14 C. B. 608; 23 L. J. (C. P.) 121. By the 17 & 18 Vict. c. 125, s. 87, in any action founded on a bill or other negotiable instrument, the court or a judge may order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court, a judge, or a master, against the claims of any other person upon such negotiable instrument. But unless he avails himself of this enactment, the plaintiff is liable to be defeated in an action on a lost bill indorsed by the payee; though he has offered an indemnity to the defendant; *Pierson v. Hutchinson*, 2 Camp. 211; *Hansard v. Robinson*, 7 B. & C. 90; and though the bill was lost after it became due; *S. C.*; *Poole v. Smith*, Holt, N. P. 144; or was not indorsed when lost; *Ramuz v. Crowe*, 1 Ex. 167; 16 L. J. (Ex.) 280. And the loss of a negotiable bill is fatal to a recovery at common law, as well on the bill as on the debt for which it was given; *Crowe v. Clay*, 9 Ex. 604; 23 L. J. (Ex.) 150; whether the bill be indorsed or not; *S. C.* Even an express promise by the defendant to pay the bill will not entitle the plaintiff to recover on it; *Davis v. Dodd*, 4 Taunt. 602. But the payee of a note, not negotiable, may require payment without producing it; *Wain v. Bailey*, 10 Ad. & E. 616; and see *per Jervis*, C. J., in *Charnley v. Grundy*, 14 C. B. 614; 23 L. J. (C. P.) 122. Where the defendant had admitted that he owed the money due upon a bill

which was in his own possession, Abbott, C. J., held that such admission might be given in evidence under the common counts without a notice to produce the bill; *Fryer v. Brown, Ry. & Mood.* 145. A formal admission of the handwriting of the defendant to his acceptance is *prima facie* evidence of the regularity of such acceptance, and dispenses with production, if there be no "saving of just exceptions": *Chaplin v. Lery*, 9 *Ex.* 531; 23 *L. J. (Ex.)* 117; and see *Sharpley v. Rickard*, 2 *II. & N.* 57; 26 *L. J. (Ex.)* 302; where in an action by indorsement against drawer, the court doubted whether, on traverses only of presentment for acceptance and notice of dishonour, it was necessary to produce the bill.

Where a bill appears to be altered it lies upon the party producing it to show that the alteration was made under such circumstances as not to vitiate the instrument; *Henman v. Dickinson*, 5 *Bing.* 183; and it cannot be left to the jury on the mere inspection of the bill, without other proof, to decide whether it was altered at the time of making or at a subsequent period; *Knight v. Clements*, 8 *Ad. & E.* 215. Where a note payable at two months was dated, by mistake, 1st January, 1854, instead of 1855, but crossed by the maker before delivery, "duo 4th March, 1855," it was held that this operated as a correction, and that the note was rightly described as of 1855; *Fitch v. Jones*, 5 *E. & B.* 238; 24 *L. J. (Q. B.)* 293. See further, as to alterations on a bill, *ante*, pp. 133-4, and *post*, *Defence*, pp. 202-3.

Variance in names, &c.] Although variances are now in most cases amendable, it has been thought as well to retain some of the cases, as bearing on other important points. Where initials or some contraction are used for a Christian name in the bill itself, the same initials or contraction may be used in the process or declaration by the 3 & 4 W. 4, c. 42, s. 12; but it may become necessary to identify the parties so designated, and if the name be spelt wrong parol evidence is admissible to show who was intended; *Willis v. Barrett*, 2 *Stark.* 29. When a bill is drawn with the payee's name in blank, and in the declaration it is stated that A. B. (a *bona fide* holder who has inserted his own name) was payee, it is no variance; *Attwood v. Griffin, Ry. & Moo.* 425. In an action against several joint makers of a note, it is no objection, on the ground of variance, that one of them, who has let judgment go by default, has been sued by a wrong Christian name, the identity of the party, and service of the writ on him, being shown; *Dickinson v. Bowes*, 16 *East*, 110. The name of a party to the bill may be stated as on the bill, though it be not the real name; *Forman v. Jacob*, 1 *Stark.* 47.

The words "now overdue," in the form Sch. B., C. L. P. Act, 1852 (15 & 16 Vict. c. 76), are part of the description of the bill, and are put in issue by a traverse of the acceptance; and if the bill produced was not due at time of action brought, it is a fatal variance; *Hinton v. Duff*, 31 *L. J. (C. P.)* 199; 11 *C. B., N. S.* 724.

Variance in the place of payment.] If a bill is drawn payable at a particular place, this as against the drawer is part of the contract, and it is a variance to state it without that qualification; *Bayley on Bills*, 310. So where a bill was directed to "A. B., payable in London," payment in London was held part of the contract; *Hodge v. Fillis*, 3 *Camp.* 463. And where a note contains, in the body of it, a promise to pay at a particular place, it is a variance to omit the place; *Sanderson v. Bowes*, 14 *East*, 500; *Spindler v. Grellett*, 1

Ex. 384. But when the place of payment is only mentioned in the memorandum at the foot of a note, it is no variance to omit it; *Price v. Mitchell*, 4 *Camp.* 200; *Williams v. Waring*, 10 *B. & C.* 2; and this seems to be now settled; *Masters v. Barretto*, 8 *C. B.* 433; notwithstanding *Trecothick v. Edwin*, 1 *Stark.* 468, *contra*. And the reason is not because a writing in the corner cannot form part of the contract, but because from mercantile usage such a writing on a bill or note is a mere memorandum for the convenience of parties; *per curiam*, in *Warrington v. Early*, 2 *E. & B.* 766; 23 *L. J. (Q. B.)* 48. But where a note was alleged to be payable at a certain place, and it was only made so payable by a memorandum at the bottom, *Abbott, C. J.*, held it no variance; *Hardy v. Woodroffe*, 2 *Stark.* 319; *Sproule v. Legge*, 3 *Stark.* 157; and the reason seems to be that, if payable generally, it is payable at the place named; *Blake v. Beaumont*, 4 *M. & G.* 7.

Variance in consideration.] The words "value received," in a bill payable to the drawer's order, mean value received from the drawer by the drawee; and if stated to be value received by the drawer, it is a variance; *Highmore v. Primrose*, 5 *M. & S.* 65; *Priddy v. Henbrey*, 1 *B. & C.* 674. But where the bill is drawn payable to the order of a third person, "value received," it is no variance to state that it was for value received "by the drawer," as that is the most natural meaning; *Grant v. Da Costa*, 3 *M. & S.* 351. "Value received," in a note, imports value received from the payee; *Clayton v. Gosling*, 5 *B. & C.* 360.

Variance in the sum.] The money mentioned in a declaration on a bill means English money; if the bill is really for Irish or foreign money, it is a variance; *Kearney v. King*, 2 *B. & A.* 301; *Sproule v. Legge*, 1 *B. & C.* 16. A bill, expressed in words to be for the sum of 200*l.*, had 245*l.* in the margin in figures and a stamp sufficient for the larger amount; held that this was a bill for the less amount, and that parol evidence of error was inadmissible; for in case of discrepancy, the words in the body of the bill, and not the marginal figures, are to be attended to; *Saunderson v. Piper*, 5 *N. C.* 425.

Ambiguous instrument.] The following instrument, "I promise to pay to J. B. or order," &c., signed "J. B.," with J. G.'s name and address in the corner, and J. G.'s name written across it as an acceptance, and indorsed by J. B., may be treated by the holder as against J. B., as a note by him; *Edis v. Bury*, 6 *B. & C.* 433; and *semble*, at the holder's election, as a bill of exchange; *Ibid.* "Pay, without acceptance, to the order of J. C. F.," signed by the manager on behalf of a banking company at one place, and addressed to the company at another, is as against a partner in the company a promissory note; *Miller v. Thomson*, 3 *M. & G.* 576. "I promise to pay T. L., or order," signed H. O., with the name of the defendant on the left corner, and his acceptance across it: Held that T. L. might sue defendant as the acceptor of a bill of exchange; *Lloyd v. Oliver*, 18 *Q. B.* 471; and *semble*, the instrument might have been treated either as a bill or a note as against H. O.; *Ibid.*

Without the drawer's signature, a bill, though accepted, is of no force; *Stoessiger v. South Eastern Railway Company*, 3 *E. & B.* 549; 23 *L. J. (Q. B.)* 293; *Goldsmid v. Hampton*, 27 *L. J. (C.P.)* 286; 5 *C. B., N. S.* 94.

In order to constitute a valid bill the payee must be a person capable of being ascertained at the time of the drawing: and therefore, if drawn payable at a future time to the order of the treasurer of a society for the time being, the instrument is invalid as a bill; *Yates v. Nash*, 29 *L. J. (C. P.)* 306; 8 *C. B., N. S.* 581. An instrument not directed to any drawee is void as a bill; and an acceptance by a person to whom it is not directed is no acceptance; *Peto v. Reynolds*, 9 *Ex.* 410; 23 *L. J. (Ex.)* 98; *Davis v. Clarke*, 6 *Q. B.* 16; unless he be an acceptor for honour; *Polhill v. Walter*, 3 *B. & Ad.* 122. A person is not liable as acceptor who accepts by procuration for the drawee, but without his authority; *Polhill v. Walter*, *supra*; but if he be one of several partners, and he accept the bill in his own name on behalf of the partnership, having no authority to bind the firm, he is still personally liable as acceptor; *Owen v. Van Uster*, 10 *C. B.* 318; 20 *L. J. (C. P.)* 61; *Nicholls v. Diamond*, 9 *Ex.* 154; 23 *L. J. (Ex.)* 1.

Where the bill was directed to no one, but was made payable at a specified address, and was accepted by a person residing at that address, it was held that he might be sued as drawee and acceptor; for that, by accepting, he acknowledged that he was the person to whom it was directed; *Gray v. Milner*, 8 *Taunt.* 739; but this case has been questioned, and can only be supported on the ground that the acceptance by the defendant was not inconsistent with the address; *Davis v. Clarke* and *Peto v. Reynolds*, *supra*. But an acceptance, where there is no drawee named, may make the person accepting liable as the maker of a promissory note; *Peto v. Reynolds*, *supra*. In *Fidler v. Marshall*, 30 *L. J. (C. P.)* 158, 9 *C. B., N. S.* 606, S. M. was sued on the following instrument:—

“Pay to Mrs. E. F. or order.” (Signed) “A. L.”

“To Mrs. E. F., Nelson Lodge, Chelsea.”

and across was written—“Accepted. S. M.”: the whole document, except “A. L.” was written by the defendant, and it was given by him to E. F. to secure a debt from A. L. to her; and it was held that the address—“To Mrs. E. F.,” might be treated as a repetition of the payee’s name, and not as a drawee, and the document as a promissory note, made by S. M. A bill addressed to “A., or in his absence, to B.,” and accepted by A., may be declared on as the acceptance of A. without noticing B.; *Anon.*, 12 *Mod.* 417. The word *at* before the name of the drawee is equivalent to *on*; at least, when the bill is in other respects drawn so as to import that the name is that of a drawee, and the action is against the drawer; *Shuttleworth v. Stephens*, 1 *Camp.* 407; *Allan v. Mawson*, 4 *Camp.* 115.

Payee against Acceptor.

[*Drawing accredited by acceptance.*] An acceptance admits the handwriting of the drawer; *Sanderson v. Collman*, 4 *M. & G.* 209; and if the bill be drawn by procuration, the procuration; *Robinson v. Yarrow*, 7 *Taunt.* 455; and the acceptor cannot say that the drawer’s name is forged; *Jenys v. Fowler*, 2 *Str.* 946; *Smith v. Chester*, 1 *T. R.* 655, *per* Buller, J.; and *per* Dampier, J., in *Bass v. Clive*, *infra*; or that the drawer is ill described in the bill; *Bass v. Clive*, 4 *M. & S.* 15. Nor can he set up the drawer’s inability, as

that he was an infant; *Taylor v. Croker*, 4 *Esp.* 187; or a married woman; *Smith v. Marsack*, 6 *C. B.* 486; 18 *L. J. (C. P.)* 65; or a corporation without authority to negotiate bills of exchange; *Hallifax v. Lyle*, 3 *Ex.* 446; 18 *L. J. (Ex.)* 197; or a bankrupt; *Drayton v. Dale*, 2 *B. & C.* 293.

Acceptance in writing.] By stat. 1 & 2 Geo. 4, c. 78, s. 2, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless the acceptance be in writing on the bill, or, if there be more than one part of the bill, on one of the parts; and by stat. 19 & 20 Vict. c. 97, s. 6, no acceptance of any bill of exchange, whether inland or foreign, made after 31st December, 1856, shall be sufficient to bind or charge any person, unless the same be in writing on the bill, or, if more than one part, on one of such parts, and signed by the acceptor or some person duly authorised by him. Before this last act, a signature was not essential to an acceptance; nor was a written acceptance necessary to foreign bills.

Acceptance, absolute or conditional.] The drawee may accept conditionally, though the holder is not bound, as against previous parties, to take such acceptance; *Petit v. Benson*, *Comb.* 452; but if the acceptance was in fact conditional, it will not support the allegation of an absolute one, though the condition has been performed; *Langston v. Corney*, 4 *Camp.* 176; *Ralli v. Sarell*, *D. & R., N. P. C.* 33; but where the drawee has accepted a bill drawn at so many months, on condition of its being renewed till a later date, an indorsee may sue upon it as a bill accepted payable at the postponed date; *Russell v. Phillips*, 14 *Q. B.* 891. An acceptance payable in renewed bills, and not in money, is no acceptance at all; *Ibid.* A bill, dated 8th September, at four months, was accepted, adding the words, "due 11th December." Held, a memorandum for the drawee's own convenience, perhaps accidentally mis-dated, and not a qualified acceptance; *Fanshawe v. Pect*, 2 *H. & N.* 1; 26 *L. J. (Ex.)* 311. "Accepted, payable on giving up a bill of lading for goods, &c., per Amazon," is a conditional acceptance, binding the holder to give up the bill of lading on presentment for payment, but not imposing on him a further condition to the acceptor's liability, that the bill of lading should be given up on the very day the bill falls due; *Smith v. Vertue*, 30 *L. J. (C. P.)* 56; 9 *C. B., N. S.* 214. Whether an acceptance be absolute or conditional is a question of law for the judge; *Sproat v. Matthews*, 1 *T. R.* 182.

Acceptance, general or special.] An acceptance, expressed to be payable at a banker's or other place, was formerly held to be a special or qualified, and not a general, acceptance; *Rouse v. Young*, 2 *B. & B.* 165. But now by 1 & 2 Geo. 4, c. 78, s. 1, such acceptance is, as against the acceptor, a general one, unless expressed to be payable at a banker's, or other place, only, and not otherwise or elsewhere. A bill which is drawn payable at a particular place, is within the statute, there being no distinction made by the statute whether the bill be rendered so payable by the language of the drawer or of the acceptor; and, unless the acceptance be special, within the statute, it is unnecessary as against the acceptor, to aver or prove any presentment; *Selby v. Eden*, 3 *Bing.* 611; *Fayle v. Bird*, 6 *B. & C.* 531; and in the case of an acceptance payable at a banker's, without adding "and not elsewhere," if the holder neglects to present, and

the banker fails with money of the acceptor in his hands, the acceptor is not thereby discharged; *Turner v. Hayden*, 4 B. & C. 1. But if the acceptance is qualified, the plaintiff must aver and prove presentment at the place named, in order to charge the acceptor, both before the statute, *Rowe v. Young*, 2 B. & B. 165, and by the express terms of the statute. The use of the word "only" is not essential to qualify the acceptance; if the words "and not elsewhere" are inserted; *Higgins* (or *Siggers*) v. *Nichols*, 7 Dowl. 551; 3 Jurist, 31. But it is to be observed, that in an action against the drawer or indorser, if the bill be drawn or accepted payable at a particular place, presentment there is still necessary; *Gibb v. Mather*, 8 Bing. 214; 2 Cr. & J. 254; *Saul v. Jones*, 28 L. J. (Q. B.) 37; 1 E. & E. 59; and see *post*, p. 190.

Since the statute, a bill of exchange, drawn generally, may be accepted in three ways: either generally, or payable at a particular banker's, or payable at a particular banker's and not elsewhere. If the drawee accepts generally, he undertakes to pay the bill at maturity when presented to him. If drawn payable at a banker's, he undertakes to pay the bill at maturity, when presented either to himself or at the banker's. If he accepts, payable at the banker's and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's; *Halstead v. Skelton*, 5 Q. B. 93.

Acceptance, how proved.] The acceptance, when traversed, is proved by evidence of the acceptor's handwriting; and the production of the bill, with such proof, is *prima facie* evidence of acceptance before action brought, as the presumption is that it was accepted within a reasonable time after date according to the regular course of business, and before maturity; *Roberts v. Bethell*, 12 C. B. 778; 22 L. J. (C. P.) 69. What is such reasonable time depends on the places of residence of the parties, &c.; *per cur.*, *Ibid.* If several, not partners, are acceptors, the handwriting of all must be proved; *Gray v. Palmers*, 1 Esp. 135.

Acceptance by partners.] If one of several partners accepts, in his own name, a bill drawn on the firm, or makes a note in his own name on behalf of the partners, it is sufficient to prove the partnership and his handwriting, in an action against all; *Mason v. Rumsey*, 1 Camp. 384. Where a bill was directed to "E. M. and others, trustees of," &c., and was "accepted, E. M.," it was held that, on proving that E. M. accepted by authority of the other trustees, plaintiff could recover on the bill against the others, as well as against E. M., though E. M. alone signed, and did not on the face of it sign on behalf of the rest; *Jenkins v. Morris*, 16 M. & W. 877. But the name of the firm must appear on the face of the instrument, and an action cannot be maintained against the firm, when the one partner signed his own name only, although the proceeds were in reality applied to partnership purposes; *Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East, 7. It is a good defence under a denial of the acceptance, that the plaintiff had notice that the firm would not be bound by such an acceptance; *Galloway v. Mathew*, 10 East, 264; *Jones v. Corbett*, 2 Q. B. 828; *Grout v. Enthoven*, 1 Ex. 382; 17 L. J. (Ex.) 70; or that the bill was not accepted for partnership purposes, and that there was covin between the partner who accepted and the plaintiff; *Shirreff v. Wilks*, 1 East, 48. But, under a

traverse of the acceptance, evidence that the acceptance, though in the name of the firm, was by a partner of the defendants in fraud of the firm, will not be enough to put the plaintiff to proof of the circumstances under which he became indorsee, unless there be evidence of the plaintiff's knowledge of the fraud; *Musgrave v. Drake*, 5 Q. B. 185. And a person who has received a bill, from one of several partners (accepted or indorsed in the name of the firm) for his separate debt, can maintain an action against the partnership on such bill, provided there was no collusion and the bill had been accepted or indorsed before he received it; *Swan v. Steele*, 7 East, 210. But, if the acceptance or indorsement was made in the plaintiff's presence by one of several partners, and the bill then handed over for the one partner's private debts, the plaintiff cannot recover; *Arden v. Sharpe*, 2 Esp. 524; *Green v. Deakin*, 2 Stark. 347. In *Ridley v. Taylor*, 13 East, 175, a bill already drawn and indorsed in the name of the firm was given to a creditor by one partner for his separate debt; the bill appeared by its date to have been drawn eighteen days before, and though drawn and indorsed by the one partner, this did not appear to have been known to the creditor; and the court held that there was not such fraud or crassa negligentia as prevented him from recovering against the firm. But this case seems to be questioned, though distinguishable on the facts, in *Leversun (or Levieson) v. Lane*, 13 C. B., N. S. 278; 32 L. J. (C. P.) 10; and it was there held, that if one partner accept in the name of the firm a bill drawn by his creditor on account of his separate debt, the presumption is that it was given without the concurrence of the other partners; and it lies on the creditor to show that it was accepted with the authority of the other partners.

Where one partner has subscribed in a style slightly differing from the real name of the firm, it is a question for the jury whether he had authority from the firm to do so; or whether he must be taken to have issued the bill on his own account; *Faith v. Richmond*, 11 Ad. & E. 339. But in *Kirk v. Blurton*, 9 M. & W. 284, a bill was accepted by one of two partners, "J. B. & Co.," the true style being "J. B.;" and the Court of Exchequer held, as matter of law, the firm not bound. In a subsequent case, the Court of Queen's Bench, however, observe: "It is unnecessary to say how far we concur with that case, for at any rate it only decides that where the firm professes to be used, it would necessarily be fatal to add to the single name which usually constitutes the firm 'and Co.;"' *Macclae v. Sutherland*, 3 E. & B. 36; 23 L. J. (Q. B.) 242. In *Stephens v. Reynolds*, 5 H. & N. 513; 29 L. J. (Ex.) 278, Martin, B., expressed his opinion that the decision in *Kirk v. Blurton* was a wrong application of the law, and that it was a question for the jury whether "J. B." and "J. B. & Co." did not mean the same thing; and it was held by the court that a bill drawn on "B. R." the true style of the firm, but with the addition of the place where B. R., one of the partners, carried on another business alone, and accepted by another partner in the true style, bound the partnership. Where the style of a firm was "S. & A.," and one of the partners signed a promissory note "T. S. & S. A.," the true names of the two partners, the firm was held bound; and *semble, per Maule, J.*, that supposing there was no authority to sign, other than the general authority conferred by the partnership, one of two partners could bind the other by signing the true names of both instead of the

fictitious name of the firm; *Norton v. Seymour*, 3 C. B. 792; 19 L. J. (C. P.) 100.

The implied power of one partner to bind the others by his acceptance, &c., of bills does not extend to partnerships other than for trading purposes, such as attorneys; *Hedley v. Bainbridge*, 3 Q. B. 316; or brokers; *Yates v. Dalton*, 28 L. J. (Ex.) 69. So there is no implied authority in a director of a joint-stock company, not being a trading partnership, to accept bills on the part of the directors of the company; *Bramah v. Roberts*, 3 N. C. 963. Nor is there any implied authority to the directors of a mining company to bind the shareholders by making notes or accepting bills; *Dickenson v. Valpy*, 10 B. & C. 128. But if it be shown to be necessary from the very nature of the company, or usual in similar companies, to draw and accept bills, it would be reasonable that the directors should have such powers, and the law would imply it; *per Bosanquet, J., Ibid.*

After a partnership is proved, the admission of one partner that he accepted the bill in the name of the firm will be proof of the acceptance as against all; *Hodenpyl v. Vingerhoed*, *per Abbott, C. J., MSS.*; *Chitty on Bills*, 627, 9th ed.; see *ante*, pp. 64-5.

Acceptance by agent.] An agent will be personally liable to third persons by drawing, indorsing, or accepting in his own name, unless he unequivocally show on the face of the writing that he signs only in a ministerial capacity. Thus a bill was drawn, "Pay to J. S. or order £200, value received, and place same to account of Y. B. Company, as per advice from C. M. To H. B. (the defendant) cashier of the Y. B. Company," and the defendant wrote "Accepted per H. B."; it was held that defendant was personally liable although he accepted by direction of the company; *Thomas v. Bishop*, 2 Str. 955. So where an agent to a country branch of a London bank, to whom the plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name a bill for the amount upon the firm in London, he was held liable although the plaintiff knew he was agent only; *Leadbitter v. Farrow*, 5 M. & S. 345. See also the cases cited *post*, on Promissory Notes, p. 213. Where a bill was directed "to the A. C. Mining Company," and was accepted in his own name, "for the A. C. Company," by one of the managing partners who had no authority to sign for the rest, it was held, that on proof of his being partner in the adventure he was liable on the acceptance; *Owen v. Van Uster*, 10 C. B. 318; 20 L. J. (C. P.) 61. So where a bill was directed to "J. D., purser of W. D. Mining Company," being an unincorporated company, and the acceptance was "J. D., *per pro.* W. D. Mining Co.," held that J. D. was personally liable, being himself a shareholder, and not authorised to bind the rest; and this, although at the time of acceptance he notified to the plaintiffs, the drawers, his intention not to be personally bound; *Nicholls v. Diamond*, 9 Ex. 154; 23 L. J. (Ex.) 1. And where a bill, directed to a person who was only purser and not an adventurer, purported to be in payment for goods supplied to the company, and the drawee accepted it "for the company, W. C., purser," he was held liable; for the bill was not directed to the company, and therefore could not be accepted by, or by procuration for, them, and the acceptance "for the company" was not inconsistent with an intention on the part of the defendant to bind himself; and being at

most only ambiguous, must be taken to be operative against him; *Mare v. Charles*, 5 E. & B. 978; 25 L. J. (Q. B.) 119. *Semble*, if the acceptance had been "*per procuration*," it would have been inoperative; *Ibid.* The power of registered companies to make or accept notes and bills is regulated by statute. See *post*, Part III., *Actions by and against Joint-Stock Companies.*

If the acceptance is by an agent, his authority and handwriting must be proved. An admission by defendant of his liability on another bill accepted by the same agent is confirmatory evidence after other proof of a general authority; *Llewellyn v. Winkworth*, 13 M. & W. 598. But *semb.*, it would not be evidence *per se*; *Ibid.* The form "*per procuration*," is express notice of a limited or special authority; and a person taking a bill drawn, accepted, or indorsed in this form, is bound to ascertain that the authority has been pursued, and if it has not, he cannot recover against the principal; *Attwood v. Munnings*, 7 B. & C. 278; *Alexander v. Mackenzie*, 6 C. B. 766; 18 L. J. (C. P.) 94; *Stagg v. Elliott*, 31 L. J. (C. P.) 260, 12 C. B., N. S. 373. Proof that the defendant's wife conducted his business and had applied the proceeds of the bill in payment of debts incurred in the business, and absence of any proof by whom the defendant's name was written as acceptor, is no evidence that the defendant had sanctioned the acceptance; *Goldstone v. Tovey*, 6 N. C. 98. Proof of an acceptance by the wife, in her own name, of a bill drawn on her husband, and that he, after looking at it, promised to pay, saying he knew all about it, is evidence that he authorised this mode of acceptance, and he is bound by it; *Lindus v. Bradwell*, 5 C. B. 583; 17 L. J. (C. P.) 121. See also *post*, p. 183, under head of *Indorsement how proved.*

[*Proof of acceptance by admission.*] If the drawee accredit the bill by acknowledging the handwriting of the acceptance to be his, before the plaintiff took it, he cannot afterwards exonerate himself by showing that the acceptance was forged; *Leach v. Buchanan*, 4 Esp. 226. Where, in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to the bill, describing it, and adding "and which said bill was accepted by the said defendant," the notice was held to be *prima facie* evidence of the acceptance; *Holt v. Squire, Ry. & Mood*. 282.

[*Proof of identity of acceptor.*] Where the proof of acceptance was simply the handwriting of the attesting witness on an acceptance, some evidence of the *identity* of the defendant and the person whose acceptance is thus proved, was held necessary; *Whitelocke v. Musgrove*, 1 C. & M. 511; and it has been thought not sufficient merely to prove that a person calling himself by the same name (which was common in the neighbourhood where the witness saw the signature put), accepted the bill; *Jones v. Jones*, 9 M. & W. 75. But where the acceptor was described as "C. B. Crawford, East India House," proof that the signature was that of a person of the same name, a clerk of the East India House, was held to be *prima facie* evidence of identity; *Greenshields v. Crawford*, 9 M. & W. 314; and in *Roden v. Ryde*, 4 Q. B. 626, the Court of Q. B. held that, unless the name is so common as to neutralise the inference of identity, or other facts appear to raise a doubt, identity of name is *prima facie* enough to

charge the defendant. And the Court of C. P. upheld that rule in *Hamber v. Roberts*, 7 C. B. 861, 18 L. J. (C. P.) 250.

Acceptance before drawing.] There may be an acceptance of a bill before it is filled in, and an acceptance of a blank bill is an authority to the drawer to fill it up with any sum covered by the stamp; *Armfield v. Allport*, 27 L. J. (Ex.) 42; and such acceptance binds the acceptor to an innocent holder for value, though the drawer may have issued the bill improperly, as after a lapse of twelve years; *Montague v. Perkins*, 22 L. J. (C. P.) 187; and in such case the Statute of Limitations is no defence; S. C. And in order to bind the acceptor against an innocent holder for value, the drawing and indorsing need not be by the person to whom the acceptor hands the blank acceptance; *Schultz v. Astley*, 2 N. S. 544. But it seems that where the holder of a bill, accepted in blank, has taken it from the drawer with knowledge of it having been so accepted, he will have no better title than the drawer had; *Hatch v. Searles*, 2 Sm. & Giff. 147; affirmed by Lords JJ. 24 L. J. (Ch.) 22.

An acceptance may be revoked and cancelled by the drawee before he has parted with it; *Cox v. Troy*, 5 B. & A. 474.

Presentment for payment.] Proof of presentment is necessary against the acceptor on a qualified acceptance, see *ante*, p. 177; but on a general acceptance, even where the bill is payable on demand, no presentment is necessary; *Rumbull v. Ball*, 10 Mod. 38; *Norton v. Ellam*, 2 M. & W. 461. But if the bill or note be payable at or after sight, it must be presented in order to charge the acceptor or maker; *Dixon v. Nuttall*, 1 C. M. & R. 307.

Evidence under the common counts.] In an action by payee against acceptor, if the plaintiff be also the drawer, the bill will be evidence on the count for money had and received; *Thompson v. Morgan*, 3 Camp. 101; or on an account stated; *per* Abbott, C. J., *Rhodes v. Gent*, 5 B. & A. 245; but not where the payees or holders are third persons; *Semb.*, *Early v. Bowman*, 1 B. & Ad. 889. An acknowledgment of his acceptance by the defendant to the holder is evidence of an account stated between them; *per* Bayley, J., *Leaper v. Tatton*, 16 East, 423; *Highmore v. Primrose*, 5 M. & S. 65.

Indorsee against Acceptor.

In this action the plaintiff may be put to prove the indorsements alleged, besides the facts required to be proved in an action by the payee.

Indorsement, how proved.] "Indorsement" in general implies delivery to the alleged indorsee as indorsee; *Marston v. Allen*, 8 M. & W. 503. The delivery need not be personal. Thus, if a general agent for the indorsee, being indebted to him, indorse and deposit a bill among other securities of the indorsee in his custody, it is sufficient; *Lysaght v. Bryant*, 9 C. B. 46; 19 L. J. (C. P.) 160. So where A. indorsed a bill in blank and delivered it to the plaintiff, the manager of a bank, for value received from the bank, and the plaintiff by direction of the directors of the bank sued the acceptor upon it; it was held that those facts proved an indorsement to the plaintiff,

inasmuch as an indorsement in blank enables the indorsee to hand it over and give title to any one to sue; *Law v. Parnell*, 29 L. J. (C. P.) 17; 7 C. B., N. S. 282; *Ancona v. Marks*, 31 L. J. (Ex.) 163; 7 H. & N. 686. But there must be a delivery with intent to transfer the property, and if the indorsed bill be delivered to an agent for a special purpose only, and he parts with it improperly, this will not be an indorsement except in the hands of a *bond fide* holder for value; *Marston v. Allen*, *supra*; *Barber v. Richards*, 6 Ex. 63; and therefore where the bill was delivered by such agent to plaintiff when overdue without consideration, it was held no indorsement; *Lloyd v. Howard*, 15 Q. B. 995.

The acceptance only accredits the drawing; and none of the indorsements are admitted by the acceptance, even if they were made before acceptance; *Smith v. Chester*, 1 T. R. 654; and even where the bill is payable to the drawer's order, his handwriting as indorser must be proved, though his name as indorser was on the bill when accepted; *Bosanquet v. Anderson*, 6 Esp. 43. So where a bill, payable to the drawer's own order, was drawn and indorsed by procuration by the same person, it was held that the acceptance only admitted the drawing by procuration and not the indorsing; *Robinson v. Yarrow*, 7 Taunt. 455. But in an action against the acceptor of a bill, drawn in favour of A. and B., indorsed by A. in the names of A. and B., and afterwards accepted by the defendant, on its being objected that the payees were not partners, and that, therefore, the indorsement was irregular, Lord Ellenborough is said to have held that, after acceptance, the defendant could not dispute the regularity of the indorsement; *Jones v. Radford*, 1 Camp. 83 (n). The acceptor of a bill or the maker of a note, when he accepts or makes, admits the then capacity of the payee, to whose order the bill or note is made payable, to indorse. He is, therefore, estopped from setting up the bankruptcy of the payee; *Drayton v. Dule*, 2 B. & C. 293; *Pitt v. Chappelow*, 8 M. & W. 616; or his infancy; *Taylor v. Croker*, 4 Esp. 187; or her coverture; *Smith v. Marsack*, 6 C. B. 486; 18 L. J. (C. P.) 65; or that the payees are a corporation having no authority to negotiate bills; *Hullifax v. Lyle*, 3 Ex. 446; 18 L. J. (Ex.) 197.

Where a bill is drawn in the name of a fictitious person payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and therefore an indorsee may bring evidence to show that the signatures of the supposed drawer to the bill, and to the first indorsement, are in the same handwriting; *Cooper v. Meyer*, 10 B. & C. 468. So where by agreement between the plaintiff and defendant a bill was drawn and indorsed by procuration in the name of a deceased person, and the bill was then accepted by the defendant for value received, he is precluded from denying the indorsement; *Ashpittel v. Bryan*, 32 L. J. (Q. B.) 91; 3 B. & S. 474; S. C. in Ex. Ch., 33 L. J. (Q. B.) 328. Where there was no proof of the handwriting of one of the indorsers, but it appeared that the indorsement was upon the bill when the defendant accepted it, and that he promised to pay it, Ryder, C. J., left the case to the jury, who found for the plaintiff, and the court refused a new trial; *Hankey v. Wilson*, *Sayer*, 223. So an offer made by the acceptor to pay a bill, with certain names on it, is a sufficient admission of the plaintiff's title, so as to supersede the necessity of proof of each person's handwriting; *Bosanquet v. Anderson*, 6 Esp. 43. But where the bill was shown to the defendant

with the name of the payee indorsed upon it, and the defendant merely objected to the want of consideration, it was ruled that that did not supersede the necessity of proving the indorser's handwriting; *Duncan v. Scott*, 1 Camp. 101. An admission of his handwriting by the indorser, though evidence against himself, is not evidence of indorsement in an action against the acceptor; *Hemings v. Robinson*, Barnes, 436. But Lord Kenyon is said to have held *contra* in *Madocks v. Hunkey*, 2 Esp. 647.

Indorsement by agent.] When the indorsement is by an agent, it is necessary to show that the person by whom the indorsement was written had the authority of the person whose name is written. In such a case an authority to draw does not of itself import an authority to indorse bills; but it is a fact which ought to go to the jury as evidence; *Robinson v. Yarrow*, 7 Taunt. 455. The clerk of the payees of a bill having been accustomed to draw checks for them, and in one instance authorised to indorse a bill, and two other bills indorsed by him having been discounted at the payees' bankers, and the proceeds received by them,—these facts were held evidence that the clerk had a general authority to indorse; *Prescott v. Flinn*, 9 Bing. 19. A power to A. to indorse and negotiate any bills remitted to G., will not authorise the indorsement of a bill remitted to G. for a special purpose, and which G. could not have applied to his own use without fraud; and though the indorsement by G. himself would have transferred a good title to a *bonâ fide* holder, the indorsement by A. in G.'s name does not; *Fearn v. Filica*, 7 M. & G. 513. Where a bill payable to the drawer's order is handed by him to another, for a good consideration, with the intention of transferring the property to him, but the drawer omits to indorse it, the transferee has no authority to indorse by procuration in the drawer's name; *Harrop v. Fisher*, 30 L. J. (C. P.) 283; 10 C. B., N. S. 196. A farm bailiff, accustomed to pay and receive all monies for his employer, has no implied authority to draw or indorse bills in the name of his principal; *Davidson v. Stanley*, 2 M. & G. 721. Though a wife, who carries on business for her husband, may be presumed to have authority to indorse in his name, yet an indorsement in her own name by a feme covert of a bill payable to her order, conveys no interest, if without her husband's consent; *Barlow v. Bishop*, 1 East, 432; *aliter* if the indorsement be made with the husband's consent; *Prestwick v. Marshall*, 7 Bing. 565. If the maker promises to pay a note, with the indorsement of a married woman upon it, it may be presumed as against him that she had authority from her husband to indorse it in her own name; *Cotes v. Davis*, 1 Camp. 485; recognised in *Prestwick v. Marshall*, 7 Bing. 565, *Prince v. Brunatte*, 1 N. C. 435, and *Lindus v. Bradwell*, 5 C. B. 583; but it is to be observed, that as she was the payee, the defendant, as maker, was estopped, without any promise, from disputing her capacity to indorse; see *ante*, p. 183. Where the wife, who managed all the money part of the business, had power to indorse in the husband's name, it may be left to the jury to say whether the power authorised an indorsement by her daughter, in her presence, and by her direction; *Lord v. Hall*, 8 C. B. 627; 19 L. J. (C. P.) 47. A power to A. to draw or indorse in B.'s name, may be exercised by a clerk of A. by his direction; *Ex parte Sutton*, 2 Cox, 84, cited *per cur.* in the last case. Unless the persons to whose order a bill is payable are in partnership, there must be an indorsement by each; *Curvick v.*

Vickery, 2 Doug. 653 (n). On the dissolution of a partnership, a power, given to one of the partners to receive and pay debts, does not authorise him to indorse a bill in the name of the partnership; and the partnership being dissolved, he has no general authority to do so; *Kilgour v. Finlyson*, 1 H. Bl. 155. But a retiring partner may give his late partners authority by parol to indorse existing securities; and a statement by the ex-partner, that he has left the assets and securities in the hands of the continuing partners, and that he has no objection to their using the partnership name, is evidence from which a jury may infer an authority to indorse; *Smith v. Winter*, 4 M. & W. 454.

The identity of the indorser must be proved. Where a note was made payable to J. H., and indorsed by a person so named, and there were two persons, father and son, named J. H., it will be presumed that the son was the payee, if the son indorsed it; *Stebbing v. Spicer*, 8 C. B. 827. In an action by an indorsee against the acceptor of a bill, whereof S. was the payee, the plaintiff proved that a person calling himself S. came to the plaintiff's residence with the bill in question and a letter of introduction, proved to be genuine, which was expressed to be given to a person introduced to the writer as S., and also another bill drawn by the writer of that letter. The bearer of these documents, after remaining some days at the plaintiff's residence, indorsed to him the bill in question. This was held to be *prima facie* evidence of the identity of this person with S.; *Bulkeley v. Butler*, 2 B. & C. 434.

Date of indorsement.] A bill is presumed to be issued when dated; *Anderson v. Weston*, 6 N. C. 296. But the date of an indorsement cannot be inferred from the date of the drawing; and if it be material, plaintiff should be prepared to prove it, either directly or by inference from circumstances; *Rose v. Rowcroft*, 4 Camp. 245. See, however, *Anderson v. Weston*, *post*, p. 200.

Proof of mesne indorsements.] All the indorsements that have been stated, though unnecessarily, must (if traversed) be proved as against acceptor; *Waynam v. Bend*, 1 Camp. 175. But an offer by the acceptor to the holder to give another bill, was held by Lord Ellenborough an admission of the holder's title, and of the defendant's liability, and so dispensed with proof of the mesne indorsements; *Bosanquet v. Anderson*, 6 Esp. 43. The first indorsement having been made in blank, the bill becomes payable to bearer, and the holder may state an indorsement from the payee to himself immediately, though there be intermediate special indorsements; and it will then only be necessary to prove the first indorsement; *Smith v. Clarke, Peake*, N.P. 225; *Walker v. Macdonald*, 2 Ex. 527; 17 L. J. (Ex.) 377. In an action by the indorsee of a bill against the acceptor, the first count stated all the indorsements; the second count an indorsement by the payee to the plaintiff; Abbott, C. J., said that all the indorsements must be proved or struck out, though not stated in the declaration; and this need not be done before the trial; *Cocks v. Borrodale*, *Chitty on Bills*, 642, 9th edit. Indorsements may be struck out even after the bill has been read in evidence and objected to on the ground of the omission to state them in the declaration; *Mayer v. Judis*, 1 Mood. & Rob. 247. By striking out intermediate indorsements, the plaintiff loses the security of those indorsers.

Title of the plaintiff as indorsee.] When a bill is indorsed in blank, possession is sufficient *primâ facie* title; and several plaintiffs, suing as indorsees, need not prove that they are in partnership, or that the bill was indorsed to them jointly; *Ord v. Portal*, 3 Camp. 239; *Rordasnz v. Leach*, 1 Stark. 446; *Attwood v. Rattenbury*, 6 B. Moore, 579. But where it is specially indorsed to a firm, the partnership must be proved to consist of the plaintiffs; *Ord v. Portal*, 3 Camp. 240 (n). And where the plaintiffs sue in a particular capacity, as assignees of a bankrupt, and allege an indorsement to them as such assignees, they must prove that the bills were indorsed to them in that capacity; *Bernasconi v. Duke of Argyle*, 3 C. & P. 29. On a traverse of the indorsement to the plaintiff, the defendant may show that the right to sue on it as indorsee is in other persons, and not in the plaintiff, though the indorsement is in blank; *Machell v. Kinneir*, 1 Stark. 499. In that case the plaintiffs were trustees of the estate of H., an insolvent; two of them were partners in the firm of L. and Co., but one was a stranger; the defendant sent the bill indorsed by him in blank, to L. and Co., on account of H.'s estate; on objection taken, Lord Ellenborough held that, on these circumstances being shown, it was necessary for the plaintiffs to show that L. and Co. had transferred the bill to the plaintiffs, or had authorised them to sue. The defendant may also show that, though indorsed in blank, it was never delivered to the plaintiff as indorsee, but only as agent for another; *Adams v. Jones*, 12 Ad. & E. 455; or had been delivered to the plaintiff on a condition which had not been complied with; *Bell v. Ingestre*, 12 Q. B. 317. So on a traverse of a previous indorsement by A. to B., it may be shown that A. had delivered it to B. as agent only, and B. had indorsed it in fraud of the true owner, with the plaintiff's privity; *Marston v. Allen*, 8 M. & W. 494. Again, where the payee indorsed specially to M., and handed it to him to get discounted, and he indorsed it to plaintiff without value when overdue, it was held on a traverse of the indorsement from the payee to M., that the defendant was entitled to the verdict; *Lloyd v. Howard*, 15 Q. B. 995; 20 L. J. (Q. B.) 1. But if the plaintiff is a *bonâ fide* holder for value, on a traverse of the indorsement by A., the payee, to a previous indorser, B., the defendant cannot show that A. delivered the bill for a particular purpose, and B. fraudulently negotiated it; *Hayes v. Caulfield*, 5 Q. B. 81. So where E. indorsed a bill in blank, and delivered it to B. to get discounted, and he deposited it with T. for value received by himself, it was held that this proved an indorsement from E. to T.; *Barber v. Richards*, 6 Ex. 63; 20 L. J. (Ex.) 135: for if the holder puts his name on the back of a bill, and delivers it to his agent for a particular purpose, and he delivers it to a third person for value, that is an indorsement from the holder to such third person; *per Parke, B., Ibid.* Nor is it any answer, on a denial of the indorsement, that it was indorsed to the plaintiff by the directors of a company (intermediate indorsees), who had no authority to indorse; for it is enough if the indorsement gives a title to the bill, though the company might not be bound by such indorsement; *Smith v. Johnson*, 3 H. & N. 222; 27 L. J. (Ex.) 363. An indorsement in blank by the maker, and a delivery by his *executor* to the plaintiff, is no indorsement to the plaintiff so as to give him a title to sue; *Bromage v. Lloyd*, 1 Ex. 32; 16 L. J. (Ex.) 257. .

Evidence under the money counts.] Although an acceptance has

been said to be evidence of money had and received by the acceptor to the use of the holder (*Bayley on Bills*, 363, 6th edit.), yet on principle it can be available upon the common counts only where there is privity; as where the parties on the record are immediate parties on the bill, or there has been a promise to pay, an account actually stated, or acknowledgment of liability; and the later authorities are to that effect; *Waynam v. Bend*, 1 Camp. 175; *Eales v. Dicker, Mood. & M.* 324; and the cases cited, *ante*, p. 182.

Drawer against Acceptor.

When a bill, though not payable to the drawer's own order, has been dishonoured by the acceptor, and taken up by the drawer, he may sue the acceptor; *Simmonds v. Parminter*, 1 Wils. 185; and in such action may be obliged by proper pleas to prove, 1. The acceptance, as to proof of which see *ante*, p. 178; 2. The presentment to the defendant, as to proof of which see *post*, p. 189, and his refusal to pay, which may be done by calling the person who presented the bill, or by proving a promise by the defendant to pay, which dispenses with proof of the presentment; and 3. The return of the bill to, and payment thereof by, the plaintiff. To prove the latter fact, it has been held not sufficient to produce the bill with a general receipt on the back of it from the then holder; for the receipt *prima facie* imports that the bill was paid by the acceptor; *Scholey v. Walsby, Peake, N.P.* 25. But the legitimacy of this last presumption is doubtful; *per cur.* in *Phillips v. Warren*, 14 M. & W. 379.

Payee or Indorsee against Drawer.

In an action by the payee or indorsee against the drawer, the plaintiff may have to prove, 1. The drawing of the bill; 2. Presentment to the drawee for acceptance or to acceptor for payment; 3. His default; 4. Due notice to the defendant of the default or dishonour; and 5, in the case of an indorsee, the indorsements, as to proof of which see *ante*, p. 182.

The contract by the drawer is substantially as follows:—viz., If the bill be payable *after sight*, that the drawee shall, on presentment within a reasonable time after date, accept it, and after acceptance pay it on presentment according to its tenor. If it be a bill payable *after date*, that the drawee shall accept it, if presented for acceptance before the time of payment, and pay it when duly presented for payment; or, if not presented for acceptance at all, then that he shall pay it when presented for payment in due course; *Whitehead v. Walker*, 9 M. & W. 514-15.

If a person put his name as indorsee on the back of a bill, which is either not negotiable, or has not been indorsed by the person to whose order it is made payable, he is liable, as *the drawer* of a bill; *Penny v. Innes*, 1 C. M. & R. 439. Thus defendant, intending to become surety to plaintiffs for A., put his name at the back of a blank bill stamp, on which A. wrote his name as acceptor, and plaintiffs then drew upon it a bill payable to their order; it was held that defendant was liable as the drawer of a bill, payable either to bearer or to plaintiffs' order; *Matthews v. Bloxsome*, 33 L. J.

(Q. B.) 209. If the drawer leave the name of the payee in blank, a person to whom it is handed for value may insert his own name as payee, and sue the drawer upon it; *Cruckley v. Clarence*, 2 M. & S. 90.

Proof of the drawing.] The drawing of the bill, when traversed, must be proved by evidence of the drawer's handwriting; or, if drawn by an agent, by proving the authority of the agent and his handwriting. A farm bailiff, intrusted to pay and receive money, has not any implied authority to bind his principal by drawing bills; *Davidson v. Stanley*, 2 M. & G. 721; and see further as to authority of agent, *ante*, p. 184. If drawn in the name of a partnership, the partnership must be proved, and the handwriting of the partner who drew the bill. See further, *Proof of Acceptance by Partners*, *ante*, p. 178. As to proof of partnership, see *post*, p. 309, *Action for goods sold; delivery to partner*.

Presentment to the drawee for acceptance.] A presentment for acceptance is not necessary except in case of bills payable at or after sight; *Bayley on Bills*, 215, 6th ed. But if presented and acceptance refused, due notice of such refusal must be given; *Blesard v. Hirst*, 5 Burr, 2670; *Goodall v. Dolley*, 1 T. R. 712; and all parties entitled to notice are discharged by want of it, *S. C.*; and are not liable on a subsequent refusal of the drawee to pay; *Roscow v. Hardy*, 12 East, 434. But the drawer is not discharged by want of notice of non-acceptance, as against a subsequent indorsee for value, who has no knowledge of the dishonour; *Dunn v. O'Keefe*, 6 Taunt. 305; *S. C. in error*, 5 M. & S. 282.

If the drawee refuse to accept the bill according to its terms, an action on the bill lies against the drawer immediately, although the time of payment is not come; *Milford v. Mayor*, 1 Dougl. 55; or against an indorser; *Bullingalls v. Gloster*, 3 East, 481; *Whitehead v. Walker*, 9 M. & W. 506. If the action be brought on this refusal to accept, presentment for acceptance must be alleged; *Mercer v. Southwell*, 2 Show. 180; and it is sufficient for the plaintiff to show that the drawee refused to accept in the terms of the bill; *Boehm v. Garcias*, 1 Camp. 425 (n). It is not sufficient to show that the bill was presented to some person on the drawee's premises without connecting him with the drawee; *Cheek v. Roper*, 5 Esp. 175.

Where the bill is payable at a certain time after sight, or at sight, it must be presented for acceptance within a reasonable time; otherwise the holder loses his remedy against the antecedent parties; what is a reasonable time, depends on the circumstances of each case, and this is a mixed question of law and fact; *Mellish v. Rawdon*, 9 Bing. 416; *Mullick v. Radakissen*, 9 Moo. P. C. 46; 2 Com. Law R. 1664. Where the payee delayed for eight months to present a bill drawn in Calcutta to the drawee at Hong Kong, payable sixty days after sight, the drawer was held discharged; *Mullick v. Radakissen*, *supra*; although no actual loss or damage had been caused by the delay, and the parties to it continued solvent; *S. C.* The holder may, however, put the bill into circulation without presenting it; *Muilman v. D'Eguino*, 2 H. Bl. 565. And the question in such cases is, whether, looking at the situation and interests of each holder and drawer, there has been any unreasonable delay on the part of the former in forwarding the bill for acceptance or putting

it into circulation; *Mellish v. Rawdon*, 9 Bing. 416. In that case a delay of nearly five months on a foreign bill was allowed, the exchange having fallen against the plaintiff immediately after the purchase by him of the bill. With regard to bills payable after sight, drawn by bankers in the country on their correspondents in London: "It does not seem unreasonable," says Lord Tenterden, "to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay of course cannot be allowed), as part of the circulating medium of the country;" *Shute v. Robins*, Mood. & M. 136.

Presentment for payment.] Where a bill is payable at a certain date, and has either not been presented for acceptance, or has been accepted, it must be presented for payment on the last day of grace; that is, in England, on the third day after and exclusive of the day of becoming due; *Tassell v. Lewis*, 1 *Ld. Raym.* 743. When the last day of grace falls on a Sunday or Christmas-day (*S. C.*), or on a Good-Friday (39 & 40 Geo. 3, c. 42), or on a Fast-day (7 & 8 Geo. 4, c. 15), it is to be presented on the day next before those respective days.

Where a bill is drawn at so many months after date, by the custom of merchants calendar months are intended; and the day on which it falls due is always regulated by the day of the date, irrespective of the length of the months, and in ordinary cases will be the day with the same number in the last month of the currency: thus, a bill drawn at two months on the 10th of January, will be due on the 10th of March. But if the date be one of the last days of a month having more days than the month in which the bill becomes due, then the bill will be due on the last day of that month: thus, bills drawn, at one month, on the 28th, 29th, 30th, or 31st of January, will, it would seem, in ordinary years, be all due on the 28th February, and with the days of grace payable on the 3rd of March; *Byles on Bills*, pp. 188-9, 8th edit.; *Story on Bills*, s. 330, 2nd edit.; *Marius*, pp. 74-75; p. 18, 4th edit.; and the dicta of the Judges in *Freeman v. Read*, 4 B. & S. 174, and in *Webb v. Fairmaner*, 3 M. & W. 473. In the same way, where a bill is drawn at so many days after date or sight, the days are reckoned *exclusive* of the day of date or sight; though this was at one time doubted; see *Bayley on Bills*, 245, and note 91, 6th edit.

Presentment must be proved, although the acceptor has become bankrupt or insolvent; *Russell v. Langstaffe*, 2 Doug. 514; *Esdaile v. Sowerby*, 11 East, 117. And where he is dead, it must be made to his executor or administrator; or, if there be none, at the house of the deceased; *Molloy*, b. 2, c. 10, s. 34; *Chitty on Bills*, 339, 9th edit. But if the bill be accepted payable at a particular place, a presentment at that place, though the acceptor is dead, is enough to charge the drawer; *Philpott v. Bryant*, 3 C. & P. 244. Where a bill is accepted by an agent, the drawee being abroad, presentment to the agent must be proved; *Philips v. Astling*, 2 Taunt. 206.

A bill, payable at a banker's, must be presented within banking hours; *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 M. & S. 28; but if presented after, and a servant at the banking-house returns for answer "no orders," it is sufficient; *Garnett v. Woodcock*, 6 M. & S. 44; *Henry v. Lee*, 2 Chit. Rep. 124. Presentment at eight in the evening at the private residence of a merchant is good; *Barclay v. Bailey*, 2 Camp. 527. So at the place where

the bill is made payable (not being a banker's) between seven and eight, though no one be there; *Wilkins v. Judia*, 2 B. & Ad. 188. Presentment to a banker's clerk at the clearing-house is a presentment at the banker's; *Reynolds v. Chettle*, 2 Camp. 596; *Harris v. Packer*, 3 Tyr. 370 (a).

Although, since the statute 1 & 2 Geo. 4, c. 78, the holder of a bill accepted payable at a banker's, &c. (not saying "and not otherwise") is not obliged, in order to charge the acceptor, to present it for payment there (*Turner v. Hayden*, 4 B. & C. 1), yet a presentment there is necessary, and will be sufficient, to charge the drawer, and will support an allegation of presentment to the acceptor himself; *Wilmot v. Williams*, 7 M. & G. 1017. Where the bill is drawn payable (in the body of it) in London, and is accepted payable at A. B.'s in London (omitting "and not otherwise"), in an action against the drawer, presentment at A. B.'s in London must be proved; the stat. 1 & 2 Geo. 4, c. 78, being confined to actions against acceptors; *Gibb v. Mather*, 8 Bing. 214; 2 C. & J. 254. There must be a presentment at the banker's named in the acceptance, and presentment at the private address of the acceptor stated in the bill is not sufficient; *Saul v. Jones*, 28 L. J. (Q. B.) 37; 1 E. & E. 59. Under the general averment that the bill was duly presented (without stating an acceptance), the plaintiff may prove a presentment at the place mentioned in the acceptance; *Parks v. Edge*, 1 C. & M. 429. If the presentment be at a place mentioned in the acceptance, and it be not the acceptor's residence, the handwriting of the acceptor must be proved; otherwise it would not appear that the place indicated in the acceptance was appointed by him; *Sedgwick v. Jager*, 5 C. & P. 199. Where a bill was drawn on P. P. No. 6, Budge Row, and accepted generally, in an action against the drawer an averment that the bill was presented to P. P. for payment was held to be supported by proof that the holder went to No. 6, but found no one there; and notice of dishonour may be given on the same day; *Hine v. Allely*, 4 B. & Ad. 624. And where the bill is directed to the drawee by a certain address and accepted generally, it is enough to present it to an inmate of the house at such address, though the drawee has in the meantime removed; *Buxton v. Jones*, 1 M. & G. 83.

Presentment—proof of.] A part payment (*Vaughan v. Fuller*, 2 Strange, 1246), or a promise to pay after the bill is due, is *prima facie* evidence, as an admission, that the bill was duly presented; *Lundie v. Robertson*, 7 East, 231; *Croxtan v. Worthen*, 5 M. & W. 5.

Presentment excused or dispensed with.] When due presentment is alleged and traversed, evidence that excuses non-presentment cannot be admitted without amending the record. Thus, if the acceptor cannot be found, so that no presentment can be made, this must be specially averred, and cannot be shown on issue joined upon presentment; *Leeson v. Pigott*, *Bayley on Bills*, 409, 9th edit. But where the presentment is informal only, and the want of strictness is owing to the acceptor's default, there the averment of due presentment is supported; as in *Hine v. Allely*, and *Buxton v. Jones*, *supra*. So where the presentment is unavoidably delayed by circumstances, as where the place of presentment was in the occupation of the king's enemies; for *duly presented* means presented according to the custom of merchants, which implies an exception in

favour of unavoidable accidents of this kind; *Patience v. Townley*, 2 *Smith*, 223.

Notice of dishonour—what sufficient.] There is no prescribed form of notice; but a mere demand of payment without notice of the dishonour is not sufficient; *Hartley v. Case*, 4 *B. & C.* 339. The notice must state, either expressly or in effect, that the bill has been dishonoured; and the following notice from the attorney of the holder was held insufficient: "A bill for 683*l.* drawn, &c., and bearing your indorsement, has been put into our hands by Mr. A., with directions to take legal measures for the recovery thereof unless immediately paid;" *Solarte v. Palmer*, 7 *Bing.* 530; *S. C.* in *House of Lords*, 1 *N. C.* 194. This decision has been considered to be against the weight of previous authorities; it is therefore not applied to any case not clearly within its principle: See the remarks of Tindal, C. J., in *Messenger v. Southey*, 1 *M. & G.* 81, (where a letter "This is to inform you that the bill I took of you, is not took up, and 4*s.* 6*d.* expense," was held sufficient;) and the observations of the court in *Everard v. Watson*, 1 *E. & B.* 804; where "We beg to acquaint you with the nonpayment of W. M.'s acceptance for 50*l.*, amounting with expenses to 50*l.* 5*s.* 1*d.*, which remit us without fail," was held sufficient. In *Grugeon v. Smith*, 6 *Ad. & E.* 499, Patteson, J., at Nisi Prius, held the following notice sufficient: "Bill due this day returned with charges, to which your immediate attention is requested;" and the court upheld the decision. This case was followed by the Court of Exchequer in *Hedger v. Steavenson*, 2 *M. & W.* 799; where a notice in the following words was held sufficient: "I am desired by Mr. H. to give you notice that a promissory note for 99*l.* 18*s.*, payable, &c., became due yesterday, and has been returned unpaid, and I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of postage." The reference to noting has been considered sufficient to show that the bill had been presented, although at the foot of the notice; *Armstrong v. Christiani*, 5 *C. B.* 687. In *Strange v. Price*, 10 *Ad. & E.* 125, "Mr. B.'s acceptance for 87*l.* 5*s.* is not paid; as indorser, Mr. P. (the defendant), is called upon to pay the money," was held not sufficient; and Coleridge, J., points out that in the cases, in which notices have been held good, the word "returned," or "dishonoured" has been used, or there has been a reference to notarial charges. But in *Bailey v. Porter*, 14 *M. & W.* 44, a letter informing the indorser that "A. B.'s acceptance, due this day, is unpaid," and "requesting his immediate attention to it," was held sufficient; and a notice in nearly the same words was held sufficient by the Exchequer Chamber, in *Paul v. Joel*, 4 *II. & N.* 355, 28 *L. J. (Ex.)* 143. It is enough if the notice conveys to the mind of the receiver, by reasonable intendment, the following facts: 1. That the bill has been presented when due; 2. That it has been dishonoured; and 3. That the party addressed is held liable for payment; *per Parke, B.*, in *Lewis v. Gompertz*, 6 *M. & W.* 403. But it is not necessary that the notice should in terms inform the party addressed that he is looked to for payment; *Furze v. Sharwood*, 2 *Q. B.* 388; *Miers v. Brown*, 11 *M. & W.* 372. "D.'s acceptance, drawn and indorsed by you, has been presented for payment, and returned, and now remains unpaid," is sufficient; *Cooke v. French*, 10 *Ad. & E.* 131, n. "I have received an intimation from B. and M. that your draft on A. B. has been dishonoured, and have requested them to proceed in the same," held

sufficient; for "dishonour" implies presentment; *Shelton v. Braithwaite*, 7 M. & W. 436. Where the bill was miscalled a "note," but the date accurately stated, that is sufficient; *Stockman v. Parr*, 11 M. & W. 809. So where the notice misdescribed the bank at which the bill was payable, but all other particulars were rightly described, and defendant in fact not misled; *Bromage v. Vaughan*, 9 Q. B. 608. So where the defendant, the drawer, was called acceptor, and the acceptor described as drawer; *Mellersh v. Rippen*, 7 Ex. 578; 21 L. J. (Ex.) 222. Where the drawer was made the executor of the acceptor, a presentment to him, as executor, at the late acceptor's house, coupled with a statement by him that he would see it paid, was held sufficient notice of dishonour; *Caunt v. Thompson*, 7 C. B. 400; 18 L. J. (C. P.) 125.

A written notice is not required; *Housego v. Cowne*, 2 M. & W. 348, *post*, p. 193. If the holder's agent verbally tell the drawer of a bill of exchange that his bill for 30*l.* drawn on T. has come back dishonoured, and produces the bill and points out to the drawer the notary's mark upon it, this is sufficient notice of dishonour; *Phillips v. Gould*, 8 C. & P. 355.

If the presentment and notice of dishonour, as proved, are sufficient, the allegations in the declaration will be amended by the judge at the trial to meet the facts proved; as where the presentment for payment was stated to have been to the acceptor, and notice of dishonour to defendant, the judge may amend by stating the death of the acceptor, that defendant was his executor, and a presentment to him for payment; *Caunt v. Thompson*, 7 C. B. 400; 18 L. J. (C. P.) 125.

[*By whom notice should be given.*] It is enough if the defendant has had notice of the dishonour of the bill from any person who is a party liable upon it; *Chapman v. Keane*, 3 Ad. & E. 193; *Lysaght v. Bryant*, 9 C. B. 46; 19 L. J. (C. P.) 160; *Harrison v. Ruscoe*, *infra*: though it was formerly thought the notice must come from the holder; *Tindal v. Brown*, 1 T. R. 167. But notice given by a person not a party to the bill, without any authority, is not sufficient; *Stewart v. Kennett*, 2 Camp. 177. The notice, however, must be such as to be in due time if the person who gave it were himself suing (see *post*, p. 193); *Chapman v. Keane*, 3 Ad. & E. 193; *Harrison v. Ruscoe*, 15 M. & W. 231; 15 L. J. (Ex.) 110. In the latter case a bill was drawn by A., indorsed by him to B., and by him to plaintiff, in whose hands it was dishonoured. Plaintiff's attorney gave notice of dishonour to A. in due time, either for plaintiff or B., but by mistake stated he applied for payment on behalf of B. (from whom he had no authority), and it was held that the notice was sufficient notwithstanding the misrepresentation. And, after a bill has in fact been dishonoured, an unequivocal notice that it has been dishonoured is good, if given by a party to the bill, though he had at the time no certain knowledge of the fact; *Jennings v. Roberts*, 4 E. & B. 615; 24 L. J. (Q. B.) 102. A notice by the holder's attorney, not stating on whose behalf the notice is given, is sufficient; *Woodthorpe v. Lawes*, 2 M. & W. 109.

[*To whom notice should be given.*] When the holder of a bill is desirous of suing all the parties to it, he should give notice at once to all; otherwise notice may not be regularly transmitted to the prior parties, who may consequently be discharged; *Rowe v. Tipper*, *post*, p. 193. But if he gives notice to his immediate indorser, and he in due time to his indorser, and so on to the drawer, the holder may sue

all or any of such parties, although there was no notice immediately from the plaintiff to the defendant; *Jameson v. Swinton*, 2 Camp. 373. A bill indorsed by defendant to B. and by B. to plaintiff was dishonoured on the 15th (*Saturday*). Plaintiff gave notice to B. on 17th, and to defendant on 18th. Defendant had received no notice from B.,—held that plaintiff's notice to defendant was too late; *Rowe v. Tipper*, 13 C. B. 249; 22 L. J. (C. P.) 135. The principle is that each indorser has his own day to give notice, but the holder has not as many days to give notice to the drawer, or prior indorser, as there are intermediate indorsers. He can sue the drawer upon a notice given by the last indorser only if each and every prior indorser has in due time given notice of dishonour to the next preceding indorser. A single default breaks the chain of notices, and disqualifies the holder from suing any indorser prior to the defective link, unless a direct and immediate notice has been given by the plaintiff to the person sued; *S. C.*

The bankruptcy of the drawer does not dispense with proof of notice; and where notice was given to a bankrupt drawer before the appointment of assignees, it was held sufficient; *Ex parte Moline*, 19 Ves. 216. Where the bankrupt drawer had absconded, but his house remained open in the possession of the messenger, and no notice was given to the drawer, or left at his house, or given to the assignees, of whose appointment the holder had notice, the drawer's estate was held to be discharged from the bill; *Rohde v. Proctor*, 4 B. & C. 517. Where the bankrupt had left his house, it was held that notice should be left there, and with the messenger in possession; *Ex parte Johnston*, 1 Mont. & Ayr. 622; 3 Deacon & Ch. 433. If the drawer is dead, notice should be given to his executors, or administrators; *Chitty on Bills*, 496-7, 9th ed.; *Cunt v. Thompson*, 7 C. B. 400; 18 L. J. (C. P.) 125. Where the drawers are in partnership, a notice to one is notice to all; and therefore where a bill is drawn by a firm upon one of that firm, and dishonoured, notice of the dishonour need not be given to the firm; *Porthouse v. Parker*, 1 Camp. 82. But whether notice to a member of a public company is notice to the company is questionable. See *post*, as to notice to joint-stock companies, Part III., *Actions by and against Companies*. The indorser of a dishonoured bill was abroad, but had a house in England, and the bill was shown to his wife there, and payment demanded, and she was also informed of the non-payment: held sufficient; *Cromwell v. Hyson*, 2 Esp. 511; *Housses v. Cowne*, 2 M. & W. 348. Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, he need not prove notice of the dishonour of the substituted bill, the defendant being no party to it; *Bishop v. Rowe*, 3 M. & S. 362.

Time within which notice must be given.] The general rule with regard to inland bills is, that, where the parties do not re-side in the same town, it is sufficient to send a notice by the post on the day following that on which the party sending receives intelligence of the dishonour; *Williams v. Smith*, 2 B. & A. 496. Where there is a post on the day on which the party receives the notice, and no post on the following day, it is sufficient to forward the notice by the post of the third day; *Geill v. Jeremy*, Mood. & M. 61. It is a question of due diligence; and distance and other circumstances may sometimes warrant a longer delay; but the holder is entitled, at all events, to one day; *per Maule, J.*, in *Rowe v. Tipper*, 13 C. B. 249; 22 L. J.

(C. P.) 135. If the parties reside in the same town, notice must be given before the expiration of the day after that on which it has been received; *Smith v. Mullett*, 2 Camp. 208. Where the party receives notice on a *dies non*, as Sunday, he is in the same situation as if it did not reach him till the next day; *Bray v. Hadwen*, 5 M. & S. 68. And where a bill is payable on the day preceding Christmas Day, Good Friday, a thanksgiving day, or fast day, it is not necessary for the holder to give notice until the day next after such Christmas Day, &c.; and where Christmas Day, &c., is a Monday, and the bill is payable on Saturday, notice is sufficient on Tuesday: and for all other purposes such days are to be considered as Sundays so far as regards bills and notes; Stat. 7 & 8 Geo. 4, c. 15. A Jew is not obliged to forward notice on the day of a great Jewish festival; *Lindo v. Unsworth*, 2 Camp. 602. If the holder places the bill in the hands of his banker, the latter is only bound to give notice of dishonour to his customer in like manner as if he were himself the holder; and the customer has the same time to communicate the notice as if he had received it from the holder; per Bayley, J., in *Firth v. Thrush*, *infra*; *Huyes v. Birks*, 3 B. & P. 599; *Scott v. Lifford*, 9 East, 347; *Langdale v. Trimmer*, 15 East, 291. And the same principle applies where the holder employs an attorney to ascertain the residence of a prior indorser; *Firth v. Thrush*, 8 B. & C. 387. When a bill has passed through several branch banks of the same establishment, each is to be considered as a separate party, so as to be entitled to the usual time for giving notice of dishonour, though the bill may have passed by delivery without indorsement; *Clode v. Bayley*, 12 M. & W. 51. Where *laches* is once incurred, the drawer or prior indorser is discharged, though he receives notice at the time within which, had each person regularly transmitted notice to another, he would have received it; *Turner v. Leech*, 4 B. & A. 451; *Marsh v. Maxwell*, 2 Camp. 210 (n).

A notice on the day on which the bill becomes due is not too soon; for though payment may still be made within the day, non-payment on due presentment is a dishonour, and the plaintiff is not bound to apply again; *Burbridge v. Manners*, 3 Camp. 193; *Hine v. Allely*, 4 B. & Ad. 621. Where a bill is drawn and indorsed in England, and accepted payable abroad by a foreign acceptor, it is enough to give the drawer or indorser such notice of dishonour and protest as the foreign law requires; *Rothschild v. Currie*, 1 Q. B. 43.

If the notice of dishonour sent to the drawer of a bill arrives too late through misdirection, it is for the jury to say whether the holder used "due diligence" to find the drawer's address; *Siggers v. Brown*, 1 Mood. & Rob. 520; and if the delay arose from the bill having been sent to a wrong person through a mistake caused by the indistinctness of the drawer's writing on the bill, he is not discharged; *Hewitt v. Thomson*, 1 Mood. & Rob. 543.

Notice, proof of, by admission.] Admission of liability is evidence of notice; as by a promise to pay; for this admits everything done to entitle the plaintiff to sue; *Lundie v. Robertson*, 7 East, 231; *Crozon v. Worthen*, 5 M. & W. 5. So a declaration by the defendant made to a party to, but not the holder of the bill, of his intention to pay the bill, "and not to avail himself of the informality of notice," is evidence of due notice; *Brownell v. Bonney*, 1 Q. B. 39. So where defendant knew that the bill was unpaid, and only objected to pay it on the ground of fraud in the holder, Lord Tenterden, C. J., held this

evidence of due notice; *Wilkins v. Judis*, 1 *Mood. & Rob.* 41. A promise to pay, though conditional as to the mode of payment, is sufficient; *Campbell v. Webster*, 2 *C. B.* 258. So where the drawer of a foreign bill, on being told it was dishonoured, said that his affairs are deranged, but that he would be glad to pay it as soon as his accounts with his agents are cleared, this is sufficient proof of a protest having been duly made; *Gibbon v. Coggon*, 2 *Camp.* 188; *Greenway v. Hindley*, 4 *Camp.* 52. Where the plaintiff gave in evidence an agreement made between a prior indorser and the defendant (the drawer), after the bill became due, reciting that the defendant had drawn the bill in question, that it was over due and ought to be in the hands of the prior indorser, and that it was agreed that the latter should take the money due to him upon the bill by instalments; this agreement was held to dispense with other proof of notice of dishonour; *Gunson v. Metz*, 1 *B. & C.* 193. But a mere offer, upon being arrested, to give another bill, is no evidence of notice; *Cuming v. French*, 2 *Camp.* 106 (n). The drawer of a bill, being applied to for payment, said, "If the acceptor does not pay, I must; but exhaust all your influence with the acceptor first:" the drawer afterwards directed the applicant to raise the money on the lives of himself and the acceptor. It was held that this admission, though evidence, was not to be taken as *conclusive* of the defendant's having received, or waived, notice of dishonour of the bill; *Hicks v. Duke of Beaufort*, 4 *N. C.* 229.

Repeated calls at the drawer's house without effect may excuse notice altogether; *Crosse v. Smith*, 1 *M. & S.* 545; but are not evidence of notice, and should be pleaded in excuse of notice; *Allen v. Edmundson*, 2 *Ex.* 719; 17 *L. J. (Ex.)* 291.

Notice, proof of delivery of.] It is sufficient proof of a notice to show that it was sent in a letter by the post, without proving that the letter was received; *Saunderson v. Judge*, 2 *II. Bl.* 509. It is no answer that delay did, in fact, take place in the post-office; *Woodcock v. Houldsworth*, 16 *M. & W.* 124; 16 *L. J. (Ex.)* 49. And when the notice must be given on a certain day, it is enough if the letter be put into the post at such an hour that it would, in the usual course, be delivered on that day; *Stocken v. Collin*, 7 *M. & W.* 515. The post-mark is not conclusive of the time of posting; *Ibid.* If a notice is sent by post, the direction of the letter will be too general to an indorser, "Mr. H., Bristol"; *Walter v. Haynes, Ry. & Mood.* 149. But where the bill was dated "Manchester," only, it was held sufficient to direct to the drawer at "Manchester," generally; *Mann v. Moors, Ry. & Mood.* 249. So where a person drew a bill, dating it generally "London," on an acceptor resident in London whose address was stated on the bill, it was held that proof of a letter containing notice of dishonour of the bill having been put into the post office, addressed generally to the drawer "London," was evidence of due notice of dishonour; *Clarke v. Sharpe*, 3 *M. & W.* 166. And in such a case this is enough, as against the drawer, though the letter never reaches him, and though his residence might have been found by inquiry at the drawee's address given on the bill; *Burmester v. Barron*, 17 *Q. B.* 828; 21 *L. J. (Q. B.)* 135. For the plaintiff has done all that the drawer himself required, who had supplied no better address; and there was sufficient evidence of due diligence; *S. C.*; and see *post*, p. 199. If there is no post, the notice may be sent by any ordinary mode of conveyance;

as, in case of a foreign bill, by the first regular ship bound for the place where notice is to be given; *Muilman v. D'Eguino*, 2 H. Bl. 565. In proving a notice sent by post, it was ruled by Lord Ellenborough not to be sufficient to show that it was contained in a letter, which letter was put upon a table for the purpose of being carried to the post, and that, in the course of the business, all letters deposited upon that table were carried to the post; but he said it might have been sufficient had the person, who was in the habit of carrying the letters to the post, been called, and stated that he invariably carried all such letters to the post; *Hetherington v. Kemp*, 4 Camp. 193. And it was held in *Skilbeck v. Garbett*, 7 Q. B. 846, that if it be shown that the letter was put on the proper day with others in a box in the plaintiff's office, out of which the postman invariably called every day to take the letters, this is evidence of a sending by the post without calling the postman. To prove the sending of a notice by post, the plaintiff's clerk was called, who stated that a letter containing the notice was sent by post on a Tuesday morning, but he had no recollection whether it was put in by himself or another clerk; it was held that this was not sufficient evidence of putting into the post; *Hurkes v. Salter*, 4 Bing. 715. Proof that duplicate notices of dishonour were written; that a letter, of which the witness could not state the contents, was sent on the same day by the plaintiff to the defendant; and that the defendant, having received notice to produce the letter written to him on that day, refused to do so;—was held slight *prima facie* evidence of the receipt of a notice; *Roberts v. Bradshaw*, 1 Stark. 28; see also *Curlewis v. Corfield*, 1 Q. B. 814.

Contents of notice, how proved.] Where a written notice has been given by letter, a duplicate or copy is good evidence without notice to produce the letter; *Kine v. Beaumont*, 3 B. & B. 288. And in the case of *Swain v. Lewis*, 2 C. M. & R. 261, it was held, after conference with all the judges, that it is not necessary to give a notice to produce a notice of dishonour of a bill of exchange, whether by letter or otherwise. Secondary, parol, or other evidence of such notice is, therefore, admissible without notice to produce. But where, in an action against the indorser of a bill, it became necessary to prove that notice of the dishonour of *other bills* had been given to the defendant, for which purpose examined copies of letters containing such notices were offered, Abbott, C. J., ruled that a notice to produce such letters was necessary, and that the case did not fall within the exception as to notices respecting bills which are the subject-matter of the action; *Lanauze v. Palmer*, *Mood. & M.* 13.

Protest.] In case of an inland bill, a protest is unnecessary and of no effect; *Windle v. Andrews*, 2 B. & A. 696; *Bonar v. Mitchell*, 5 Ex. 415; 19 L. J. (Ex.) 302. A protest, where necessary, is sometimes stated in the declaration; but it seems to be involved in the allegation of notice, when notice can only be legally given through a protest; *Salomons v. Stavely*, 3 Doug. 298; the plaintiff should therefore, on a traverse of the notice, be prepared to prove the protest. In case of a foreign bill, notice of dishonour without notice of protest is sufficient, if the party to whom notice is given resides in this country; *Robins v. Gibson*, 1 M. & S. 288; and it is sufficient, though he should happen at the time of the dishonour to be absent abroad; *Cromwell v. Hynson*, 2 Esp. 511. In giving

notice of non-payment to the drawer of a foreign bill resident abroad, it is sufficient to inform him that the bill has been protested without sending a copy of the protest; *Goodman v. Harrey*, 4 *Ad. & E.* 870. The production of the protest purporting to be attested by a notary-public, when made abroad, is sufficient proof of the protest; *Anon.*, 12 *Mod.* 345. But a notarial protest is no evidence that a foreign bill of exchange has been presented for payment in England; *Chesmer v. Noyes*, 4 *Camp.* 129; and a protest made in England must, it is said, be proved in the ordinary way; *Chitty on Bills*, 655, 9th ed. But there is a dictum of Lord Abinger to the contrary in *Brain v. Preece*, 11 *M. & W.* 775. In *Geralopulo v. Wieler*, 10 *C. B.* 690, 20 *L. J. (C. P.)* 105, it was held that upon payment supra protest for the honour of a party, it is enough if before payment the bill be in fact protested, and a declaration of payment for honour be made and noted in the notarial register, and that the formal protest may be drawn up afterwards, even after action brought; and that a duplicate protest made from the notary's book was primary evidence as much as the protest sent abroad. A promise to pay (though qualified) is an admission by the defendant of due protest for non-acceptance, and notice of it; *Campbell v. Webster*, 2 *C. B.* 258; 15 *L. J. (C. P.)* 4.

By the 2 & 3 Will. 4, c. 98, all bills of exchange, wherein the drawer shall have expressed that such bills of exchange are to be payable in any place other than the place by him therein mentioned to be the residence of the drawee, and which shall not, on the presentment for acceptance thereof, be accepted, shall or may be, without further presentment to the drawee, protested for non-payment in the place in which such bills of exchange shall have been by the drawer expressed to be payable, unless the amount owing upon such bills shall have been paid to the holder thereof on the day on which they would have become payable had the same been duly accepted.

This statute appears to have been occasioned by the decision in *Mitchell v. Baring*, 10 *B. & C.* 4.

A bill drawn in the United Kingdom or adjacent islands and payable in, or drawn on a person resident therein, is an inland bill. See *ante*, pp. 130—3.

Waiver, or dispensation of notice.] Whenever the want of notice is excused, the circumstances relied upon as the excuse must be stated in the declaration. Therefore, where the defendant told the indorsee beforehand not to send such notice, and that he would pay the amount, this is not evidence to support an averment of notice, but should have been pleaded as a dispensation of it; *Burgh v. Legge*, 5 *M. & W.* 418. A mere promise to pay made in anticipation that the bill will be dishonoured, does not dispense with notice of dishonour; *Pickin v. Graham*, 1 *C. & M.* 725. But if the drawer, a few days before the bill becomes due, calls on the holder, and tells him that he has no regular residence, but he will call and see if the bill be paid by the acceptor, this dispenses with notice of dishonour; *Phipson v. Kneller*, 4 *Camp.* 285.

So if the holder send a dishonoured bill to the place of business of the indorser, for the purpose of giving notice, and find it closed, he can recover against him without having left a notice, as these facts go to prove a dispensation of notice; *Allen v. Edmundson*, 2 *Ex.* 719; 17 *L. J. (Ex.)* 291; *Crosse v. Smith*, 1 *M. & S.* 545, cited

ante, p. 195. Proof of knowledge of dishonour is not equivalent to proof of notice; *Solarte v. Palmer*, 1 N. C. 194; *Burgh v. Legge*, 5 M. & W. 418. But where a bill is taken to the drawer when it becomes due, who says the acceptor is dead and that he is the executor, and asks for time, and says he will see the bill paid, this is sufficient notice of dishonour; *Cuunt v. Thompson*, 7 C. B. 400; 18 L. J. (C. P.) 125.

If an indorser, who has had no notice of dishonour, on being told, after the time for giving notice has expired, that the holders are about to take proceedings against him on the bill, says he will pay it if they will give him time,—that, though not conclusive, is evidence from which a jury may infer that he has waived the right to notice; *Woods v. Dean*, 3 B. & S. 101; 32 L. J. (Q. B.) 1; *Cordery v. Colville*, 32 L. J. (C. P.) 210; 14 C. B., N. S., 374; and if the declaration allege notice, the judge or court will amend it to a waiver of notice; *S. C.* The effect of a promise to pay a dishonoured bill is thus summed up by Byles, J., in the latter case (as reported in the *Law Journal*; and the editors have the highest authority for saying that this report contains the *ipsissima verba* of the learned judge):—“A promise to pay may operate either as evidence of notice of dishonour, or as a prior dispensation, or as a subsequent waiver of notice. Whether made after, or even before, the time for giving notice has expired,—inasmuch as notice may be given at any time within the limit prescribed by law,—a promise to pay is always evidence from which a jury may infer due notice. But even when the other evidence is conclusive to show that due notice was not given, or where a jury refuse to draw the inference that it was given, a promise to pay made within the time for giving notice is a dispensing with notice, and made after that time is a waiver of notice. A prior dispensation, or subsequent waiver, should be pleaded, but the Common Law Procedure Act enables and obliges the Court to amend the record, wherever amendment is necessary to decide the real question in controversy between the parties. The practical consequence is, that in almost every case proof of a promise to pay cures the want of notice of dishonour.” See also *post*, p. 201.

Notice excused; no effects.] Notice of dishonour to the drawer is unnecessary if he had not, at the time of drawing or before the time of becoming due, any effects either in the hands of the drawee, or consigned on their way to him; *Bickerdike v. Bollman*, 1 T. R. 405; nor a reasonable expectation of having any; *Claridge v. Dalton*, 4 M. & S., 226. This excuse must be alleged in the declaration; *per Parke, B.*, in *Burgh v. Legge*, 5 M. & W. 421. When issue is joined on the want of effects in the hands of the drawee, the terms of the allegation will sufficiently indicate the required proof. The averment is disproved if it be shown that the drawer had effects on their way to the drawee, though they never reached him; *Rucker v. Hiller*, 3 Camp. 217; 16 East, 43. So if the drawer had some effects in the drawee's hands at the time when the bill was drawn, though at the time the bill was presented for acceptance and thence until presentment for payment he had not any; *Orr v. Maginnis*, 7 East, 359. So, though there were no effects at the time the bill was drawn or accepted, provided there were effects when it became due; for the whole period must be looked to from the drawing of the bill till it is due; and notice is requisite if the drawee had any effects at any time during that inter-

val; *Hammond v. Dufreno*, 3 *Camp.* 145; *Thackray v. Blackett*, 3 *Camp.* 164. So if the drawer has effects in the hands of the drawee, though he is indebted to the drawee greatly beyond that amount; *Blackhan v. Doren*, 2 *Camp.* 503. So where there is a running account between the drawer and the drawee, and a fluctuating balance between them, and the drawer has reasonable grounds to expect that he shall have effects in the drawee's hands when the bill becomes due; *per Lord Ellenborough, C. J., Brown v. Maffey*, 15 *East*, 221; or where the bill is drawn in the reasonable expectation that, in the ordinary course of mercantile transactions, it would be accepted or paid; *Claridge v. Dalton*, 4 *M. & S.* 226; *Lafitte v. Slatter*, 6 *Bing.* 623; or where the acceptor has received from the drawer his acceptances upon which he has raised money, and some of which have been dishonoured, and some are outstanding; *Spooner v. Gardiner, Ry. & Mood.* 84. And, in general, where the drawer would have any remedy over against a third person (as in the case of a bill drawn for the accommodation of a person to whom he indorses it), notice ought to be alleged and proved; *Cory v. Scott*, 3 *B. & A.* 619; *Norton v. Pickering*, 8 *B. & C.* 610; *Lafitte v. Slatter*, 6 *Bing.* 623. It is no excuse of notice, that the plaintiff and the defendant are both shareholders in a joint-stock company, and that the defendant drew the bill on the company (the acceptors) in order to raise money for them, and as an additional security to the plaintiff who advanced the money; *Maltass v. Siddle*, 6 *C. B., N. S.*, 494; 28 *L. J. (C. P.)* 257.

The fact that the drawer of a bill made it payable at his own house is evidence that the bill is an accommodation bill, and so excuses notice of dishonour; *Sharp v. Bailey*, 9 *B. & C.* 44.

Notice dispensed with by ignorance of drawer's residence.] Where either want of notice or delay is sought to be excused by the holder's ignorance of the place of residence of the defendant, it is a question for the jury whether he used due diligence to find it; *Bateman v. Joseph*, 12 *East*, 433; and time may be allowed for inquiries by post; *Baldwin v. Richardson*, 1 *B. & C.* 245. It is not enough to show that inquiries as to an indorser's residence were made at the place at which the bill was payable; *Beveridge v. Burgis*, 3 *Camp.* 262. Inquiry should be promptly made of some of the other parties to the bill or note; and of persons of the same name, &c.; *Bayley on Bills*, 281-2, 6th ed.; *Chapcott v. Curlew*, 2 *Mood. & Rob.* 484.

Calling on the indorser the day after the bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, has been considered sufficient; *Browning v. Kinnear, Gow*, 81. In one case it was held sufficient, on the dishonour of a promissory note, to make inquiry at the maker's house for the residence of the defendant, the payee and indorser; *Sturges v. Derrick, Wightw.* 76.

Where the holder is excused by ignorance from giving notice until after the usual day, the common allegation of notice is still sufficient, if actually given as soon as possible; *Firth v. Thrush*, 8 *B. & C.* 387. But, generally, excuse of any notice does not prove an averment of notice; *ante*, p. 197.

Account stated.] Where the drawer, knowing the plaintiff to be the indorsee of an overdue bill, promises him to pay it, the plaintiff

may recover on an account stated; *Oliver v. Dovatt*, 2 Mood. & Rob. 230. See *ante*, p. 187.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a bill, the plaintiff must prove the following matters, if traversed:—1. The indorsement by the defendant: 2. the indorsements between that of the defendant and the plaintiff, when stated in the declaration: 3. the presentment to the drawee or acceptor, and the dishonour: 4. due notice of the dishonour to the defendant.

It has long been decided that every indorser is in the nature of a new drawer; *Ballingalls v. Gloster*, 3 East, 482; as to what the drawer's contract is, see *ante*, p. 187. A person, who puts his name on the back of a blank bill stamp, is liable as indorser for any amount, commensurate with the stamp, which the person to whom he gives it fills in; *Russell v. Langstaffe*, 2 Dougl. 514.

It is not necessary, as against an indorser, to prove the signature of the drawer or of prior indorsers; for the indorsement of the defendant admits the hand-writing of the drawer, and the defendant cannot even insist that it is a forgery; *Lambert v. Oakes*, 1 Id. Raym. 443; *Critchlow v. Parry*, 2 Camp. 182; so it admits the signature of all antecedent indorsers; *MacGregor v. Rhodes*, 6 E. & B. 266; 25 L. J. (Q. B.) 218.

The law *prima facie* presumes that a bill was indorsed before it became due; *Parkin v. Moon*, 7 C. & P. 408; *Lewis v. Parker*, 4 Ad. & E. 838. A bill being drawn and indorsed in the name of the firm under which defendant and another carried on business, a question arose whether the indorsement was before or after the dissolution of the partnership had been advertised. The bill was dated before the advertisement, but the indorsement was not dated. Held, that the date was *prima facie* the true date, and that it was properly left to the jury to say whether it was indorsed before or after the advertisement; and that, as it was drawn payable to the defendant's own order, the jury might reasonably infer that it was indorsed shortly after the drawing; *Anderson v. Weston*, 6 N. C. 296. As to indorsement by one of several partners after dissolution, see *ante*, p. 185.

In suing an indorser on nonpayment of the bill by the drawee, it is unnecessary to state an acceptance; and, if stated, it need not be proved; *Tanner v. Bean*, 4 B. & C. 312. It is only necessary to prove a presentment for payment at the place, if any, pointed out in the acceptance; *Parkes v. Edge*, 1 C. & M. 429. The rules with regard to the presentment of the bill and notice of dishonour are, in general, the same in this action as in an action by the payee against the drawer; see *ante*, pp. 188 *et seqq.* If a bill be reindorsed to a previous indorser, he has in general no right of action against the intermediate parties, inasmuch as he would be liable over to them on his previous indorsement; *Bishop v. Hayward*, 4 T. R. 470; *Britten v. Webb*, 2 B. & C. 483. But circumstances may be specially pleaded showing that the defendant could not sue the plaintiff on his indorsement; *Wilders v. Stevens*, 15 M. & W. 208. And in an action by indorsee against indorser, where the issue was only on the want of notice to the defendant of nonpayment by drawee, defendant was not permitted to show that the plaintiff (who had given due notice) and

the drawer, were one and the same person; the defence should have been specially pleaded; *Williams v. Clarke*, 16 M. & W. 834.

No evidence of a demand upon the drawer, or prior indorsers, is necessary; *Bromley v. Frazier*, 1 Str. 441; *Heylyn v. Adamson*, 2 Burr. 669. The fact that the drawer has never had any effects in the hands of the drawee will not excuse the want of notice of dishonour to the indorser, who has no concern with the accounts between the drawer and acceptor; *Wilkes v. Jacks, Peake*, N. P. 202; *Brown v. Maffey*, 15 East, 216; nor that the indorser was aware of the insolvency of the drawer and acceptor; *Esdaile v. Sowerby*, 11 East, 114; and the indorser without consideration, although also payee of a bill, the drawer and acceptor of which are fictitious persons, is entitled to notice, if he have no knowledge of the fraud; *Leach v. Hewitt*, 4 Taunt, 731. Proof of notice of dishonour will be dispensed with by a promise of the defendant to pay; *Wilkes v. Jacks, Peake*, N. P. 202; provided it be an unambiguous one; thus the following letter from the indorser was held not to waive the proof of notice: "I cannot think of remitting till I receive the draft; therefore if you think proper you may return it to Trevor and Co., if you think me unsafe;" *Borradaile v. Lowe*, 4 Taunt. 93. A promise to pay not made to the plaintiff, but to another person who was holder of the bill at the time, will be sufficient; *Potter v. Rayworth*, 13 East, 417. So allowing judgment to go by default in an action brought by the then holder of the same bill dispenses with proof of notice of dishonour; *Rabey v. Gilbert*, 30 L. J. (Ex.) 170; 6 H. & N. 536. And see further, *ante*, p. 197, as to what will dispense with proof of notice of dishonour.

[*Evidence under the money counts.*] An indorsement is *prima facie* evidence of money lent by the indorsee to his immediate indorser; *Kessebourer v. Tims*, *Bayley on Bills*, 363, 6th ed. But where the indorser told his indorsee, just before presentment, that the bill would not be paid, that notice need not be sent to him, and that he would send the money on a future day, this was held no evidence on an account stated; it being no proof of a debt due from the indorser at the time of the promise; but only a conditional promise in a certain event; *Burgh v. Legge*, 5 M. & W. 418. Though as between indorser and his indorsee the bill is evidence of an account stated, this may be rebutted by showing that the defendant indorsed in blank, and delivered it to F., who carried it to the plaintiff to be discounted; *Burmester v. Hogarth*, 11 M. & W. 97.

Damages generally.

In an action against an acceptor by indorsee, the defendant is generally liable only for principal and interest where due, and not for re-exchange; *Woolsey v. Crawford*, 2 Camp. 445. But as against drawer or indorser the holder may also recover the expenses of noting, protest, postages, &c., and re-exchange, in cases where those expenses are by law or usage chargeable or incurred; *De Tastet v. Baring*, 11 East, 265. The amount for which the indorser of a bill, drawn and indorsed in England and payable abroad, is liable in case of dishonour by nonpayment, is only the re-exchange,—that is, the value of the foreign coin expressed in English money at the rate of exchange on the day of dishonour,—with interest and expenses,

and the holder has not the option of recovering the sum which he gave for the bill in England or the re-exchange; *Suse v. Pompe*, 30 *L. J. (C. P.)*, 75; 8 *C. B.*, *N. S.*, 538; and evidence of custom amongst merchants, allowing this option, is not admissible, as it would contradict the obligation implied by the written instrument; *S. C.* As to the mode of calculating interest on bills and notes, see *post*, *Action for Interest*.

Defences, generally, to Actions on Bills of Exchange.

By the Rules II. T., 1853, r. 7, in actions on bills or notes the pleas of *non-assumpsit* or *nunquam indebitatus*, are inadmissible. A plea in denial must traverse some matter of fact, as the drawing, making, indorsing, presenting, accepting, or notice of dishonour. Under the similar rule, 4 *Wm. 4*, it was held that if an executor declared on a bill or note payable to his testator, laying a promise to pay the executor, such promise might still be denied by *non-assumpsit*: for the action is then not on the bill simply, but on a promise not implied by it; *Timmis v. Platt*, 2 *M. & W.* 720. And this decision seems still to be law. Under a plea denying acceptance, it is not competent for defendant to avail himself of the defence that plaintiff, an indorsee, has lost the bill and cannot produce it; *Blackie v. Pidding*, 6 *C. B.* 196. So in an action on a note against maker, the defence of the loss of it must be pleaded specially. *Charney & Grundy*, 23 *L. J. (C. P.)* 121; 14 *C. B.* 608. The principle of this defence is that the holder of a negotiable security is only entitled to payment on production of it for re-delivery to the person liable to pay. If the defendant refuses to pay on that ground only, as where it is destroyed or is lost, there must be a plea to that effect. If there be only a traverse, under the circumstances already stated the plaintiff may prove the bill by secondary evidence; *Blackie v. Pidding*, 6 *C. B.* 196. See *ante*, p. 173.

The proofs required on a traverse of allegations in the declaration have already been considered. The following are some of the most usual defences to actions on bills, not already noticed.

Stamp.] No stamp, or a wrong one, is a defence under a traverse of the drawing or acceptance; *Dawson v. Macdonald*, 2 *M. & W.* 26; *McDowell v. Lyster*, 2 *M. & W.* 52. So, in an action on a cheque it is competent for the defendant to show that it was post-dated, on a traverse of the making of the cheque; and the objection may be made after it has been read; *Field v. Woods*, 7 *Ad. & E.* 114. See *ante*, p. 122. And it is competent in an action against the acceptor for the defendant to show that a bill, purporting to be a foreign bill, was in truth drawn in England, though the defendant was party to the fraud, and the plaintiff took the bill in ignorance; *Steadman v. Duhamel*, 1 *C. B.* 888. Interlocutory proof in support of the objection should be received *instantly*, and the question must be decided by the judge; *Bartlett v. Smith*, 11 *M. & W.* 483.

Alteration.] An alteration of such a kind as to discharge the acceptor cannot be shown under a traverse of the acceptance; if it do not render a new stamp necessary; *Mason v. Bradley*, 11 *M. & W.* 590; *Parry v. Nicholson*, 13 *M. & W.* 778. The defendant authorised W. to put his name to a general acceptance on a blank

stamp; this was done, and on filling the bill up the payee added a place of payment to the acceptance, the bill being declared on without stating the place of payment; on a traverse of the acceptance, the defendant was held entitled to succeed, on the ground apparently that the acceptance never existed on the perfect bill as a general acceptance; and a special one was not authorised by the defendant; *Crotty v. Hodges*, 4 M. & G. 561. This case is not clearly reported, but the above appears to be the result; otherwise it is inconsistent with *Purry v. Nicholson*, *suprà*. After a joint and several note, made payable "with lawful interest," had been signed by three makers, two of the makers, with the assent of the plaintiff, the payee and holder, wrote on the left-hand corner of it, "with interest at six per cent." Held that this avoided it as against the third maker who was sued alone; *Warrington v. Early*, 2 E. & B. 763; 23 L. J. (Q. B.) 47. An unauthorised insertion, made by a stranger, of a place of payment in the acceptance of a bill, is a material alteration, notwithstanding the 1 & 2 Geo. 4, c. 78, as against the acceptor, and discharges him, even as against a subsequent indorsee, taking it *bonâ fide* for value, and without notice that the words had been so inserted after issuing; *Burchfield v. Moore*, 3 E. & B. 683; 23 L. J. (Q. B.) 261. So, altering a joint and several note signed by two into a note signed by three, by getting a third maker to join, vitiates the note as against one of the makers who did not assent to the alteration; *Gardner v. Walsh*, 5 E. & B. 83; 24 L. J. (Q. B.) 285. Where the defendant had paid two years' interest on an altered note, this was held to be evidence that the alteration was by his consent; *Curiss v. Tattersall*, 2 M. & G. 890. It is for the party, who sues on an instrument evidently altered, to give some evidence to explain the alteration; *Clifford v. Parker*, 2 M. & G. 909. In a suit by drawer against acceptor: Plea 1. traverse of acceptance; 2. alteration after acceptance; the proof was, that the bill was drawn in France on the defendant in London, and the defendant had expressly accepted the bill for a less sum than in the body of it, and that the sum had been altered accordingly, but by whom or when did not appear: Held that plaintiff ought to recover; for it might be presumed that the defendant consented to alter the bill, and *non constat*, but that the alteration was made in France, so as not to require a stamp; *Hamelin v. Bruck*, 9 Q. B. 306. See as to alterations which avoid bills under the stamp acts, *ante*, pp. 133-4.

Where the drawer made an alteration fatal to the bill, as between him and acceptor, he may recover on a count for the original consideration; *Atkinson v. Hawdon*, 2 Ad. & E. 628; *aliter* as between indorsee and drawer, the alteration being made by the former; *Alderson v. Langdale*, 3 B. & Ad. 660. A note so altered as to avoid it, may be used by the payee as evidence of an account stated by the maker at the time it was given; *Gould v. Coombs*, 1 C. B. 543.

Fraud.] Fraud, which makes the contract void or voidable as against the defendant, must be specially pleaded. See Rules, H. T., 1853. But when the fraud is one which avoids the *consideration*, it may be given in evidence under a general plea denying the consideration; *Mills v. Oddy*, 2 C. M. & R. 103. The maker of a note pleaded that it was made and delivered to W. only to get it discounted, and that W. fraudulently indorsed it to the plaintiff, who gave no consideration and knew of the fraud: replication *de injuriâ*; letters written by W., while holder of the note, are not admissible

against the plaintiff to prove the fraud, without first establishing, *aliunde*, a privity between the plaintiff and him; *Phillips v. Cole*, 10 *Ad. & E.* 106. A knowledge by the plaintiff, indorsee, of fraud in the concoction of a bill, is no defence if he received it for good consideration from an innocent indorser; *May v. Chapman*, 16 *M. & W.* 355.

Forgery.] Forgery of the defendant's signature is, of course, evidence under a traverse of the making, &c.; but, for the purpose of proving the forgery, the defendant cannot be permitted to prove that other bills, with forged signatures of his, had been in the hands of the plaintiff and circulated by him; *Griffits v. Payne*, 11 *Ad. & E.* 131.

Cancellation, so imperfectly effected that the bill is still apparently uncanceled, affords no answer as against a *bona fide* holder. Therefore where the acceptor of a bill tore it in two for the purpose of destroying it before circulation, and the drawer picked up and fraudulently rejoined the bits so as to look like a bill which had been divided for transmission by post, and passed it to a *bona fide* holder for value, the acceptor was held liable, whether the fraud amounted to forgery or not; *Ingham v. Primrose*, 28 *L. J. (C. P.)* 294; 7 *C. B., N. S.*, 82.

Want of consideration.—Onus probandi.] Some difficulty exists with regard to the party upon whom the *onus* of proving the consideration, or want of consideration, when pleaded, rests. The point depends in some measure upon the form of the pleadings.

A bill or note imports consideration; the holder is therefore presumed to have given value for it; and, before the late rules of pleading, the plaintiff could not in general be put upon proof of such consideration (where the want of it would be a defence), without previous notice of an intention to dispute it, and also proof of something to discredit the plaintiff's title to the bill. Since the new rules, a special plea, alleging want of consideration, is equivalent to notice and dispenses with it; but the old rule of practice continues so far to prevail, that, where the defence is founded simply on want of consideration (as in actions between immediate parties), and the plea alleges such want of consideration, which the plaintiff denies, the defendant is still bound to give some evidence, in the first instance, in support of his plea; *Percival v. Frampton*, 2 *C. M. & R.* 180; *Mills v. Barber*, 1 *M. & W.* 425. So where the only consideration for defendant's acceptance was the giving up to him by the plaintiff (the indorsee) of another acceptance of the defendant, which turned out to be a forgery, plaintiff was held bound to show himself *bona fide* holder of the forged bill; *Mather v. Maidstone*, 1 *C. B., N. S.*, 273; 26 *L. J. (C. P.)* 58. Where the plaintiff replied, to a plea of no consideration, that there was consideration, "to wit, the sale of goods by the plaintiff to the defendant," concluding to the country, the defendant was held liable to the burden of proof; *Low v. Burrows*, 2 *Ad. & E.* 483. But where the plaintiff, instead of merely denying the defendant's allegations, states a specific consideration in terms that make the proof of it part of the issue, then it has been considered that the proof of it lies upon the plaintiff; *Batley v. Catterall*, 1 *Mood. & Rob.* 379.

If the plea alleges not only want of consideration in the plaintiff, but also fraud in a prior party, or some other matter, such as illegality, throwing suspicion on the title to the bill,—in this case, when

the replication puts in issue the whole plea, it will be enough, in the first instance, for the defendant to prove the fraud, &c.; for this puts the plaintiff on proof of consideration; see *Percival v. Frampton*, and *Mills v. Barber*, *suprà*; *Bailey v. Bidwell*, 13 M. & W. 73. Thus where it was alleged and proved that the bill was indorsed to the plaintiff by a person who was a mere bailee of it from the defendant to get cash for it, and the plea also alleged that plaintiff took it without any consideration, proof of the fraud of the indorser throws on plaintiff the burden of proving consideration; *Smith v. Braine*, 16 Q. B. 244; 20 L. J. (Q. B.) 201 (over-ruling *Brown v. Philpot*, 2 Mood. & Rob. 285); *Hall v. Featherstone*, 3 H. & N. 284; 27 L. J. (Ex.) 308; *Harvey v. Towers*, 6 Ex. 656; 20 L. J. (Ex.) 318; *Berry v. Alderman*, 14 C. B. 95; 23 L. J. (C. P.) 34. In the latter case, it was said, *arguendo*, by Maule, J., that even if fraud be not alleged in the plea, but only want of consideration, yet fraud may be shown at the trial on the issue of want of consideration, in order to raise an inference against the plaintiff. Such a case may perhaps occur, but, generally, neither want of consideration alone, nor fraud alone, will vitiate the security except as between immediate parties or their privies. When the plea alleges that the bill was founded on a wager, and that the indorsements were without value, proof of a wager, void but not unlawful, only shows want of consideration and not illegality, and raises no presumption that the plaintiff is not a *bond fide* holder for value. The defendant, therefore, must prove this; *Fitch v. Jones*, 5 E. & B. 238; 24 L. J. (Q. B.) 293.

Where the plea alleges both fraud and want of consideration, and the replication simply traverses the want of consideration, a difference of opinion exists, as to whether this is such an admission on the record as to put the plaintiff to proof of consideration. The Court of Exchequer has held that it is *not* such an admission; but that the fraud or other circumstance of suspicion must be proved at the trial, in order to put the plaintiff to prove that he has given value; *Edmunds v. Groves*, 2 M. & W. 642; *Smith v. Martin*, 9 M. & W. 304. On the other hand, the Court of Queen's Bench has held that an admission on the record must be taken as an admission for every purpose in the cause, and that the plaintiff is therefore bound, in such a state of the record, to prove consideration; *Bingham v. Stanley*, 2 Q. B. 117. The grounds of the decisions in the cases above cited seem scarcely reconcilable, although attempts have been made to reconcile them. In *Edmunds v. Groves*, the indorsee sued the maker of a note, who pleaded that he had made it to secure a gaming debt, and that it was indorsed to the plaintiff *with notice* and without consideration. The plaintiff replied that it was indorsed *without notice* and for value, on which issue was joined. At the trial, no evidence being given, the judge directed a verdict to be entered for the plaintiff, and the Court of Exchequer held the direction right. In *Bingham v. Stanley*, the drawer of a check payable to bearer pleaded, that he gave it to secure a debt due to L. on a gaming transaction; that L. delivered it to the plaintiff without consideration, who was suing on it for L.'s benefit: Replication, that L. delivered it to the plaintiff for a good consideration; and issue thereon. The Court of Queen's Bench held, in opposition to the ruling of Lord Denman, C. J., at Nisi Prius, that the plaintiff was bound to prove that he had given value. In this case the court assented to the decision of the Court of Exchequer, but

dissented from the doctrine laid down by the court in giving judgment. In *Smith v. Martin*, the indorsee sued the maker of a note who indorsed it to F., who indorsed to G., who indorsed to the plaintiff. Plea, that while the note belonged to G., his claim on it was referred to arbitration by an order made by consent; and that G., against good faith, indorsed it to the plaintiff before award made, who took it with knowledge of the premises. Issue was joined on a replication denying the plaintiff's knowledge of the premises when he took the bill. The defendant before trial gave notice to the plaintiff to prove a consideration for the indorsement to him. The Court of Exchequer held, that the defendant was bound to begin by proving knowledge of the fraud. See further the observations of Alderson, B., in *Carter v. James*, 13 M. & W. 144; in which the learned judge has no doubt that *Bingham v. Stanley* was rightly decided, though he cannot agree with the reasons given.

Where the defendant, the acceptor, pleaded that the bill was an accommodation bill indorsed to plaintiff's indorser for a special purpose, and by him indorsed to plaintiff in fraud of defendant after it was due, and the plaintiff traversed the taking of it after it was due, it was held that the defendant must begin and show that the bill was due when indorsed; *Lewis v. Parker*, 4 Ad. & E. 838. In *Musgrave v. Drake*, 5 Q. B. 185, some of the defendants, acceptors, pleaded non-acceptance: Held that proof under this issue, that the acceptance was by one of the defendants, who had let judgment go by default, in fraud of the others, his partners, but without showing the plaintiff's privity, did not oblige the plaintiff to show the circumstances under which he took the bill. A bill was sent to the plaintiff by a clerk with a message which, if delivered, would have shown that the plaintiff had such notice as would have made him not a *bond fide* holder for value. The bill was delivered, but the clerk was not called, and it was not proved whether the message had been given or not: Held, in an action of trover, that the evidence was not sufficient to rebut the presumption that plaintiff was a *bond fide* holder; *Middleton v. Burned*, 4 Ex. 241; 18 L. J. (Ex.) 433.

Failure, or want of consideration.] Want of consideration alone is only a defence when the parties to the action are the parties as between whom there was the alleged want of consideration, or as between parties who are in privity with them. A *bond fide* holder for value is not affected by any want of consideration as between antecedent parties to the bill or note.

The want of consideration ought to be pleaded specially with the particulars which show want of it, so that the plaintiff may be prepared to meet them; and under the Rules 4 Will. 4, a general plea was held open to special demurrer; *Stoughton v. Kilmorey*, 2 C. M. & R. 72. The Rules of H. T., 1853, are expressed in the same terms as the old; but as objections, heretofore open only on special demurrer, can no longer be taken (Common Law Procedure Act, 1852, s. 51), it seems that a plea of this general kind is now available, subject to an application to the court or a judge under sect. 52, if the plaintiff shall be prejudiced by it. Hence any facts or circumstances which invalidate the original consideration of a bill or note, will, it would seem, be admitted in support of such general plea; see *Mills v. Oddy*, 2 C. M. & R. 103, cited *ante*, p. 203.

Where a debt is due on a judgment between the parties there is a good consideration; as the taking the security imports a promise on the part

of the judgment debtor to suspend proceedings on the judgment till the maturity of the bill or note; *Baker v. Walker*, 14 M. & W. 465; the same principle applies where there is a debt from a third person to the payee, *Popplewell v. Wilson*, 1 Str. 264. An attorney's bill, though not delivered according to law, is a good consideration; *Jeffreys v. Evans*, 14 M. & W. 210. In an action by payee against the acceptor of a bill at three months, drawn in consideration of money to be paid in one month by payee to drawer, and accepted for the accommodation of the drawer, if the money be not paid, the consideration fails and the plaintiff cannot recover; *Astley v. Johnston*, 29 L. J. (Ex.) 161; 5 H. & N. 137. A note given by the defendant on the faith of a misrepresentation by the plaintiff of either matter of fact or of law, though made without fraud, may be impeached as for want of consideration; *Southall v. Rigg* and *Forman v. Wright*, 11 C. B. 481; 20 L. J. (C. P.) 145. So a note given for past gratuitous services, and in consideration for future services, as to which there was no binding contract; *Hulse v. Hulse*, 17 C. B. 711; 25 L. J. (C. P.) 177. But the compromise of a claim, though unfounded, and known by the defendant to be so, but for which the claimant threatened to sue, is a good consideration; *Cook v. Wright*, 30 L. J. (Q. B.) 321.

In an action by indorsee against acceptor, it is not even *prima facie* evidence of want of consideration between the defendant and the drawer, to show that the drawer, on the day before the bill became due, procured all the indorsements to be made without consideration, in order that the action might be brought by the indorsee, and on the understanding that the money should be divided between one of the indorsees and the drawer; *Whitaker v. Edmunds*, 1 Ad. & E. 638. In an action against a drawer by his indorsee, where defendant pleaded that the bill was given in payment for hops of a certain quality to be delivered by plaintiff, and that he did not deliver such hops, "or any hops whatever;" to which plaintiff replied *de injuriâ*, &c.; it was held enough for the defendant to prove the delivery of some hops of an inferior quality; and the plaintiff was not permitted, on this issue, to show an acceptance of them by the defendant; *Wells v. Hopkins*, 5 M. & W. 7. In an action by payee against maker, defendant pleaded that the note was given to the plaintiff in consideration that he would pay the defendant's creditors, and that he promised to pay them, but had not; the replication averred that the note was delivered to plaintiff for the purpose of paying the creditors when the note was paid by defendant, and specially traversed the promise as alleged in the plea: Issue being joined on the traverse, it was held that the plaintiff entitled himself to a verdict by proving the inducement of his replication; for he thereby negatived the promise alleged in the plea, and the promise to hold as trustee was sufficient consideration; *Cole v. Cresswell*, 11 Ad. & E. 661. Where the plea to an action on a note states an executory consideration for it, which was never executed; the defendant is not precluded from proving his plea, although the note professes, on the face of it, to be founded on a past consideration; *Abbott v. Hendricks*, 1 M. & G. 791. And generally the consideration or alleged "value received," apparent on the face of a note, may be contradicted, but not the contract or promise itself; *Easter v. Jolly*, 1 C. M. & R. 703; and see *ante*, p. 26.

In general, the declarations of a former holder of a bill are not admissible to prove the want of consideration; *Shaw v. Broom*, 4 D. & R. 730. But where the plaintiff and the party, whose decla-

rations are offered in evidence, are identified in title; as where the plaintiff took the bill from him after it became due; such declarations are admissible; *Henson v. Marshal*, cited 4 D. & R. 732; *Beauchamp v. Parry*, 1 B. & Ad. 89. So where the plaintiff, though he did not take the bill after it was due, sues as agent for the party who made the declarations; *Welstead v. Levy*, 1 Mood. & Rob. 138.

Illegality of consideration; bona fides of holder.] When the consideration of a bill is illegal, in general, the objection is confined to persons who are parties or privies to the illegality, and those to whom they have passed the bill without value; *Bayley on Bills*, p. 529, 6th ed.; for a *bona fide* indorsee for value, without notice of the illegality, may recover on such bill; *Wyatt v. Bulmer*, 2 Esp. 538; *Masters v. Ibbersen*, 18 L. J. (C. P.) 348; 8 C. B. 100. In this and similar cases, the question for the jury is now settled to be, whether the party taking the bill acted with good faith. If he took it without actual knowledge of the illegality, or other circumstance affecting the title to the note, and gave full value for it, this entitles him to recover, although he may have neglected the means of ascertaining the illegality which were in his power; as where a stolen note was changed by the plaintiff, a money changer, who had received notices a year previously of this and other stolen notes, and kept such notices filed in his office, but did not examine them; *Raphael v. Bank of England*, 17 C. B. 161; and *Gill v. Cubitt*, 3 B. & C. 466, in which a contrary doctrine was upheld, is now completely over-ruled, *Ibid.*; *Bank of Bengal v. McLeod*, 7 Moo. P. C. 35. Gross negligence may, however, be evidence of *mala fides*, though not equivalent to it; *Goodman v. Harvey*, 4 Ad. & E. 870.

Where the bill was given for money lost by gaming, or upon an usurious contract, or to secure money paid to induce a bankrupt's creditors to sign his certificate, various statutes made it a void security, even in the hands of a *bona fide* holder; but by 58 Geo. 3, c. 93, and by 5 & 6 Wm. 4, c. 41, so much of the former statutes as made the securities void is repealed, and by the last Act it is enacted that they shall be deemed to have been given for an illegal consideration. The stat. of Wm. 4, so far as it relates to usurious transactions, was repealed by the 17 & 18 Vict. c. 90, s. 1; but so as not to prejudice the right or remedies of any person in respect of any thing done before the passing of the Act (s. 2).

Before the passing of this Act, the defendant accepted a bill of exchange to secure a loan at usurious interest; and after the Act passed, he accepted fresh bills for the amount of the loan and the usurious interest, and it was held by the Court of Exchequer (Martin, B., dissenting) that there was good consideration for the new bills; *Flight v. Reed*, 32 L. J. (Ex.) 265; 1 H. & C. 703. Where the defence was usury in the indorsement, the usury must have been proved; suspicion is not sufficient to put the plaintiff to proof of consideration; thus, in an action by indorsee against one who had indorsed the bill for the accommodation of the drawer, it was shown that one J., a relation of the plaintiff, got the bill discounted for the drawer, and although it appeared that usurious discount was deducted by J., it was held that whatever suspicion there might be against the defendant, this did not prove usury as against him; *Bassett v. Dodgin*, 10 Bing. 40.

Mere wagers, not made unlawful by any statutes against gaming,

&c., are made void by 8 & 9 Vict. c. 109, s. 18, which avoids all "contracts, parol or in writing, by way of gaming or wagering." But the act does not in terms avoid a security given to pay a wager; it would therefore be only without consideration; see *Fitch v. Jones*, *ante*, p. 205.

On issue taken on a plea that a note was given for an illegal consideration, the plaintiff is not bound to produce the note as part of his own case; *Read v. Gamble*, 10 *Ad. & E.* 597 (*n.*)

It will be seen by several of the cases cited under the head of *Want of Consideration*, *ante*, pp. 204-8, that illegality in the concoction or transfer of a bill, as well as fraud, felony, &c., will, if proved, put the holder on proof of consideration.

Agreement at variance with the bill.] The terms of a bill or note cannot be varied by parol evidence to contradict it, even as between original or immediate parties to it; yet a contemporaneous memorandum in writing is admissible for that purpose, whether on the same or a separate paper; *Leeds v. Lancashire*, 2 *Camp.* 205; *Bowerbank v. Monteiro*, 4 *Taunt.* 844. The two together may thus form one agreement, and must be treated as such. But to have this effect the agreement or memorandum must be between the same parties, and not merely collateral. Thus in a suit by payee against maker, it is no answer that by an independent, contemporary, written agreement between the plaintiff on one side, and the defendant and others on the other side, it was agreed that the note should not be payable except in a certain contingency; *Webb v. Spicer*, 13 *C. B.* 894; affirmed in House of Lords, 3 *H. L. C.* 510.

Payment.] Payment or satisfaction must be specially pleaded. For presumptive evidence in support of such plea see the cases cited, *ante*, pp. 35-6. Payment of the exact sum due on a note by the defendant in full satisfaction of debt and damages is sufficient, and entitles the defendant to a verdict, and the jury are not bound to give interest or even nominal damages, for the detention of the debt; *Beaumont v. Greathead*, 2 *C. B.* 494. This was an action of debt; but in an action by indorsee against acceptor, plea, *puis darrein continuance*, that an earlier indorser had paid to plaintiff, then the holder, who accepted the full amount of the bill, and also interest thereon, in full satisfaction of the bill, and all moneys due in respect thereof, not mentioning damages or costs, is bad; *Goodwin v. Cremer*, 18 *Q. B.* 757; 22 *L. J. (Q. B.)* 30. Satisfaction to one of several partners is a satisfaction as to all; *Jucaud v. French*, 12 *East*, 317. And payment by one, not sued, of several joint and several makers, is payment by the defendant; *Beaumont v. Greathead*, *supra*. So renewal of a joint and several note by one of the makers, and payment of such renewed note, is payment by all of the first note; *Thorne v. Smith*, 10 *C. B.* 659; 20 *L. J. (C. P.)* 71; But the mere acceptance by the payee, from one of two joint and several makers of a note, of a mortgage and covenant to pay the amount of the note, is no defence to an action against the other; for the securities are not co-extensive; and proof that the mortgage was given to secure the same debt does not prove that it was accepted in lieu and satisfaction of the note; *Ansell v. Baker*, 15 *Q. B.* 20.

A judgment and execution, without satisfaction, against a subsequent party to a bill, will be no discharge of a prior party; it is only

an extinguishment between the parties to the judgment; *Hayling v. Mullhall*, 2 W. Bl. 1235; as explained in *English v. Darley*, 2 B. & P. 62. But a composition with the acceptor, and the taking of a third person's note as a security for it, operates as a satisfaction of the bill; *English v. Darley*, *supra*; *Lewis v. Jones*, 4 B. & C. 506. Where the first bill is "renewed" by a second, no action can be maintained during the currency of the latter; *Kendrick v. Lomax*, 2 C. & J. 405. But where the plaintiff held a bill accepted by defendant, who, when it became due, asked for time, and three months afterwards gave plaintiff another bill for the same amount, plaintiff telling him at the same time that something was due for interest, and continuing to hold the first bill; and the second bill was paid after it became due: it was held that plaintiff was entitled to sue on the first bill to recover the interest; *Lumley v. Musgrave*, 4 N. C. 9. Where one of three partners, after a dissolution of partnership, undertook, by deed, to pay a partnership debt on two bills of exchange drawn by them, and the holder consented to take the separate notes of the one partner for the amount, *reserving his right against all three*, and retaining possession of the original bills: it was held that, the separate notes having proved unproductive, he might resort to his remedy against the other partners, and that the taking of the separate notes, and afterwards renewing them several times successively, did not amount to satisfaction of the joint debt; *Bedford v. Deakin*, 2 B. & A. 210. So where, on a bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first; and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff; it was held that the second bill was merely a collateral security, and that the receipt of it by the payee did not exonerate the drawer of the first; *Pring v. Clarkson*, 1 B. & C. 14; see also *Adams v. Bingley*, 1 M. & W. 192.

Although payment by the drawer is no answer, in general, in an action against the acceptor; *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390; *Jones v. Broadhurst*, 9 C. B. 173; yet payment by the drawer of a bill, accepted for his accommodation is an answer, as he is the person ultimately liable; *Lazarus v. Cowie*, 3 Q. B. 459; *Parr v. Jewell*, 16 C. B. 684; and this principle applies to a part payment, and to cases in which the bill is not strictly an accommodation bill; *Cook v. Lister*, 32 L. J. (C. P.) 121; 13 C. B., N. S., 513. But where an accommodation acceptor pleaded payment by the drawer in an action by an indorsee, proof that the drawer had handed a forged acceptance to the indorsee for the purpose of retiring the outstanding bill, and that the indorsee, being his banker, had credited the drawer for the amount in his banking account, was held insufficient to prove payment, the forged acceptance being, in fact, no payment at all; *Bell v. Buckley*, 11 Ex. 631; 25 L. J. (Ex.) 163. Payment by drawer, who is also payee, to the plaintiff himself, his indorsee, is no answer to an action against the acceptor for value, if the bill was left in the plaintiff's hands to sue on it as trustee for the drawer; *Williams v. James*, 15 Q. B. 498; nor if he sue against the will of the drawer; *Jones v. Broadhurst*, 9 C. B. 173. If the acceptor discounts his own acceptance for the drawer, this is not payment so as to bar an action on the bill against the drawer, by a *bonâ fide* indorsee for

value, who has taken under an indorsement by the acceptor; *Attenborough v. Mackenzie*, 25 L. J. (Ex.) 244. "Retiring" a bill by acceptor is equivalent to payment, and stops the circulation; but retiring by an indorser only takes it out of circulation as regards himself, and he retains the same remedies as if he had paid his indorsee in due course; *Elsam v. Denny*, 23 L. J. (C. P.) 190; 15 C. B. 87.

On a plea of payment, neither the plaintiff nor the defendant is bound to produce the security; and where the plea stated, by way of introduction to an allegation of payment, that the note was given in lieu of a former one, and the plaintiff replied *de injuriâ* generally, it was held enough to show payment without proving the superfluous introductory statement; *Shearn v. Burnard*, 10 Ad. & E. 593. But if, on a special plea of satisfaction, it becomes necessary for the defendant to prove the bill or note, he cannot give secondary evidence of it without having given notice to produce it; *Goodered v. Armour*, 3 Q. B. 956.

[*Voluntary discharge and waiver.*] Generally, a principal debtor cannot be discharged after breach otherwise than by a release under seal. It has, however, been held to be the law merchant that an acceptor may be discharged from liability by the express renunciation of the holder; thus, where the holder agreed to "consider the acceptance at an end," made an entry to that effect in his account-book, and abstained for three years from suing him, the acceptor was discharged; *Walpole v. Pulleney*, cited 1 Doug. 219; see also *Black v. Peele*, cited *ibid.*; *Whalley v. Tricker*, 1 Camp. 35. The rule has been contested, and has been supposed to be confined to cases where the waiver has been founded on some new consideration; but it has been upheld and considered established too long to be now questioned; see *Foster v. Darber*, 6 Ex. 839; 20 L. J. (Ex.) 385; in which it was held to extend to cases between immediate, as well as remote, parties to a bill, and also to promissory notes. The renunciation must be unequivocal:—Thus a declaration by the holder, that "he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt not connected with the bill," will not be sufficient to discharge the acceptor; *Parker v. Leigh*, 2 Stark. 228; *Adams v. Gregg*, 2 Star. 531. In *Dingwall v. Dunster*, 1 Doug. 247, it was held that nothing but an *express* declaration by the holder will discharge the acceptor. See also *Parker v. Leigh*, *suprà*; *Farquhar v. Southey*, Mood. & M. 14. The waiver, in order to be operative, must be by the person who is at the time holder of the bill; *Harmer v. Steele*, 4 Ex. 1; 19 L. J. (Ex.) 34.

The reported cases on this head have usually been in suits against acceptors of bills or makers of notes; but the language of the court in *Foster v. Darber*, *suprà*, does not appear to confine the rule to the case of acceptors or makers; nor is it so confined in the law of those foreign countries from which the rule is there supposed to have been borrowed; *Pothier, Contrât de Change*, pt. 1, c. 6, art. 2. It is observable, however, that the remission of debts by a formal renunciation is not treated merely as part of the law merchant in the codes referred to, but as applicable to debts in general, and as equivalent to a release. But the absence of the distinction between a release under seal and a release not by deed in most foreign countries, affords a reason why the law merchant in England adopts this rule as to bills of exchange.

Giving time.] Giving time to a principal discharges a surety; and therefore giving time to the acceptor discharges the drawer and indorsers; *English v. Darley*, 2 B. & P. 61. So giving time to any prior party discharges subsequent ones; *Hall v. Cole*, 4 Ad. & E. 577. This defence requires a special plea; so that the pleadings on the record sufficiently apprise the parties of the nature of the requisite proofs. There must be a binding agreement founded on a good consideration, on which an action would lie, if broken; *Moss v. Hall*, 5 Ex. 46; 19 L. J. (Ex.) 205. Forbearance to sue the acceptor is not of itself equivalent to giving time; *Walwyn v. St. Quintin*, 1 B. & P. 652; *English v. Darley*, 2 B. & P. 61. An agreement between the plaintiff and a stranger to give time to the acceptor will not discharge an indorser, unless the acceptor, the principal debtor, was party to the agreement; *Lyon v. Holt*, 5 M. & W. 250; *Fraser v. Jordan*, 8 E. & B. 303; 26 L. J. (Q. B.) 288. Taking a *cognovit* from the acceptor, after action brought, by which the time of obtaining judgment against him is not deferred, is not a giving time; *Jay v. Warren*, 1 C. & P. 532; *Lee v. Lery*, 4 B. & C. 390.

There is no distinction, at least in a court of law, between an accommodation acceptor and an acceptor for value, so far as regards giving time. Therefore, giving time to the drawer does not release an acceptor, though he accepted for the drawer's accommodation; and this, though the holder, who was indorsee of the drawer, knew when he took it that it was an accommodation bill; *Fentum v. Pocock*, 5 Taunt. 192; *Harrison v. Courtauld*, 3 B. & Ad. 36; *Nichols v. Norris*, *id.* 41; overruling *Laxton v. Peat*, 2 Camp. 185, and other cases at Nisi Prius. Where the defendant was one of two makers of a joint and several note of which the plaintiff was payee, it was held no defence at law to show that the defendant was only surety for the other maker, and that the plaintiff, knowing this, gave time to the other maker without the defendant's consent; and it is no defence at law, even if the plaintiff knew the fact when he took the note, if he did not agree (*semble* in writing) to treat the defendant as surety only; *Manley v. Boycott*, 2 E. & B. 46; 22 L. J. (Q. B.) 265. But see *infra*, *Equitable Defences*.

Other defences.] It is no defence in an action against the acceptor that the plaintiff took the bill without consideration, and with notice that his indorser had commenced an action against the defendant, and that the action is still pending; *Deuters v. Townsend*, 33 L. J. (Q. B.) 301.

Equitable defences.] Since the Common Law Procedure Act, 1854, equitable defences may be set up at law; and in *Strong v. Foster*, 25 L. J. (C. P.) 106, 17 C. B. 201, an attempt was made to plead circumstances similar to those in *Manley v. Boycott*, *supra*, by way of equitable defence; but the evidence failed, and no judgment on the point was necessary. See also *Rayner v. Fussey*, 28 L. J. (Ex.) 132. In *Pooley v. Harradine*, 7 E. & B. 431, 26 L. J. (Q. B.) 156, the Court of Queen's Bench upheld a plea, as a good equitable defence, which stated that the defendant made the note jointly with A. as surety only for him, of which the plaintiff had notice at the time, and that the plaintiff gave time to A. without the defendant's knowledge. The Court of Exchequer in *Taylor v. Burgess*, 29 L. J. (Ex.) 7, 5 H. & N. 1, adopted the decision of *Pooley v. Harradine*, which was ex-

pressly affirmed in the Exchequer Chamber in *Greenough v. M'Clelland*, 30 *L. J. (Q. B.)* 15; and in this last case it was found as a fact, that, though the plaintiff knew the defendant was only surety, he did not agree, nor did the defendant stipulate, that he should be treated by the plaintiff as surety only, or otherwise than as a maker of the note.

In *The Mutual Loan Association v. Sudlow*, 5 *C. B., N. S.*, 449, 28 *L. J. (C. P.)* 108, the plaintiffs lent money to A. on the security of goods and a joint and several note by A. and the defendant as his surety; and it was held that the defendant might show, as an equitable defence, that the plaintiffs had taken and sold the goods which would have fully realised the money due, but for the plaintiffs' misconduct. In *Lawrence v. Walmsley*, 31 *L. J. (C. P.)* 143, 12 *C. B., N. S.*, 799, the defendant pleaded that the note, payable on demand, was given by the defendant jointly with A. as surety for A., and that at the time of making, the plaintiff knowing this, agreed with the defendant in consideration of his making such note as surety, that he, the plaintiff, would call in and demand payment of the note from A. within three years from the date, which he had omitted to do, whereby the defendant was unable to obtain payment from A. who had become insolvent; and the court held the plea a good equitable defence.

ACTION ON PROMISSORY NOTES.

In general, the rules and cases relating to the proof of the drawing, indorsing, presentment, and notice of dishonour, &c., of bills of exchange, apply also to promissory notes.

An agent who makes a note in his own name will be personally liable, unless he distinctly show on the face of it that he signs as agent only. Thus, "On demand we jointly and severally promise to pay E. H. or order 250*l.*, value received, for and on behalf of the W. N. Association; P. S., J. W., Directors," was held to bind the persons signing personally; *Healey v. Story*, 3 *Ex.* 3; 18 *L. J. (Ex.)* 8; *Penkivill v. Connell*, 5 *Ex.* 381, 19 *L. J. (Ex.)* 305, and *Bottomley v. Fisher*, 31 *L. J. (Ex.)* 417, 1 *H. & C.* 211, are to the same effect. But where the defendants, being directors of the company, signed the following note: "Three months after date we jointly promise to pay F. L. or order 500*l.*, for value received in stock on account of the L. and B. Company, Limited, J. M., H. W. W., J. H., Directors," it was held by the Exchequer Chamber, affirming the court below, that it sufficiently appeared that the note was made in the name of the company, within 19 & 20 *Vict. c.* 47, s. 43; and that the defendants were not personally liable, *Lindus v. Melrose*, 3 *H. & N.* 177; 27 *L. J. (Ex.)* 326; *Aggs v. Nicholson*, 1 *H. & N.* 165; 25 *L. J. (Ex.)* 348, to the same effect; but in the latter case the court also rested their decision on the fact, which they held was in effect pleaded, that the defendants did not deliver the note, nor the plaintiffs take it, except as a note on behalf of the company; this is pointed out by *Bramwell, B.*, in *Price v. Taylor*, 29 *L. J. (Ex.)* 331, 5 *H. & N.* 540; and this would at

any rate be an equitable defence; *per* Wilde, B., *S. C.*; and see *Wake v. Harrop*, 6 *H. & N.* 768; 30 *L. J. (Ex.)* 273; *S. C. in error*, 31 *L. J. (Ex.)* 451; 1 *H. & C.* 202.

Payee against Maker.

[*The making of the note.*] The making of the note is proved by proving the handwriting of the defendant; or, if made by an agent, by proof of the handwriting and authority of such agent. An admission by the defendant that the handwriting is his, will be sufficient proof though it was made pending a treaty for a compromise; *Waldridge v. Kennison*, 1 *Esp.* 143. An offer on the part of the defendant, after the note has become due, to give another note to the plaintiff instead of it, is an admission of the plaintiff's title; *Bosanquet v. Anderson*, 6 *Esp.* 43. An admission of his signature by one of the parties, not being partners, will only be evidence against himself; *Gray v. Palmers*, 1 *Esp.* 135.

Formerly, if the bill or note was for less than 5*l.* it must have been attested by a witness, and the other requisites of the 17 *Geo.* 3, c. 30, s. 1, observed; but this act is now repealed by the 26 & 27 *Vict.* c. 105, which is to remain in force for three years from July, 1863; and a bill may now be made without any other restriction than that it must be for 20*s.* (see 48 *Geo.* 3, c. 88, s. 2), and this restriction applies to notes also; but the 7 *Geo.* 4, c. 6, s. 3, which prohibits the issuing of *promissory notes* under 5*l.* payable to bearer on demand, is still unrepealed.

Under a denial of the making, the defendant may show that the note, alleged to be made payable to "bearer," was in fact made by the defendant payable to his own order and indorsed by him to the plaintiff; for this shows it to be no promissory note within stat. 3 & 4 *Ann.* c. 9; *Flight v. Muclean*, 16 *M. & W.* 51. But this decision is at variance with *Wood v. Mytton*, 10 *Q. B.* 805, so far, at least, as regards the opinion that a note payable to the maker's order is not within the statute. It is, however, agreed by all the courts, that when such a note is indorsed, it then becomes a note payable to *bearer*, or to the *indorsee*, or his order, according as the indorsement is in blank or to a named person; *Hooper v. Williams*, 2 *Ex.* 13; 17 *L. J. (Ex.)* 315; *Absolon v. Marks*, 11 *Q. B.* 19; 17 *L. J. (Q. B.)* 7; *Brown v. De Winton*, and *Gay v. Lander*, 6 *C. B.* 336; 17 *L. J. (C. P.)* 281, 287. And it makes no difference that there is a foot-note to it making it payable at a particular place; *Masters v. Baretto*, 8 *C. B.* 433; 19 *L. J. (C. P.)* 50. Where defendant denied the making, and the instrument was in the form of a promissory note payable to the "secretary for the time being" of an insurance company, nine months after date, the defendant was held entitled to a verdict for a note payable to an uncertain payee is not a promissory note; *Storm v. Stirling*, 3 *E. & B.* 832; 23 *L. J. (Q. B.)* 298; affirmed *in error*, 6 *E. & B.* 333; 25 *L. J. (Q. B.)* 335; *Yates v. Nash*, 29 *L. J. (C. P.)* 306; 8 *C. B., N. S.*, 581. "I promise to pay A. B. or order three months after date, £100, as per memorandum of agreement," is, on the face of it, a negotiable promissory note; and if the effect of the agreement is to make it conditional, the defendant must show it by plea; *Jury v. Barker*, *E. B. & A.* 459.

Presentment.] Where the promise to pay is general, no presentment to the maker need be proved; *Exon v. Russell*, 4 M. & S. 505; *Williams v. Waring*, 10 B. & C. 2. But where the note contains in the body of it (and not merely in a memorandum at the foot) a promise to pay at a particular place, a presentment at such place must be alleged and proved; *Sanderson v. Bowes* 14 East. 500; *Spindley v. Grellett*, 1 Ex. 384; 17 L. J. (Ex.) 6. But notice of the dishonour to the maker is unnecessary; *Pearse v. Penberthy*, 3 Camp. 261. The presentment must be proved at the place specified, though the maker may not be there to pay, and may have absconded, and left no effects there or other means of payment; *Sands v. Clark*, 8 C. B. 751; 19 L. J. (C. P.) 84. But the memorandum at the foot of a note, "at &c.," although on the note when signed by the maker, is no part of the contract, and presentment at the place named need not be proved; *Exon v. Russell*, 4 M. & S. 505; *Williams v. Waring*, 10 B. & C. 2. In *Trecothick v. Edwin*, 1 Stark. 468, Lord Ellenborough ruled otherwise, but as the required proof was given, and the plaintiff had a verdict, it was not necessary to question that ruling; and that case was cited in *Masters v. Baretto*, 8 C. B. 433; 19 L. J. (C. P.) 50, and the court held that "payable at," &c., at the foot of the note was a memorandum only; and this is from mercantile usage; S. C.; and *per curiam* in *Warrington v. Early*, 2 E. & B. 766; 23 L. J. (Q. B.) 48. See the cases on presentment to acceptor, *ante*, p. 189. In an action on a note payable on demand, a demand need not be alleged or proved; for the action itself is a demand; *Rumball v. Bull*, 10 Mod. 38. It is otherwise if payable at or after sight; *Holmes v. Kerrison*, 2 Taunt. 323. Where a promissory note was in the following form: "I promise to pay to M. or bearer on demand the sum of 16*l.* at sight;" it was held that an action was not maintainable without a presentment for sight; *Dixon v. Nuttall*, 1 C. M. & R. 307. If a note be made payable at a particular town, and the maker has no residence there, a presentment at the banking-houses there will support an allegation that it was presented there to the maker; *Hardy v. Woodroffe*, 2 Stark. 319. If a note be payable at two places, presentment at either is sufficient; *Beeching v. Gower*, Holt, N. P. 313.

Evidence under the common counts.] A promissory note is evidence on the money counts only between immediate parties; *Waynam v. Bend*, 1 Camp. 175. It is evidence of money lent by the payee to the maker; *Bayley on Bills*, 362, 6th ed. A promissory note, dated August, 1844, purporting to be for the amount of interest due on another note for 117*l.* down to 6th July, 1844, is evidence of an account stated in August, 1844, of a then subsisting debt of 117*l.*; *Perry v. Slade*, 8 Q. B. 115. Where a note cannot be given in evidence for want of a proper stamp, the plaintiff may recover on the consideration of the note; *Furr v. Price*, 1 East, 58; note (a), *ibid.* And the note may be used as evidence of the terms of a loan of money, though avoided by an alteration without a fresh stamp; *Sutton v. Toomes*, 7 B. & C. 416.

The plaintiff cannot resort to the money counts, if the note has been lost, *ante*, p. 173. Nor can he resort to them, where he has made a note his own by laches, for this operates as payment; *Camidge v. Allenby*, 6 B. & C. 373. A special plea may be necessary in both

Indorsee against Maker.

In an action on a promissory note by an indorsee against the maker, the plaintiff will have to prove, in addition to the making of the note by the defendant, the indorsements stated in the declaration, if traversed.

It has been already stated, *ante*, pp. 182, *et seqq.*, in what manner an indorsement may be proved, and what indorsements are to be proved. Where indorsements are unnecessarily mentioned, as in declaring upon a note made to payee or bearer, they must, if traversed, be proved; *Waynam v. Bend*, 1 *Camp.* 175. But *semb.* the finding on such issues will be immaterial, if the plaintiff appears to be bearer; and the indorsements may be struck out at the trial; see *Macgregor v. Rhodes*, *infra*.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a promissory note, the traversable allegations are, the defendant's indorsement; the presentment to the maker; his default; and notice to the defendant of the dishonour.

The indorsee of a note cannot declare against his indorser as maker, where the indorser has indorsed a note not payable or indorsed to him; for it is not true that every indorser of a note is a fresh maker, though every indorser of a bill is in the nature of a fresh drawer; *Gwinnell v. Herbert*, 5 *Ad. & E.* 436.

In what manner an indorsement may be proved has been already stated, *ante*, p. 182. An indorsement admits all prior indorsements, and also the handwriting of the maker; *Lambert v. Oakes*, 1 *Lord Raym.* 443; *Free v. Hawkins*, 11 *Holt*, N. P. 550; *Macgregor v. Rhodes*, 25 *L. J. (Q. B.)* 318; 6 *E. & B.* 266.

In what manner a note or bill of exchange must be presented for payment, has been stated, *ante*, p. 189.

It has been before stated by and to whom, and within what time, notice of dishonour must be given, and what will be considered sufficient proof of the delivery of the notice and of its contents, &c., *ante*, pp. 191—6. It has also been shown in what cases proof of notice may be dispensed with by an acknowledgment or otherwise, *ante*, pp. 197—9. Where the payee of a note indorses it for the accommodation of the maker, it is still necessary to give notice to the payee in order to charge him as indorser, and parol evidence is not admissible that it was agreed between the parties that the note should not be put in force until after a given event; *Free v. Hawkins*, 8 *Taunt.* 92.

Evidence under the common counts.] An indorsement is evidence of money lent by the indorsee to the indorser; *Kessebower v. Tims*, *Bayley on Bills*, 363, 6th edit.

ACTION ON CHEQUES.

Cheques on bankers have some resemblance both to bills and notes. They are transferable and negotiable (*Keene v. Beard*, *infra*), so as to

entitle the holder to sue the drawer or indorser; but no acceptance is necessary; nor are there days of grace; and the drawer is the principal debtor as the maker of a note, and not a surety for the drawee as in case of bills. They have till lately been always made payable to bearer on demand, in order to be exempt from stamp duty. But drafts or orders on bankers, whether payable to order or bearer, are, by the 16 & 17 Vict. c. 59, and the 21 & 22 Vict. c. 20, s. 1, made chargeable with the duty of one penny, and consequently cheques are now often drawn payable "to order" on demand, and then require indorsement. By the 16 & 17 Vict. c. 59, s. 19, bankers are warranted in paying a cheque made payable to order on demand to the bearer, if it "purports" to be indorsed by the payee, without being obliged to prove that the indorsement by the payee, or any subsequent indorsement, was made by authority of the person to whom the draft was, or is, made payable either by the drawer or any indorser thereof. By the 23 & 24 Vict. c. 111, s. 18, any banker or person acting as such, into whose hands a draft may come unstamped may affix the stamp and cancel it. By s. 19, the last remaining restriction as to the drawing of cheques is repealed; and a draft to order or bearer on demand may be drawn for less than 20s., if upon a banker *bond fide* holding money of the drawer.

Actions on a cheque are either by payee, bearer, or indorsee against the drawer, or against an indorser, that is, a person who has put his name on the back of the cheque with an intention of indorsing; *Keene v. Beard*, 29 L. J. (C. P.) 287; 8 C. B., N. S., 372.

Payee, bearer, or indorsee, against drawer.] The plaintiff may be put to prove the drawing and the presentment to, and non-payment by, the banker.

A cheque payable to bearer on demand is void if post-dated; and under a traverse of the drawing, it may be shown that the cheque was post-dated; *Field v. Woods*, 7 Ad. & E. 114. But a cheque payable to order is not rendered void by being post-dated; *Whistler v. Forster*, 32 L. J. (C. P.) 161; 14 C. B., N. S., 248. See *ante*, pp. 129—30.

As between holder and drawer mere delay in presenting for payment, short of six years, is no answer, unless the defendant has been prejudiced by it; as by the failure of the bank after the drawing of the cheque; *Robinson v. Hawksford*, 9 Q. B. 52; *Laws v. Rand*, 27 L. J. (C. P.) 76; 3 C. B., N. S., 442. If in consequence of such delay the cheque becomes valueless by the failure of the bank, the drawer is released from liability; and, in order to avoid this risk, the bearer must present it, either himself or through his banker, on the day following the day of receipt; *Moule v. Brown*, 4 N. C. 266; *Alexander v. Burchfield*, 7 M. & G. 1061. But if the holder of the cheque does not live in the same place with the drawee, he may send it to his banker or other agent by the post of the next day after he received it, and the agent should present it not later than the day after he received it; *Rickford v. Ridge*, 2 Camp. 537; *Hare v. Henty*, 30 L. J. (C. P.) 302; 10 C. B., N. S., 65: and this holds good as between banker and customer; *S. C.*; see *Bailey v. Bodenham*, 33 L. J. (C. P.) 252; 16 C. B., N. S., 288.

Where the cheque has been indorsed, and the indorser is sued by the holder, plaintiff is bound to show due diligence in endeavouring to obtain payment, and giving notice of non-payment to the defendant; 3 Kent. Com. 88, 104; *Moule v. Brown*, *supra*.

A person taking a cheque payable to order, but without indorsement, has no better title than the person from whom he took it, although he took it *bonâ fide* and without notice; and he is affected by that person's fraud of which he had notice before he obtained a formal indorsement; *Whistler v. Forster, supra*.

Banker's liability on cheques.] Although a drawee is not liable before acceptance, yet there is an implied contract by a banker with his customer to cash cheques within a reasonable time after he has effects; *Marzetti v. Williams*, 1 B. & Ad. 415; and the customer, if a trader, is entitled to temperate damages on his cheque being thus dishonoured, without showing special damage; *Rolin v. Steward*, 14 C. B. 595; 23 L. J. (C. P.) 148; and a banker, having been in the habit of cashing cheques of the plaintiff when there were securities of his at the bank, though the cash balance was against him, was held liable for dishonouring cheques under similar circumstances; *Cumming v. Shand*, 29 L. J. (Ex.) 129; 5. II. & N. 95.

Crossed cheques.] The practice of crossing cheques with the name of a banker was discussed in *Bellamy v. Majoribanks*, 7 Ex. 389, 21 L. J. (Ex.) 70; and it was there held that such crossing does not restrain the negotiability of a cheque payable to bearer, but is only to secure, as far as possible, payment to *bonâ fide* holders; and if the banker were to pay such draft to any one who presents, except through some banker, it would be evidence of negligence as between him and his customer. In *Carlton v. Ireland*, 5 E. & B. 765, 25 L. J. (Q. B.) 113, this ruling was recognised. There the plaintiff was bearer of a cheque crossed "— & Co.," to which he had added the name of his banker, D.; the cheque was purloined by a clerk, who obtained cash from defendant, and the defendant struck out the name of D., and recrossed it with the name of his own banker, on whose presentment the money was obtained from the drawee: held that defendant was entitled to retain the money as against the plaintiff, if the jury found that he was a *bonâ fide* holder for value, whether he took it negligently or not; and that the question was one of good faith, and not want of caution, in the defendant.

Since these decisions, the Act 19 & 20 Vict. c. 25, has enacted that where a draft on a banker, or banking company, made payable to bearer, or to order, on demand, bears across its face the name of any banker, or the words "and company," or "& Co.," such addition shall have the force of a direction to the banker on whom it is drawn that it is to be paid only to or through some banker, and the same shall be payable only to or through some banker.

The crossing having been erased when a cheque was presented to the banker, it was held payable as if there had never been a crossing; *Simmons v. Taylor*, 4 C. B., N. S., 463; 27 L. J. (C. P.) 45, and 248. It was there held that the crossing was no part of the cheque, and the erasure therefore no forgery, so as to make the banker liable as on payment of a forged cheque; and therefore that the payment, without negligence, to the holder, not a banker, of a cheque from which the crossing had been fraudulently obliterated by the holder, was as between the banker, the drawee, and his customer, the drawer, a good payment. An Act, 21 & 22 Vict. c. 79, was passed in consequence, making (s. 1) the crossing a "material part" of the cheque, and making the fraudulent erasure or alteration of it felony, punishable as provided in cases of forgery. But there is a clause

(sect. 4) exempting bankers from liability for paying a cheque otherwise than to a banker, if the cheque does not "*plainly appear* to be, or to have been, crossed, or to have been obliterated, added to, or altered with intent to defraud," unless the banker shall have acted *malâ fide*, or have been guilty of negligence in so paying the cheque. By sect. 2, the lawful holder of a cheque, crossed generally "and company," may cross it with the name of a banker, and, if uncrossed, may cross it with the words "and company," with or without the name of a banker; and such crossing shall become a material part of the cheque, and shall not be afterwards obliterated, added to, or altered "by any person whomsoever," and the banker (drawee) shall not pay the cheque to any other than the banker with whose name the cheque shall be crossed.

The effect of this section seems to be to restrain even a lawful holder from altering or erasing the name of a banker already inserted across the cheque.

ACTION ON POLICY OF MARINE INSURANCE.

The plaintiff may be called upon to prove the following facts; viz., the subscription or execution of the policy by the defendant; the interest of the party as averred; the putting of the goods, &c., on board, when the policy is on goods; the inception of the risk; compliance with warranties; a licence for the purpose of legalising the voyage, in some cases; the loss; and amount of it.

Proof of the policy.] On a plea of the general issue or other plea denying the making of the policy, the policy must be produced and proved; and if subscribed by an agent of the defendant, the handwriting and authority of the agent must be proved. If the authority of the agent was in writing it should generally be produced; but the authority may also be proved by showing that the defendant has recognised the act of the agent in this instance, or in other similar instances in which he has subscribed policies for the defendant; as where a witness stated that he was authorised by power of attorney, but added that the defendant had been in the habit of paying losses upon policies which the witness had subscribed in his name, the power need not be produced; *Haughton v. Ewbank*, 4 Camp. 88; *Brockelbank v. Sugrue*, 5 C. & P. 21. Where a witness proved the agent's handwriting, and swore that he had often observed him sign policies for the defendant, but did not know that the defendant had given any authority to sign that policy, Lord Kenyon held the agency proved; *Kent v. Ewing*, 1 Esp. 61; but where the witness added that he did not know of any instance in which the defendant had paid a loss upon any policy so subscribed, Lord Ellenborough held the proof of agency was incomplete; *Courteen v. Touse*, 1 Camp. 43, n.

In the case of joint-stock companies for insurance the policies often provide expressly on the face of them that the capital stock and funds of the company shall alone be charged, and that no proprietor shall be liable beyond his share in it. In such cases, the insured cannot sue the proprietors as general partners jointly liable *in solido*, even if the stock and funds be adequate; and it is question-

able whether such a policy amounts to a joint contract at all, or to a contract with each proprietor in proportion to his share, or to a separate contract with the directors who signed the policy in pursuance of the deed of settlement. See *Halket v. Merchant Traders' Insurance Company*, 13 Q. B. 960; *Hallett v. Dowdall*, 18 Q. B. 2.

The usage of a particular trade will be regarded in the construction of policies, and every underwriter is supposed to be acquainted with it; *Noble v. Kennoway*, 2 Doug. 510, and cases cited, *ante*, pp. 19 *et seq.* As to the stamp and alteration of the policy, see *ante*, pp. 142-3.

An action will lie at the suit of the agent or other person in whose name the insurance was effected, or in the name of the person interested. Policies are frequently under seal, but the matters to be proved are substantially the same whatever be the form of writ or pleadings.

Interest in the ship, how proved.] Insurances without interest, or wagering policies, are void by 19 Geo. 3, c. 37; and the interest must be proved otherwise than by the policy itself, unless the ship be foreign. Interest is not in issue unless traversed.

The interest in the ship, as stated in the declaration, may be proved, *primâ facie*, by evidence of possession of the ship; or of acts of ownership, as directing the loading of the ship, purchasing the stores, paying the people employed, &c.; *Amery v. Rogers*, 1 Esp. 209; *Thomas v. Foyle*, 5 Esp. 88. A common mode of proof is to call the captain or master, who will prove that he was appointed and employed by the parties in whom the interest is averred; and though it should appear, on cross-examination, that the plaintiff claims under a bill of sale, it is not, on that account, necessary for him to produce the bill, or the ship's register, unless such further evidence should be rendered necessary in support of the *primâ facie* proof of ownership, in consequence of proof to the contrary; *Robertson v. French*, 4 East, 136. The certificate of registry has been rejected as not even *primâ facie* evidence of ownership in favour of the plaintiff; for though registration is necessary to complete the title, it is not therefore evidence of it; *Fraser v. Hopkins*, 2 Taunt. 5; *Pirie v. Anderson*, 4 Taunt. 652; *Cooper v. South*, 4 Taunt. 802. But, by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 107 (see also 18 & 19 Vict. c. 91, s. 15), the register, or an examined or certified copy thereof, is *primâ facie* proof of the matters contained in it, or indorsed on the certificate, such as ownership and changes, transfers and mortgages of ships, or shares in them, and other matters required to be registered by that act.

Interest in ship—Insurable interest.] A person who lends money for repairs of a ship has no insurable interest in it, and as a master has no power to hypothecate, an hypothecation of the ship by the master gives no insurable interest to such a creditor. And, *quære*, whether a valid hypothecation would give such interest; *Stainbank v. Fenning*, 11 C. B. 51; 20 L. J. (C. P.) 226; *Stainbank v. Shepard*, 13 C. B. 418; 22 L. J. (Ex.) 341. Where the interest is averred in persons who have never been in possession of the ship, it will be necessary to prove the ownership of the persons under whom such parties claim, and the derivative title from them, viz.,

the bill of sale, and the registry of the ship according to the last register act, 17 & 18 Vict. c. 104.

Interest in goods, how proved.—Bill of lading.] The interest in goods may be proved *prima facie* like the interest in the ship, by evidence of possession and acts of ownership. It is also frequently proved by the production of the bill of lading. A bill of lading directing the delivery of the goods to the consignee is evidence of interest in him, the captain proving that he received the goods under it; *McAndrew v. Bell*, 1 Esp. 373; and where the goods are made deliverable to the consignor, the bill indorsed by him either specially or in blank, is evidence of interest in the indorsee, or holder; *Lickbarrow v. Mason*, 2 T. R. 71. The signature of a deceased master to the bill of lading, as it has the effect of charging himself, is evidence of the interest of the consignee; but if the master qualifies his acknowledgment by the words "contents unknown," it is then no evidence *per se*; *Haddow v. Parry*, 3 Taunt. 303. Where, to prove property in a cargo by purchase beyond seas, the plaintiff produced a bill of parcels of one G. at Petersburg with his receipt to it, and proved his hand, Lee, C. J., admitted it as evidence against the insurers; *Russel v. Boheme*, 2 Str. 1127.

Interest in goods—Insurable interest.] An averment that the plaintiffs were interested in the profits to arise from the sale of goods which H. and Co. had sold to them, is not satisfied by showing a verbal agreement for the sale to the plaintiffs not capable of being enforced against H. and Co.; *Stockdale v. Dunlop*, 6 M. & W. 224. A mere equitable interest in goods is an insurable one; thus where A., being indebted to B., indorses a bill of lading to C., with a letter telling him to hold the goods in trust for B., B. has an insurable interest; *Hill v. Secretan*, 1 B. & P. 315. A lien on goods is insurable; as where the plaintiff, owner of a ship, which had been abandoned, but afterwards brought into harbour together with goods by salvors, was obliged to pay the whole salvage, and thereby acquired a lien on the cargo for contribution in the nature of general average; *Briggs v. The Merchant Traders' Insurance Association*, 13 Q. B. 167; such interest is sufficiently described as average expenses; *Ibid.* A person who insures goods lost or not lost may recover, though he acquired his interest after a partial loss of them, if he bought without knowledge of the loss; *Sutherland v. Pratt*, 11 M. & W. 296.

If it be averred that the plaintiff was interested at the time of effecting the policy, it is immaterial; it is sufficient to show that he was interested at the commencement of the risk; *Rhind v. Wilkinson*, 2 Taunt. 237. Where a policy was effected for all persons interested, and B. was in fact interested at the time, but had not authorised the insurance, it is sufficient to prove an adoption of the policy by B. after the loss; *Hagedorn v. Oliverson*, 2 M. & S. 485.

Insurance on freight.] The interest of a shipowner in the profit expected from carrying his own goods, is properly described and insured as freight; *Flint v. Flemyng*, 1 B. & Ad. 45; *Devauz v. J'Anson*, 5 N. C. 519.

Inception and end of the risk.] The risk begins at the port, when the insurance is on a voyage "at and from," &c.; *Palmer v. Marshall*,

8 *Bing.* 79, 317; or at the beginning of the voyage, when the insurance is "from" the port; *Small v. Gibson*, 16 *Q. B.* 156-7. In the case of a *time* policy (i. e., an insurance within certain dates without regard to a particular voyage), the risk begins at the first date.

Where the vessel is lost in the course of a voyage for which she is insured, some proof of the inception of the voyage, or risk, must be given; *Koster v. Innes, Ry. & Mood.* 833. This may be proved by some of the crew; or proof of a particular destination by charter-party will afford a presumption that she sailed on the chartered voyage; so proof of her clearing out for a particular port would be evidence that she set sail for that port; *per* Lord Ellenborough, C. J., *Cohen v. Hinckley*, 2 *Camp.* 52. So proof of a convoy-bond for a particular port, signed by the captain, coupled with the testimony of the custom-house officer that a certificate and other papers for such a voyage would, in the regular course of office, be delivered to the captain before he sailed, together with proof of his sailing, is *prima facie* evidence of the ship having sailed on such voyage; *Ibid.* A licence for the port mentioned in the policy is *prima facie* evidence to the same effect; *Marshall v. Parker*, 2 *Camp.* 69. If the declaration avers that the ship sailed *after* the making of the policy, but in fact it was before, the variance is not material; *Peppin v. Solomons*, 5 *T. R.* 496.

The risk in the case of a voyage-policy on the ship terminates, in general, at the end of twenty-four hours after mooring in safety in port; and the underwriters are not liable for a seizure after the twenty-four hours, though for smuggling committed on the voyage; *Lockyer v. Offley*, 1 *T. R.* 252; but where during the twenty-four hours the ship is compelled to go back for performance of quarantine, the risk continues; *Waples v. Eames*, 2 *Str.* 1243. A ship was insured from L. to certain ports and during thirty days' stay in her last port of discharge, and in another part of the policy the risk was stated to continue until she had moored at anchor twenty-four hours in good safety;—held that the thirty days did not begin to run till the expiration of the twenty-four hours; *The Mercantile Marine Insurance Company v. Titherington*, 31 *L. J. (Q. B.)* 11.

In the case of goods, the risk depends on the agreement of the parties, but it usually begins with the loading on board, and ends with the safe discharge, including their passage to the shore by usual means; *Tierney v. Etherington*, cited by the court, 1 *Burr.* 348; 3 *Kent Com.* 309. Where the insurance was on goods "at and from a given port, beginning the adventure from the loading at as above," a constructive loading at the port is sufficient; as if the goods have been partially reloaded, or there has been a material alteration in the ownership of the goods or the voyage, on the arrival of the ship at the port with the goods already aboard; *Carr v. Montefiore*, 33 *L. J. (Q. B.)* 57; *S. C. affirmed in error*, *Id.* 256. It seems that evidence of brokers and merchants is admissible to show what is the custom as to when the outward bound risk determined, in order to show when the homeward bound risk commenced; *Camden v. Cowley*, 1 *W. Bl.* 417.

The risk on insurance of freight, in the absence of express provisions, begins when the goods, or part, are on board, or the ship is at the port of loading in a condition to take them on board; *Tonge v. Watts*, 2 *Str.* 1251; *Deraux v. J. Anson*, 5 *N. C.* 519; *Williamson v. Innes*, 1 *Mood. & Rob.* 88; 8 *Bing.* 81 (n.); 3 *Kent Com.* 270, 311.

Shipment of the goods.] The shipment of goods on board is usually

proved by the captain; and, if he be dead, the production of the bill of lading and proof of his handwriting will be evidence of the shipping as well as of the interest, but not if he add "contents unknown;" *Haddow v. Parry*, 3 Taunt. 303; nor if he be alive; *Dickson v. Lodge*, 1 Stark. 226. The copy of an official report, made in pursuance of the Customs' Acts, 12 Car. 2, by the searcher of the customs, containing an account of the cargo exported, has been admitted to prove the shipping, without calling the searcher; *Johnson v. Ward*, 6 Esp. 48.

In an action upon a policy on freight, the assured must show that some freight would have been earned, either by proving that some goods were put on board, or that there was some contract for doing so; *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. J'Anson*, 5 N. C. 519.

Compliance with warranties.] Warranties are expressed or implied. They are in the nature of conditions precedent; but as only a general performance of all such conditions is now usually stated in the declaration, the particular warranty the breach of which is relied on appears in a special plea, and not on a traverse either general or special, unless performance shall have been *specially* alleged by the plaintiff. Where the policy contains an express warranty, and there is a proper plea, a literal and strict compliance with it must be proved: it is not sufficient to show something tantamount to a performance, unless it be a waiver or dispensation of performance, which must be pleaded as such, and not as a compliance; *Pawson v. Watson*, Cowp. 785; 2 Wms. Saund. 201 (n); *Weir v. Aberdeen*, 2 B. & A. 320; *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J. (Ex.) 153.

● A memorandum written on a separate piece of paper cannot be considered a warranty; *Pawson v. Barnevelt*, 1 Doug. 12 (n). But if a separate paper be referred to in the policy, it may thereby become part of the policy, and constitute a warranty; *Worsley v. Wood*, 6 T. R. 710 (fire policy); *Colledge v. Hartly*, 6 Exch. 205; 20 L. J. (Ex.) 146; *Heath v. Durant*, 12 M. & W. 438; cited *post*, p. 239. It is immaterial whether the warranty is in the margin or in the body of the policy; *Bean v. Stupart*, 1 Doug. 11; *De Hahn v. Hartley*, 1 T. R. 343. A warranty may be waived by a memorandum on the policy without a stamp, under the 35 Geo. 3, c. 63, s. 13, *Hubbard v. Jackson*, 4 Taunt. 169; *Weir v. Aberdeen*, 2 B. & A. 325.

Warranty of sailing.] To satisfy a warranty "to depart" on or before a particular day, the vessel must be out of port on or before that day; *Moir v. Royal Exch. Assur. Co.*, 3 M. & S. 461; 6 Taunt. 241; but a warranty "to sail" is satisfied by the ship breaking ground and getting under weigh; *S. C.*; *Lang v. Anderdon*, 3 B. & C. 495. Where the insurance was from an inland port, as Lyons, and the ship left that port before the day, without her masts and heavy tackle, as she could not have made the river navigation with them on board, and she afterwards took them in at Marseilles (this being the usual course) without unreasonable delay, but did not sail thence till after the day; it was held that looking at the nature of the voyage, and the mercantile usage in similar adventures, she had complied with the warranty to sail by the given day, and with the implied warranty of seaworthiness; *Bouillon v. Lupton*, 33 L. J. (C. P.) 37; 15 C. B., N. S., 113; and see *Dixon v. Sadler*, *post*, p. 225. But unless the

ship is unmoored, the warranty to sail is not complied with; *Nelson v. Salvador, Mood. & M.* 309. Sailing before the vessel has got her clearances, and is equipped for the voyage, is not a sailing within the warranty; *Ridsdale v. Newnham*, 3 *M. & S.* 456. So, if the ship leaves the harbour on the day without a sufficient crew on board; though the remainder of the crew are engaged and ready to sail; *Graham v. Barras*, 5 *B. & Ad.* 1011. Where a vessel sailed from St. Anne's Jamaica, within the time of warranty with her cargo and clearances on board, and called at another usual port in Jamaica for convoy, where she was detained by an embargo till after the time of warranty, it was held that this was a sufficient sailing from Jamaica; *Bond v. Nutt, Cowp.* 601; *Thellusson v. Fergusson*, 1 *Doug.* 360. A warranty to sail from Q. on or before 1st November, contained in a policy on a vessel "at and from" New York to Q., and thence to England, is confined to the part of the voyage from Q. to England, and the insurer is therefore liable for a loss occurring after 1st November on the voyage from New York to Q.; *Baines v. Holland*, 21 *L. J. (Ex.)* 204; 10 *Ex.* 802. In a time-policy a warranty not to sail for a particular country after a certain day, is complied with by getting out of the dock, and endeavouring to leave the harbour in the prosecution of the voyage; it might be otherwise, if the warranty were to sail from some particular terminus; *Cockrane v. Fisher*, 1 *C. M. & R.* 809. A ship having been proved to have sailed under convoy, to prove the time of sailing, the log-book of the commander of the convoy is evidence; *D'Israeli v. Jowett*, 1 *Esp.* 427.

Warranty of flag.] On a policy on goods, in order to prove a warranty that the ship insured was Danish, proof of her carrying the flag of that nation at times when she was free from the danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port, was held *prima facie* evidence; *Arcangelo v. Thompson*, 2 *Camp.* 620. Under a warranty of neutrality it is sufficient to show that the ship was neutral when the risk commenced, though from subsequent hostilities it ceased to be so during the voyage; *Eden v. Parkison*, 2 *Doug.* 732.

Implied Warranties.] There are also certain implied warranties, the breach of which will prevent the insured from recovering. Such implied warranties are;—that there shall be no deviation from the voyage insured;—that it shall be commenced without unreasonable delay;—that all material circumstances shall be disclosed to the underwriters;—and that the ship shall be seaworthy: And a breach of these conditions avoids the policy whether there be fraud or not; *per Parke, B.*, delivering the judgment of the Exchequer Chamber in *Small v. Gibson*, 16 *Q. B.* 158.

Warranty of seaworthiness.] "By being seaworthy is meant that the ship shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and if the voyage be such as to require a different complement of men, or state of equipment in different parts of it, as if it were a voyage down a canal or river and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation properly manned

and equipped for it. But the assured makes no warranty that the vessel shall continue seaworthy, or that the master and crew shall do their duty during the voyage, and their negligence or misconduct is no defence to an action on the policy where the loss had been immediately occasioned by the perils insured against; *per* Parke, B., delivering the judgment of the court, in *Dixon v. Sadler*, 5 M. & W. 414; cited and approved by the court in *Biccard v. Shepherd*, 14 Moo. P. C. 494, and *Bouillon v. Lupton*, *ante*, p. 223.

There is a warranty of a similar nature, in an insurance upon goods, with respect to the ship on which they are loaded; *Biccard v. Shepherd*, *supra*. But there is no implied warranty as to the goods themselves, that they are seaworthy for the voyage; *Koebel v. Saunders*, 33 L. J. (C. P.) 310; 17 C. B., N. S., 71. In *Biccard v. Shepherd*, *supra*, there was an insurance on copper ore "at and from the anchorages of H. and N. to S., to commence from the loading at and from the above ports." The ship was seaworthy at H., but became unseaworthy at N. by reason of overloading, and was lost after sailing from N.; and it was held that the insured could recover for the ore shipped at H., but not for that shipped at N.; see also *Bouillon v. Lupton*, *ante*, p. 223.

Primâ facie a ship is presumed to be seaworthy; *Parker v. Potts*, 3 Dow, 23; but where the inability of the ship to perform the voyage becomes evident in a short time after sailing, the presumption is that it arises from causes existing before her setting sail on the voyage, and that the ship was not then seaworthy; and the *onus probandi* in such cases rests with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage; *per* Lord Eldon, in *Watson v. Clark*, 1 Dow, 344; *Douglas v. Scougall*, 4 Douc, 269. A ship is not fit for a voyage unless she sails with a crew competent for the voyage, considering its length and the circumstances under which it is undertaken. Therefore where, on a voyage from Mauritius to London, there was no one on board competent to supply the captain's place in case of illness, Lord Tenterden, C. J., left it to the jury whether the vessel was seaworthy, and the jury found in the negative; *Clifford v. Hunter*, *Mood. & M.* 103. *Kent* (3 Com. 287, n.) observes that this ruling will hardly apply to short coasting voyages, and cites an American case to that effect. But where the assured has once provided a sufficient crew, the negligence of the crew at the time of the loss is no breach of the implied warranty; *Busk v. Royal Ex. Assur. Co.*, 2 B. & A. 73.

There is an implied warranty of seaworthiness in a voyage policy, though the insurance be on an abandoned ship and cargo in the interest of the salvor's lien; *Knill v. Hooper*, 2 H. & N. 277; 26 L. J. (Ex.) 377. But "seaworthiness" is a relative term; and it is for the jury to say whether the ship was reasonably able to perform the voyage; *S. C.* So it has been held that the seaworthiness of which there is an implied warranty is a relative term, depending on the nature of the ship as well as of the voyage insured for; and that in an action on a policy (in the usual form) parol evidence of these facts is admissible to show the amount of seaworthiness implied. Therefore on a policy "on the Ganges steamer from the Clyde to Calcutta," it being shown that the vessel was of very light draught of water, constructed for river navigation; that this was disclosed when the policy was effected; and that, although it was impossible to make her absolutely fit for ocean navigation, she had been made as seaworthy as her size and construction would admit; it was held the underwriters were liable;

Burges v. Wickham, 33 L. J. (Q. B.) 17; 3 B. & S. 669; affirmed by Ex. Ch. in *Clapham v. Langton*, (T. T. 1864), 34 L. J. (Q. B.) See also *Bouillon v. Lupton*, ante, p. 223.

There is not, under ordinary circumstances, any implied warranty of seaworthiness where the policy is merely a time policy, and not a policy connected with a voyage; *Gibson v. Small*, 4 H. L. C. 353; *Jenkyne v. Heycock*, 8 Moo. P. C. 351; *Michael v. Tredwin*, 25 L. J. (C. P.) 83; 17 C. B. 551. The doubt suggested by the Common Pleas in the last case, whether there might not be an implied warranty of seaworthiness in a time policy essentially connected with the commencement of a voyage, was decided in the negative by the Queen's Bench in *Thompson v. Hopper*, 6 E. & B. 172, 25 L. J. (Q. B.) 240; and in *Fawcus v. Sarsfield*, 6 E. & B. 192, 25 L. J. (Q. B.) 249. But although there is no warranty of seaworthiness in a time policy, yet if the injury or loss happens at sea, in consequence of the defective state of the ship, or improper equipment of it, when exposed to the ordinary operation of wind and waves, the insurer will not be liable for injury thus occasioned by the misconduct of the insured; *Thompson v. Hopper*, supra. And this, although there was no fraudulent intention, nor even knowledge of the defect; *Fawcus v. Sarsfield*, supra. But in order to afford a defence, the unseaworthiness must have been the immediate cause of the loss; *Thompson v. Hopper* (in Ex. Ch.), E. B. & E. 1038; 27 L. J. (Q. B.) 441.

Where a question arises as to the seaworthiness of a ship, ship-builders, though they have never seen the ship, may state their opinion on examining a survey taken by others, it being a matter of skill and science; *Beckwith v. Sydebotham*, 1 Camp. 117; *Thornton v. Royal Exchange Assur. Co.*, Peake, N. P. 25.

Where the policy expressly admits seaworthiness, the underwriter cannot dispute it, even where the loss was by reason of unseaworthiness; *Purfitt v. Thompson*, 13 M. & W. 392.

Deviation.] A deviation from the voyage insured is a defence to an action on the policy, as being a breach of an implied warranty on a voyage policy. Where the insurance is on a voyage to a given place, and the captain, when he sails, does not mean to go to that place at all, he never sails on the voyage insured, and the policy does not attach; *Wooldridge v. Boydell*, 1 Doug. 16; but where the ultimate termini of the intended voyage are the same as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same until the vessel arrives at the dividing point of the two voyages. The departure from the course of the voyage insured then becomes a deviation; but, before the arrival at the dividing point, there is no more than an intention to deviate, which alone will not vitiate the policy; *Kewley v. Ryan*, 2 H. Bl. 343; *Hare v. Travis*, 7 B. & C. 14. Whether a deviation for the purpose of assisting a vessel in distress is a forfeiture of the policy does not appear to be settled. Lawrence, J., in *Lawrence v. Sydebotham*, 6 East, 54, seemed to assume it to be lawful, "being for the common advantage of all persons, underwriters, and others." The Court of Admiralty has expressed a doubt whether it is a forfeiture; and the American courts have expressed the same doubt; *The Jane*, 2 Hagg. Adm. Rep. 345; 3 Kent Com. 313. All deviations by reason of inevitable accident or stress of weather, to obtain needful provisions, or do needful repairs, or avoid capture, are implied excep-

tions to the warranty; 3 *Kent Com.* 316, 317; *per cur.* in *Urquhart v. Barnard*, 1 *Taunt.* 456; *O'Reilly v. Gonne*, 4 *Camp.* 249. A deviation does not discharge the insurer from liability for previous loss, but only from loss accruing after the deviation; *Green v. Young*, 2 *L. Ray.* 840; 2 *Salk.* 444. If there be in the policy liberty to touch at several named ports, and the order of touching is specified in it, that must be followed, otherwise they must be visited in the order usual on similar voyages, unless circumstances justify a different order; *Gairdner v. Senhouse*, 3 *Taunt.* 16; 3 *Kent Com.* 314-15.

An unreasonable and unjustifiable delay on the part of the insured, either before or after the risk attaches, in commencing the voyage insured, is in the nature of a deviation, and amounts to such an alteration of the risk as to discharge the underwriters; *Mount v. Larkins*, 8 *Bing.* 108; *Palmer v. Marshall*, 8 *Bing.* 79, 317. Unreasonable delay is properly a question for the jury; *Palmer v. Marshall*, *supra*; *Hamilton v. Sheddon*, 3 *M. & W.* 49. But in case of a seeking ship, much greater latitude for the seeking adventure must be allowed; *Phillips v. Irving*, 7 *M. & G.* 325.

Full disclosure.] See post, p. 239, *Concealment.*

Other implied Warranties.] There is no implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented; therefore, where the captain neglected to mention the goods in the ship's manifest, as required by 13 & 14 Car. 2, c. 11, &c., this was held no defence by the underwriter against the owner of the goods; *Carruthers v. Gray*, 3 *Camp.* 142. Goods must be properly stowed; but lading them on deck is not necessarily improper, as some writers have supposed; *Milward v. Hibbert*, 3 *Q. B.* 120.

Licence.] Where the voyage has been legalised by a licence, such licence must be produced unless lost, when parol evidence of its contents is admissible; *Kensington v. Inglis*, 8 *East*, 288. But where a licence was granted by the Secretary of State in this country pursuant to 48 Geo. 3, c. 126, parol evidence was excluded on the ground that there must have been some register of it preserved in the office of the Secretary of State, which would be better than parol evidence; *Rhind v. Wilkinson*, 2 *Taunt.* 237. By the above-mentioned statute a duplicate of the order in council, authorising the grant of the licence, is to be annexed to it; where therefore the licence was lost, examined copies of the order in council from the council books and of the licence in the office of the Secretary of State were held to be the only proper evidence; *Eyre v. Palsgrave*, 2 *Camp.* 605. Proof that a vessel warranted to carry a French licence remained at Bordeaux a month after the inspection of a document purporting to be a French licence, and of other documents, by the officers of the French Government, is *prima facie* evidence that the document is genuine; *Ewerth v. Tunno*, 1 *Stark.* 508. Where the licence is general some evidence must be given to apply it to the voyage in question; *Barlow v. McIntosh*, 12 *East*, 311. On proof that goods, which cannot be exported without a licence, were duly entered for exportation at the custom-house, it was presumed, in an action against the shipowner, that there was a licence to export them; *Van Omeron v. Dowick*, 2 *Camp.* 44.

Proof of loss—Perils of the sea.] If the insurance is with the words "lost or not lost" it will attach, although the subject matter had been in fact lost at sea at the time of insurance, provided the party insured was at the time ignorant of the loss; 3 *Kent Com.* 258-9; *Mead v. Davison*, 3 *Ad. & E.* 307.

The proximate and not the remote cause of loss is to be regarded. But where the insurance is against perils of the sea, and mischief is occasioned by the sea, the natural and unavoidable consequence of which is to cause a further mischief, this consequential injury is also a peril of the sea; as, where the sea water damages part of a cargo, which thereby becomes putrid so as to injure another part of the cargo in contact with it; *Montoya v. London Assur. Co.*, 6 *Ex.* 451; 20 *L. J. (Ex.)* 254. A loss by perils of the seas, though remotely occasioned by the negligence of the crew, is within the policy; *Walker v. Maitland*, 5 *B. & A.* 171; *Bishop v. Pentland*, 7 *B. & C.* 219; *Shore v. Bentall*, 7 *B. & C.* 798 (*n.*). So a loss occasioned by the mistake of the master, provided he was a person of competent skill when the policy was effected; *Phillips v. Headlam*, 2 *B. & Ad.* 380. So, though the ship was damaged by negligent loading, and became leaky, and was run ashore to prevent sinking; *Redman v. Wilson*, 14 *M. & W.* 476. A loss, occasioned by running foul of another vessel by misfortune, is a loss by the perils of the seas; *Buller v. Fisher*, 3 *Esp.* 67. So if the ship was run down by another ship, though through gross negligence on the part of the other ship; *Smith v. Scott*, 4 *Taunt.* 126. So where the vessel is wrecked in consequence of the gross misconduct of the master; *Heyman v. Parish*, 2 *Camp.* 149. Where a portion of the goods was saved from the wreck and got on shore, but they were plundered by the natives and never came to the hands of the owners, this is a loss by perils of the sea; *Bondrett v. Hentigg*, *Holt, N. P.* 149. So on an insurance on goods, where the ship was stranded, and utterly disabled from proceeding, and while she lay in the sand, was seized and confiscated by the foreign authorities; *Hahn v. Corbett*, 2 *Bing.* 205. But if the ship be merely temporarily disabled, and afterwards seized, this is a total loss by capture, and if this be an excepted risk, the insured cannot recover for the previous partial loss by perils of the sea; *Livie v. Janson*, 12 *East*, 648. Several thousand bags of coffee were insured against perils of the sea, and were warranted free from capture and all the consequences of hostilities; the captain got out of his reckoning, and without being aware of it got off a cape on which, in ordinary times, a light was kept burning, but owing to hostilities between two neighbouring states the light had been extinguished; if the light had been burning the captain would have seen it, and been able to put his ship about, but as it was she ran ashore, and was lost; 120 bags of the coffee were saved by salvors, and 1000 bags more would have been saved but for the interference of one of the hostile parties; after which the ship went to pieces; and it was held that the underwriters were liable for a partial loss: for that the cause of the wreck was perils of the sea, and that the putting out the light, though an act of hostility within the exception, was too remotely connected with the loss to be taken as the cause; but that the loss of the 1000 bags was within the exception; *Ionides v. The Universal Marine Association*, 32 *L. J. (C. P.)* 170; 14 *C. B., N. S.*, 259. Where the insurance was on cattle warranted free from mortality, and they in the course of the voyage were killed by the rolling of the ship in a storm; this was held

a loss by the perils of the seas; *Lawrence v. Aberdeen*, 5 B. & A. 107. So, under a similar policy, where the horses, owing to a storm, broke down the partitions, &c., between them, and so kicked and injured each other that they died; *Gabay v. Lloyd*, 3 B. & C. 793.

A transport was insured for twelve months during which she was ordered into a dry harbour the bed of which was uneven, where, the tide having left her, she received damage from an unusual sea swell; this was held a loss by perils of the seas; *Fletcher v. Inglis*, 2 B. & A. 315. But if the damage be occasioned merely by the ship taking the ground on the ordinary reflux of the tide, this is not a peril of the sea; *Magnus v. Buttemer*, 11 C. B. 876; 21 L. J. (C. P.) 119. So where a ship was hove down upon a beach within the tideway to repair, and, the tide rising, she was bilged and damaged; it was held not to be a loss by the perils of the seas; *Thompson v. Whitmore*, 3 Taunt. 227; *Phillips v. Barber*, 5 B. & A. 161.

An insurance against "perils of the sea" does not cover an injury resulting from the ordinary chemical action of the sea-water upon an article exposed to the action in such a state as inevitably to receive injury from it; *Paterson v. Harris*, 30 L. J. (Q. B.) 354; 1 B. & S. 336. So where a ship became so injured by worms during her voyage as to be unable to proceed, and was condemned as irreparable, this is not a loss by perils of the seas; *Rohl v. Parr*, 1 Esp. 445.

Where two ships were injured by collision, and the owners of one were, in consequence, compelled by a court of admiralty to pay damages, this was held not a loss by perils of the seas; nor could they recover the extra expense of maintaining the crew whilst the ship was under repair, owing to damage by the sea; *De Vaux v. Salvador*, 4 Ad. & E. 420. It has become the frequent practice to add what is called a collision clause, in modern policies, making the underwriters liable for any damages that the shipowner may have to pay in consequence of the ship coming into collision with another ship; but this will not extend to personal injury on board the other ship, unless expressly so extended; *Taylor v. Dewar*, 33 L. J. (Q. B.) 141.

Where a ship was disabled by perils of the seas from pursuing her voyage, and the master, having no other means of defraying the expense of repairs, sold part of the goods insured, and applied the proceeds towards the expense, it was held that this was not a loss of the goods by perils of the seas; *Powell v. Gudgeon*, 5 M. & S. 431; *Sarguy v. Hobson*, 2 B. & C. 7; *S. C.* in *Ex. Ch.*, 4 Bing. 131; 1 F. & J. 347; see also *Philpot v. Swann*, *post*, p. 234. A ship was wrecked, sunk, and sold by the owner and master after a survey by captains approved by the agent of Lloyd's: two days afterwards she was got clear off by the purchaser and repaired, but at great expense, and she might then have returned to England in ballast, or with certain kinds of cargo. Lord Tenterden held, that not only must the owner act honestly, but that the underwriters were not liable unless he formed the best and soundest judgment that could be formed under the circumstances, and that if the ship could have been brought to England even in ballast, so as to have repaid the money expended in repairs, they ought to have been made by the captain; and he left it to the jury to say, whether the captain exercised a sound judgment as well for the benefit of the underwriters as for the owners; *Doyle v. Dallas*, 1 Mood. & Rob. 48; see *Gardner v. Salvador*, 1 Mood. & Rob. 116.

The question is, whether he actually exercised a sound judgment; and proof of his inability to do so by reason of habits of drunkenness or otherwise, is legitimate evidence; *Alcock v. Royal Exchange Assurance Company*, 13 Q. B. 292. If a ship, agreed to be seaworthy, is damaged by a storm, so that the expense of repair will exceed the value of the ship when repaired, it is a total loss by the perils of the seas, though the ship was an old and partially decayed one, and the expense would, on that account, be increased; *Phillips v. Nairne*, 4 C. B. 343; 16 L. J. (C. P.) 194. See *Grainger v. Martin*, and other cases, *post*, p. 234.

A ship, never heard of after sailing, is presumed to have foundered at sea; *Green v. Brown*, 2 Str. 1199; *Newby v. Read*, *Park's Ins.*, 148, 8th edit. It is sufficient to prove that the ship has not been heard of in the country from which she sailed, without calling witnesses from the port of destination to prove that she never arrived there; *Twemlow v. Oswin*, 2 Camp. 85. The time within which a missing ship will be presumed lost must depend on the circumstances of the case. In *Houstman v. Thornton*, *Holt, N. P.* 242, a ship which had sailed on a seven weeks' voyage, and had not been heard of for eight or nine months, was presumed to be lost. Where it was proved that the vessel (a foreign one, and trading between foreign ports) sailed on the voyage insured with the goods on board, but had never arrived at her port of destination, and that a report prevailed at the place whence she sailed that she had foundered at sea but that the crew were saved,—this was held sufficient *prima facie* evidence of a loss by the perils of the seas, and the plaintiff was held not bound to call any of the crew, or to show that he was unable to procure their attendance; *Koster v. Reed*, 6 B. & C. 19.

Proof of loss by fire.] Proof that the ship was burned by the captain to prevent her falling into the hands of the enemy, is evidence of a loss by fire; *Gordon v. Rimmington*, 1 Camp. 123. So though the ship was burned by the negligence of the master and mariners, this is a loss by fire; *Busk v. Royal Exchange Assurance Company*, 2 B. & A. 73. But on an insurance on goods, if the goods are burnt in consequence of being put on board in bad condition, this, being occasioned by the insurer's own act, would not be a loss by fire within the policy; *Boyd v. Dubois*, 3 Camp. 133.

Proof of loss by capture.] Where a vessel is driven by a gale of wind on an enemy's coast without damage, and there captured, it is a loss by capture; *Green v. Elmslie, Peake, N. P.*, 212; *aliter*, if lost by standing before the capture; *Hahn v. Corbett*, cited *ante*, p. 228. The books at Lloyd's have in some cases been received as evidence of a capture; but not of notice of the loss to the underwriter; *Abell v. Potts*, 3 Esp. 242. A foreign sentence of condemnation is not evidence of a capture; but after other proof of a capture it is evidence to show the grounds of condemnation; *Marshall v. Parker*, 2 Camp. 69. If a ship after capture, without abandonment, is restored so as to be in a condition to pursue the voyage insured, and is afterwards lost on another voyage, the plaintiff cannot recover for a total loss by capture; *Kulen Kemp v. Vigne*, 1 T. R. 304. A recapture may convert a total into a partial loss; *Thellusson v. Shedden*, 2 N. R. 228, 230. Proof of a capture by collusion with the captain will support an averment of loss by capture; *Arcangelo v. Thompson*, 2 Camp. 620. Insurance of a

French ship in England during peace will not avail against British capture after war declared; *Furtado v. Rodgers*, 3 B. & P. 191. Whether the words "capture or seizure" occur in the policy or in a warranty excepting them, capture by a foreign force under error is within the words; and the fact that the ship is sunk by the captor's guns does not make it less a capture; *Powell v. Hyde*, 5 E. & B. 607; 25 L. J. (Q. B.) 65. See also *Kleinwort v. Shepard*, *post*, p. 238.

Proof of loss by restraint of princes, &c.] In an insurance in the usual form against the restraint of all princes, &c., is included a loss consequent on a seizure, under an embargo for a temporary purpose by the government of the country of the assured, that country and the country of the assurer being at peace, and the embargo being unconnected with any hostility existing or expected between the two countries; for the assured is not so identified with the acts of the government of his country as to make their acts his own; *Aubert v. Gray*, 32 L. J. (Q. B.) 50; 3 B. & S. 163; in the Exchequer Chamber, overruling *Conway v. Gray*, 10 East, 536; but the court intimated that they did not say, if the act of seizure were a lawful act under the municipal law of the country of the assured, that as against him the seizure would be within the insurance. A wrongful seizure as a slaver comes within this clause; and notice of abandonment makes the loss total; and though after long litigation and judgment of restitution the goods still remain in specie, a reasonable man could not be expected to be willing to retain possession, and therefore the loss remains total; *Lozano v. Janson*, 2 E. & E. 160; 28 L. J. (Q. B.) 337.

Proof of loss by barratry.] Barratry is a fraud committed by master or mariners against the owner; therefore the act of the owner is not barratry. Evidence that the person, who was described in the policy and acted as master of the ship, carried her out of her course for fraudulent purposes of his own, is *prima facie* evidence of barratry without negative proof that he was not the owner; *Ross v. Hunter*, 4 T. R. 33. Where, however, the whole ship is let, the freighter is owner *pro hac vice*, and barratry may then be committed even with the consent of the general owner; *Vallejo v. Wheeler*, *Comp.* 143; *Soares v. Thornton*, 7 Taunt. 627. Smuggling by the captain, on his own account, will be evidence of barratry; *Lockyer v. Offley*, 1 T. R. 252. But if, by the gross negligence of the owner, the mariners barratrously carry smuggled goods on board, the underwriters are not liable; *Pipon v. Cope*, 1 Camp. 434. Proof that prisoners of war rose and confined all the crew and put them on shore except one, who was heard on the deck in conversation with them, is evidence of barratry; *Hucks v. Thornton*, *Holt*, N. P. 30.

Proof of loss by "other perils."] The general insurance against "all other perils, losses, and misfortunes," covers cases of marine damage of like nature as those enumerated. It does not cover cases of ordinary wear and tear, or damage resulting from ordinary occurrences of a sea voyage, such as loss of anchors, friction of rocks, leakage, worms, rats, &c., for these are not the extraordinary and fortuitous perils of the sea; 3 Kent Com. 300. Of this kind is the damage done to a ship in harbour by the ordinary flux or reflux of the tide; *Magnus v. Buttemer*, 11 C. B. 876; unless occasioned by an unusual

swell or other accident; *Phillips v. Barber*, 5 B. & A. 161; see *ante*, p. 229. But the case of a vessel sunk by an English ship of war firing into her by mistake, was held to be a loss within the general words, though *semble*, not by "perils of the sea;" *Cullen v. Butler*, 5 M. & S. 461.

Proof of stranding.] The memorandum, usual in policies on goods, to protect the insurers from claim for loss on certain articles, or from liability to particular average, "unless the ship be stranded," raises the question as to what is a "stranding" within the memorandum. If there be a stranding, then the policy attaches, although the loss or injury to the excepted articles was not really caused by it; *per* *Ld. Tenterden*, in *Wells v. Hopwood*, 3 B. & Ad. 34, 35. Where goods are insured free from average, unless general or the ship be stranded, before the plaintiff can recover for a partial loss the *stranding* must be proved. A *striking* is not sufficient, if it is merely temporary, as for a minute and a half; in order to constitute a stranding, the ship must be stationary for some time; *McDougle v. Royal Exchange Assurance*, 4 Camp. 283; 4 M. & S. 503. But where the ship was fixed from fifteen to twenty minutes, it was held a stranding; *Baker v. Twyry*, 1 Stark. 436. If a ship is forced ashore, or is driven on a bank and remains for any length of time on the ground, as for two hours, this is a stranding without reference to the degree of damage she sustains; *Harman v. Vaux*, 3 Camp. 431. "A stranding," says Mr. Justice Bayley, "may be said to take place where a ship takes the ground not in the ordinary course of the navigation, but by reason of some unforeseen accident." *Bishop v. Pentland*, 7 B. & C. 224; *Wells v. Hopwood*, 3 B. & Ad. 20, *accord*.

Where a ship, under the conduct of a pilot, in her course up the river to Liverpool was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, and left there, and took the ground, and when the tide left her fell over on her side and bilged: this was held to be a stranding; *Carruthers v. Sydebotham*, 4 M. & S. 77. So, where, in the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water, and the ship in consequence, having been placed in the most secure situation that could be found, when the water was drawn off went by accident upon some piles which were not previously known to be there,—it was held a stranding; *Rayner v. Godmond*, 5 B. & A. 225. So where, in the course of the voyage, the ship was by tempestuous weather forced to take shelter in a harbour, and on entering it struck upon an anchor, and being brought to her moorings was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground, and remained fast for half an hour,—the stranding was held to be proved; *Barrow v. Bell*, 4 B. & C. 736. A ship was compelled in the course of her voyage to put into a tidal harbour, and was there moored alongside a quay in the usual place for such ships. The rope with which she was fastened, not being of sufficient length, broke when the tide left the vessel, and she fell over upon her side, and was thereby greatly injured:—held to be a stranding, though occasioned remotely by the negligence of the crew; the falling over was not in the ordinary course of the voyage, but in consequence of an unforeseen accident out of the ordinary course of the voyage, *viz.* the breaking of the rope; *Bishop v. Pentland*, 7 B. & C. 219.

But where the taking the ground is in the ordinary course of navigation, and no more than is usual with the vessels on the same voyage, it is not a stranding, though the vessel or goods are injured by it; *Hearne v. Edmunds*, 1 B. & B. 388. "Where a vessel," says Lord Tenterden, "takes the ground, in the ordinary course of navigation and management in a tide river or harbour, upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered as stranding within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place by reason of some unusual or accidental occurrence, such an event shall be considered as a *stranding* within the meaning of the memorandum;" *Wells v. Hopwood*, 3 B. & Ad. 34. In that case the vessel, in the course of discharging her cargo in a tidal harbour, on one occasion grounded, not on the mud as was intended, but on a heap of stones, owing to one of her mooring ropes breaking, and the wind blowing at the time from a particular quarter; and the majority of the court held it "a stranding." But where upon the ebbing of the tide the vessel took the ground in a tidal harbour in the place where it was intended she should, but in so doing struck against some hard substance by which two holes were made in her bottom,—this was held to be no stranding; *Kingsford v. Marshall*, 8 Bing. 458. In *Corcoran v. Gurney*, 1 E. & B. 456, 22 L. J. (Q. B.) 113, the ship was forced by stress of weather to take a tidal harbour, where, it being low water, she took the ground, and only floated about eight days in a month at the top of the spring tides, being unable to leave the harbour for two months, owing to contrary winds; and this was held a stranding, the court adopting the above definition of Lord Tenterden in *Wells v. Hopwood*, *supra*.

In order to bring the case within the *stranding* mentioned in the memorandum as to partial loss, it must appear that the goods were on board at the time; thus where hides grew putrified from leakage, and were sold in the course of the voyage at an intermediate port, and the ship was afterwards stranded, it was held that the stranding was not within the condition in the memorandum; *Roux v. Salvador*, 1 N. C. 526. The stranding must be of the ship itself, and although the insurance includes risk of craft, &c., the stranding of a lighter conveying the goods from the ship will not make the insurers liable; *Hoffman v. Marshall*, 2 N. C. 383.

Proof of loss; total or partial.] A loss may be total or partial, and a total loss may be either actual or constructive. A loss is said to be total if the thing insured is either totally destroyed, or is so damaged as to be worthless, and the adventure thereby wholly frustrated; *Roux v. Salvador*, 3 N. C. 266. It is a constructive total loss if the thing insured, though still existing in fact, is lost for all useful purposes, so as to justify the insured in abandoning all his interest in it to the insurer and claiming as for a total loss. Where the loss is *actually* total, no abandonment is necessary to found a claim; *Roux v. Salvador*, *supra*; 3 Kent Com. 318. Thus, stranding is not a total loss, and may not be the foundation of any claim at all; but if the ship becomes thereby unnavigable by reason of the impossibility of getting her afloat or the great expense of doing so, the loss may be converted into a total one by abandonment; 3 Kent Com. 323. A partial loss may be recovered

on a declaration claiming a total one; *Gardiner v. Crosedale*, 1 *W. Bl.* 198. And this may be done upon a traverse of the total loss; *Benson v. Chapman*, 8 *C. B.* 950. And, therefore, where an allegation of total loss is untraversed, the defendant admits no more than some partial loss; *King v. Walker*, 33 *L. J. Exch.* 167; 2 *H. & C.* 384; *S. C.* in *Ex. Ch.*, 33 *L. J. (Ex.)* 325; 3 *H. & C.* 209.

A loss is total and no abandonment is necessary where the ship is lost, or destroyed, or captured, or reduced to a mere wreck or congeries of planks, so as to exist as a ship for no useful purpose; *Cambridge v. Anderton*, 2 *B. & C.* 691. So in case of goods where they are become putrid, and are sold at an intermediate port, being unfit to be carried further; *Roux v. Salvador*, 3 *N. C.* 266, 288. In some cases of damage by sea the owners may be justified in selling the ship and claiming for total loss; in such cases the question for the jury will be, whether the sale was justified by necessity, and was for the benefit of all parties, and the net amount of the sale becomes money received for the insurer; *Roux v. Salvador*, *supra*; *Doyle v. Dallas*, 1 *Mood. & Rob.* 48; *Gardner v. Salvador*, *Id.* 116, *ante*, p. 229. In order to make out a constructive total loss the plaintiff must show affirmatively that the cost of repair would have exceeded the value of the ship when repaired; and where the ship is of an exceptional size, the price she would fetch in the market when repaired is not the test of her real value; *Grainger v. Martin*, 31 *L. J. (Q. B.)* 186; 2 *B. & S.* 456; *S. C.* in *Ex. Ch.*, 4 *B. & S.* 9; see also *Young v. Turing*, 2 *M. & G.* 593. In the case of insurance on freight, where the ship was disabled before she had completed her lading, and the master went to a distant place for repairs, and finding he could not get them done there, sailed on to the port of destination without returning for the rest of his cargo, acting throughout as a prudent owner, uninsured, would have done,—it was held that the freight was not lost by perils of the seas; *Philpot v. Swann*, 30 *L. J. (C. P.)* 358; 11 *C. B.*, *N. S.*, 270; citing and approving *Mordy v. Jones*, 4 *B. & C.* 394, and *Moss v. Smith*, 9 *C. B.* 94, 19 *L. J. (C. P.)* 225. In case of sale by the master of a ship or goods in specie, there must be a clear case of extreme necessity to constitute an *actual* loss without abandonment. Where the thing insured exists in specie, the general rule is that the loss is constructive only, and the assured can only found a claim for total loss by abandonment; *Knight v. Faith*, 15 *Q. B.* 649; 19 *L. J. (Q. B.)* 509; and the cases cited in the judgment; see also the judgment of the Exchequer Chamber in *King v. Walker*, 33 *L. J. (Ex.)* 325. There is no total loss of freight, merely because there was an injury to the ship by perils of the sea, which cost more to repair than the amount of freight; if the ship itself was worth repairing; *Moss v. Smith*, 9 *C. B.* 94; 19 *L. J. (C. P.)* 225. Where freight is eventually earned, although paid to the obligees of a bottomry bond (by a decree of the Admiralty), which the master has been obliged to enter into in order to get money necessary for repairs, the shipowner cannot claim either for total or partial loss of freight; *Benson v. Chapman*, 8 *C. B.* 950; 2 *H. L. C.* 696; reversing the decision of the *C. P.*, 6 *M. & G.* 792. A loss, which by abandonment might become total, may become a partial loss only by subsequent events, as by recapture, release from detention, &c., before action; 2 *Wms. Saund.* 203*f*, *n.* (19).

An insurance "against total loss only" does not exclude a constructive total loss; *Adams v. McKenzie*, 32 *L. J. (C. P.)* 92; 13 *C. B.*, *N. S.*, 442.

Proof of loss—Abandonment.] The cases in which abandonment is necessary have been thus described:—"There may be a capture, which, though *prima facie* a total loss, may be followed by recapture. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the improbability of bringing ship or goods to their destination. There may be some other peril which renders the ship unnavigable, without reasonable hope of repair, or by which goods are partly lost, or so damaged as not to be worth the expense of bringing them to their destination. In these or similar cases, if a prudent man, not insured, would decline any further expense in prosecuting the adventure, a party insured may, for his own benefit as well as that of the underwriter, treat the case as one of total loss. But if he elects to do so, the principle of indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives intelligence of the accident. . . In all these cases the thing assured, or part of it, is supposed to exist in specie, and there is a possibility, however remote, of its arriving at its destination, or of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it;" *per* Ld. Abinger, C. B., delivering the judgment of the Ex. Ch. in *Roux v. Salvador*, 3 N. C. 286. "The cases show that a mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship or spoiled, does not constitute a total loss under a policy of insurance, unless by the aid and effect of abandonment;" *per* Lord Tenterden, C. J., delivering the judgment of the Q. B. in *Naylor v. Taylor*, 9 B. & C. 723. In order to justify an abandonment, there must have been *that* in the course of the voyage which, at the time constituted a total loss; thus the desertion of a ship, necessitated at the time from stress of weather, coupled with a notice of abandonment, constitutes a total loss, though the ship be afterwards saved; *Holdsworth v. Wise*, 7 B. & C. 794. Where a cargo of hides, in consequence of a leak, began to putrify and was sold at an intermediate port for less than a fourth of their value, and it appeared that, if not sold, they could not have arrived at the end of the voyage *as hides*, it was held to be a total loss without an abandonment; *Roux v. Salvador* (in *Ex. Ch.*) 3 N. C. 286. The mere loss of the voyage by delay or otherwise, will not warrant the abandonment of *ship or cargo*, if either remain in specie; *Anderson v. Wallis*, and *Falkner v. Ritchie*, 2 M. & S. 240, 290; *Hunt v. Royal Exchange Assurance Co.*, 5 M. & S. 47.

An abandonment may be by parol; but it should be certain; and therefore a statement of the facts with a request to settle for a total loss, and to direct the disposal of the ship, has been held insufficient; *Parmeter v. Todhunter*, 1 Camp. 541. So where the captain wrote home to his co-owners that the ship had been disabled, that a survey had been made, and she was not worth repairing, that he had consulted the best legal authorities as to what was best to be done, but had not yet received their opinion, adding: "My own opinion is, that it will be better for all parties to sell the ship; give the different clubs notice of our position"; and this letter having been communicated to the underwriters, the captain sold without further communication with them: this was held no notice of abandonment; *King v. Walker*, 33 L. J. (*Ex.*) 167; 2 H. & C. 384. But it appearing that another letter had been written by the captain by the next monthly mail, and communicated to the underwriters, in which he announced that he had

sold, "give the clubs notice," that was held, by the Court of Exchequer Chamber, a notice of abandonment, and in good time; *S. C. 33 L. J. (Ex.) 325; 3 H. & C. 200*. The notice of abandonment must be given as soon as possible; *Hunt v. Royal Exchange Assurance Co., infra*, 5 *M. & S. 47*. But an informality or inaccurate statement in it will not vitiate it; *Dean v. Hornby*, 3 *E. & B. 180*. It must apply to the entire subject of insurance and not to part only; 2 *Wms. Saund.*, 203 *f. n.* (19); 3 *Kent Com.* 329. On the other hand, the underwriter, if he intends to dispute it, is bound to say so, within a reasonable time after receiving notice of abandonment, otherwise he will be taken to have acquiesced in it; *Hudson v. Harrison*, 3 *B. & B. 97*.

A party, jointly interested in the subject-matter of the insurance, and who has effected the insurance, may give notice of abandonment for all; *Hunt v. The Royal Exchange Assur. Co.*, 5 *M. & S. 47*. But the person with whom a policy on a ship has been simply deposited as a security for a loan to the shipowner, has no implied authority to give notice of abandonment to the underwriters; and a notice given by such person cannot enure for the benefit of the shipowner, so as to enable him to recover upon a constructive total loss; *Jardine v. Leathley*, 32 *L. J. (Q. B.) 132; 3 B. & S. 700*.

Proof of amount of loss—Adjustment.] If the liability is not disputed, and the policy is an open one, the parties usually proceed to adjust the amount, and this adjustment is an admission of the facts on which the claim is founded, and is evidence against the underwriter of the amount due. It is proved by evidence of his signature, or that of his agent, with proof of the authority of the latter; and it seems that an agent, who has authority to subscribe a policy, has also authority to sign an adjustment of the loss; *Richardson v. Anderson*, 1 *Camp.* 43 (*n.*). But an adjustment is only *prima facie* evidence against the underwriter, and does not bind him, unless there was a full disclosure of the circumstances of the case; *Shepherd v. Cheuter*, 1 *Camp.* 274; and fraud opens an adjustment; *Christian v. Coombe*, 2 *Esp.* 489. An adjustment does not require a stamp; *Wiebe v. Simpson*, 2 *Schw. N. P.* 990, 12th edit.

Loss, how to be calculated.] The rule on an open policy is to estimate the actual value of the subject insured at its actual or market value at the commencement of the risk. The object of insurance is merely to put the party in *statu quo*, and not to indemnify him for the loss of prospective profits; 3 *Kent Com.* 335. If the claim be on repairs of a ship, the full costs of repair will not be allowed, because the owner substitutes new for old materials; *Pongdestre v. Roy. Exch. As. Co., Ry. & Mood.* 378. The usage is in such case to deduct a third from the cost of repair; *Ibid.*; unless the ship be on her first voyage; *Pirie v. Steele*, 2 *Mood. & Rob.* 49. Where the claim is for partial loss on damaged goods sold at the destined port, the sum to be paid by the insurer is to bear the same ratio to the original value at the port of lading, as the gross proceeds of the actual sale bear to what would have been the gross proceeds if the goods had been sound when sold. The expenses of insurance and commission are to form part of the original value in this calculation, and added to the prime cost or invoice price; *Johnson v. Sheddon*, 2 *East*, 681; *Usher v. Noble*, 12 *East*, 639. The payment of freight is not to be considered, unless the

freight be also insured; 3 *Kent Com.* 337. Besides the amount subscribed for by the underwriters, they may become liable for average losses and monies expended in and about the attempting to save or recover the subject insured, if claimed in the declaration; *Le Cheminant v. Pearson*, 4 *Taunt.* 367; 3 *Kent Com.* 339, 340.

In an action on insurance of goods, if the declaration alleges the ship to have been sunk, whereby the goods were spoiled, and it appears that some of the goods were saved, the plaintiff may give the expense of salvage in evidence, though not specially averred; *Cary v. King*, *Ca. temp. Hardw.* 304.

In open policies the assured must prove the extent of his loss; but in valued policies, if the loss be a total one, he is only bound to prove *some* interest in the ship or goods in order to take the case out of the statute 19 *Geo. 2*, c. 37; for ever since that statute, the constant usage has been to permit the valuation fixed in the policy to stand, unless the defendant can show that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods. But where the loss is partial, it opens a valued policy; and the plaintiff is as much bound to prove the value of the goods that have been lost, and to ascertain the damage he has sustained by the loss, as in case of an open policy; 2 *Wms. Saund.* 201*t*, n. (8). The certificate of an agent of Lloyd's is not admissible to prove the amount of damage sustained by goods, though the defendant is a subscriber to Lloyd's; *Drake v. Marryat*, 1 *B. & C.* 473.

Where, in a valued policy, the risk on the goods was to commence on the loading thereof twenty-four hours after ship's arrival at the coast of Africa, a considerable part of the cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put upon the goods in the policy,—it was held that the valuation was opened, and that the assured was only entitled to recover a proportion calculated on the part of the cargo shipped at the time of the loss; *Rickman v. Carstairs*, 5 *B. & Ad.* 651. On a policy on freight, the ship having actually earned full freight, though not that intended for her, the assured cannot recover for the delay and expense as a partial loss; *Brackelbank v. Sugrue*, 1 *Mood. & Rob.* 102.

The amount recoverable depends on the value of the thing insured, the sum insured, and the amount of loss; and, as the contract of marine insurance is a contract of indemnity merely, where there are several policies on the same subject-matter, and the assured has been paid on some of the policies, he can only recover, on the one in suit, such an amount as with the sums already received will give him indemnity against the loss actually sustained. In ascertaining this loss in an action on an open policy, the true value of the thing assured is the criterion. But on a valued policy the assured can only recover to the amount that the thing is valued in the particular policy; and it has been held that if he has already received that value on another policy, he cannot recover anything further, although the true value and loss be beyond what he has already received; *Bruce v. Jones*, 32 *L. J. (Ex.)* 132; 1 *H. & C.* 769. This decision is contrary to Lord Ellenborough's ruling in *Bousfield v. Barnes*, 4 *Camp.* 228, and has been questioned; see *per* Shee, J., in *Wilson v. Nelson*, 33 *L. J. (Q. B.)* 220.

Excepted risks, "free from average."] We have incidentally seen that there are often clauses excepting certain risks. Thus there is ordinarily a memorandum by which certain goods are "warranted free from

average, unless general, or the ship be stranded" (*ante*, p. 232). An insurance with a warranty "free from particular average," is equivalent to an insurance against total loss and general average only; and in such a case, if the ship be disabled from continuing her voyage owing to a peril insured against, and the subject of insurance be forced to be landed, and expense is properly incurred in sending it on by another ship; that is particular average, and the insured cannot recover; *The Great Indian Peninsula Ry. Co. v. Saunders*, 1 B. & S. 41; 30 L. J. (Q. B.) 218; *S. C. in Ex. Ch.* 2. B & S. 266; 31 L. J. (Q. B.) 206; *Booth v. Gair*, 33 L. J. (C. P.) 99; 15 C. B., N. S., 291. There is not a total loss of part, but only particular average, where some bales of insured silk were so damaged as to make it prudent to sell them, if a portion of each bale might have been saved and sent home at a moderate expense; retaining its saleable character as silk; *Navone v. Haddon*, 9 C. B. 30; 19 L. J. (C. P.) 161. In *Dary v. Milford*, 15 East, 559, it had been held that there might be a total loss of part of an entire cargo, though the other part be saved; and the effect of decided cases was formerly considered to be, that whether a loss was a total loss of part, or an average loss of the whole cargo, depended on the mode of packing; and that if the cargo was stored in bulk, and part only was destroyed, or if in casks or other separate packages, capable of separate valuation, and part only of each were damaged,—this was an average loss; but that if one or more of the packages were totally lost, that was a total loss to that extent; but the latter proposition must be taken as exploded by *Ralli v. Janson*, 6 E. & B. 422, 25 L. J. (Q. B.) 300; where the Court of Exchequer Chamber reviewed the earlier decisions, and explained that the effect of several has been misapprehended; and so far overruling *Dary v. Milford*, 15 East, 559, the court held that where memorandum goods of the same species are shipped, whether in bulk, or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average nor stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though one or more entire packages be entirely destroyed.

A usage that underwriters are not liable, under the ordinary form of policy, to general average on account of the jettison of timber stowed on the deck, is a valid custom, and not inconsistent with the terms of such policy; *Miller v. Tetherington*, 30 L. J. (Ex.) 217; 6 H. & N. 278; *S. C. in Exch. Ch.* 31 L. J. (Ex.) 363; 7 H. & N. 954.

A warranty "free from capture and seizure, and the consequences of any attempt thereat," includes a piratical carrying away of the ship by passengers; *Kleinwort v. Shepard*, 1 E. & E. 447; 28 L. J. (Q. B.) 147.

Defence.

Under the general issue, or plea traversing the making of the policy, the defendant cannot, since the pleading rules of 1853, show that the plaintiff is not entitled to recover on account of fraud, misrepresentation, concealment, unseaworthiness, deviation, &c.; but such defences and other matters in confession, avoidance, or discharge, must be set up by special traverse or plea; the rules declaring that such general plea will operate as a denial, in fact, of the contract, as of the subscription to the alleged policy by the de-

fendant, but not of the interest, or the commencement of the risk, of the loss, or of the alleged compliance with warranties.

Under these rules (which in this respect are like the rules 4 Will. 4) in an action on a policy containing the usual stipulation against capture, the defendant may show under the general issue a contemporary written agreement between plaintiff and defendant that it should extend only to capture in war, such agreement being in effect part of the policy itself; *Heath v. Durant*, 12 M. & W. 438; see *ante*, p. 223. Not so, if the policy had been varied by a subsequent stipulation; *S. C.* An insufficient subscription of the policy by the defendant, within 35 Geo. 3, c. 63, s. 11, which avoids the policy, is evidence on this issue; *Hallett v. Dowdall*, 18 Q. B. 2.

Before the Common Law Procedure Act, 1852, the plaintiff alleged specific performance of all express warranties and conditions precedent. Since that Act the plaintiff need only allege general performance; and many matters of defence, which formerly came before a jury on a traverse of matter in the declaration, must now be specially pleaded and relied upon by the defendant, and the performance of all other conditions will be taken to be admitted. Where an abandonment is stated in the declaration, as is sometimes done, the defendant who disputes it must traverse it. But it seems to be sufficient to allege a total loss, without stating an abandonment, and the question of abandonment, if one be necessary to enable the plaintiff to treat the loss as total, then arises on a traverse of the loss *modo et formâ*.

[*Concealment; misrepresentation; fraud.*] If the assured conceals any material fact which relates to the ship, the policy is void; *Carter v. Boehm*, 3 Burr. 1905; *Russell v. Thornton*, 29 L. J. (Ex.) 9; 4 H. & N. 788; *S. C. in Ex. Ch.*, 30 L. J. (Ex.) 69; 6 H. & N. 140. And the assured is bound to communicate all the information he has received, though he does not know it to be true, and though it afterwards turns out to be false; *Lynch v. Hamilton*, 3 Taunt. 37. On a replication *de injuriâ* to a plea of concealment of a material fact, it lies on the defendant to prove not only the fact and the plaintiff's knowledge, but also the non-communication of it to the defendant; but slight evidence is enough, and the mere subscribing of the policy may be evidence of it, where the suppressed fact is one which would have prevented a reasonable man from subscribing; as that the ship had been so long abroad on her voyage as to be a missing ship; *Elkin v. Janson*, 13 M. & W. 663. It is sufficient to communicate facts, without the opinion or conclusion founded upon those facts; *Bell v. Bell*, 2 Camp. 479. Mere rumours or news in the public papers, need not be mentioned; 3 Kent Com. 285; but see *Durrell v. Bederley*, *Holt*, N. P. 283. Underwriters have been sometimes called to state as a matter of opinion whether the communication would have varied the terms of insurance; *Berthon v. Loughman*, 2 Stark. 258. But the admission of this kind of evidence is now discountenanced; *Carter v. Boehm*, 1 W. Bl. 594; and it is treated as a question for the jury whether any particular fact not mentioned is, or is not, material; *Lindenau v. Desborough*, 8 B. & C. 586; *Westbury v. Aberdeen*, 2 M. & W. 267.

As there must be no concealment of a material fact, so there must be no misrepresentation of any such fact. Such misrepresentation will avoid the policy, though the actual loss is unconnected with the fact misrepresented or concealed, and though there be no fraud

intended by the insurer; *Seamon v. Fonereau*, 2 Str. 1183. In *Flinn v. Tobin*, Mood. & M. 367, Lord Tenterden, C. J., told the jury that a verbal mis-statement of the quantity of the cargo which a ship was about to carry would not vitiate a policy on the ship unless it was fraudulent. The question as stated by *Kent* (3 Com. 283) is, "Whether there was under all the circumstances a fair representation, or a concealment; if the misrepresentation or concealment was designed, whether it was fraudulent; and if not designed, whether it varied materially the object of the policy, and changed the risk understood to be run. If fraudulent, it avoids the policy without inquiring as to its materiality; if by mistake or oversight, it does not affect the policy, unless material and not true in substance." In *Anderson v. Thornton*, 8 Ex. 425, it was held that a plea alleging a material mis-statement as to the time of sailing, fraudulently made, may be supported by proof of material mis-statement, but without fraud. If the representation is not a positive assertion, but only an expression of the speaker's opinion, expectation, or belief, this will not avoid the policy, if the assertion is made *bonâ fide* and in ignorance of the untruth; *Barber v. Fletcher*, 1 Doug. 305; *Bowden v. Vaughan*, 10 East, 415. It is sufficient, however, if a representation be substantially correct, and it need not, like a warranty, be strictly and literally complied with; *Pawson v. Watson*, Conquer, 785. See as to life policies, and the distinction between marine and life policies, *Wheelton v. Hardisty*, 8 E. & B. 232, cited, *post*, p. 243.

In an action against a second or subsequent underwriter, it has been the practice to admit evidence of representations to the first underwriter, on a presumption that the subsequent underwriter gave credit to them; *Pawson v. Watson*, *supra*; *Barber v. Fletcher*, 1 Doug. 305; *Marsden v. Reid*, 3 East, 572. The rule is confined to representations made to the first underwriter, that is, the first on the policy; *S. C.*; *Bell v. Carstairs*, 2 Camp. 543. The principle of the rule was questioned by Lord Ellenborough, C. J., in the last case and in *Forrester v. Pigou*, 1 M. & S. 13.

If goods insured are over-valued with intent to defraud the underwriters, the contract is void, and the assured cannot recover even for the value actually on board; *Haigh v. De la Cour*, 3 Camp. 319.

Illegality.] A contravention of law, by the assured, having direct relation to the subject of the risk, will vitiate the policy. Thus, where a ship was loaded in contravention of the 16 & 17 Vict. c. 107, forbidding a ship to sail from certain ports at certain times in the year with any of the cargo on deck, and the plaintiff insured the cargo with express knowledge of the mode of loading, it was held that the plaintiff could not recover for any part of the cargo; *Cunard v. Hyde*, 20 L. J. (Q. B.) 7; 2 E. & E. 1; *aliter*, if the assured had no knowledge of the mode of loading; *S. C.*; *E. B. & E.* 670; 27 L. J. Q. B. 408.

Payment.] It is a good defence, under a special plea, to show a custom that credit taken between the insurance broker and underwriter should be taken as payment to the assured by the underwriter, after the amount has been adjusted between him and such broker; *Stewart v. Aberdeen*, 4 M. & W. 211. But the assured is not bound by such a custom if he had no knowledge of it; *Sweeting v. Pearce*,

30 *L. J. (C. P.)* 109 ; 9 *C. B., N. S.*, 534 (*Ex. Ch.*). An adjustment indorsed on the policy produced by the assured, with the defendant's name struck out of it, is not evidence for the defendant that the amount so adjusted has been paid ; *Adams v. Sanders*, *Mood. & M.* 373.

Return of Premium.

A count for a return of premium is often added to a declaration on a policy, for which purpose the indebitatus count is sufficient ; and the question of the right to recover arises on the failure of the plaintiff to establish his case on the policy.

When plaintiff entitled to a return.] If the policy is void *ab initio*, or where there is no insurable interest, and this proceeds through misinformation or other innocent cause ; or where an interest is less than that insured ; the premium, or part of it, may be recovered ; 3 *Kent Com.* 341. Where there are two insurances at different times together exceeding the interest insured, the excess of premium is to be recovered from the last insurers, and not the first ; *Fisk v. Masterman*, 8 *M. & W.* 165. When several insurances are effected at the same time, and before the risk commenced, they are to be taken as one policy, and the return must be *pro ratâ* ; *semb. S. C.*

If the risk has never commenced there must be a return ; as if the ship never sailed, or the policy is avoided by failure of warranty, without fraud ; 3 *Kent Com.* 341. But if the risk has once commenced, or the policy be void for illegality, or for any fraud of the assured, there is no return ; *Ib.* Where the policy is avoided by material misrepresentation or concealment without fraud, the premium may be recovered, and the policy is conclusive evidence of payment of the premium ; *Anderson v. Thornton*, 8 *Ex.* 425. Where the voyage and the risk are divisible, and part is not run, there may be a return of a proportionate part of the premium. As where the voyage was from London to Halifax, Nova Scotia, to depart with convoy from Portsmouth, and when the ship arrived at that place the convoy had sailed ; *Stevenson v. Snow*, 3 *Burr.* 1237 ; 1 *W. Bl.* 318.

The defendant having paid the amount of premium into court, the plaintiff afterwards obtained a verdict on the policy for a sum less than the sum assured ; and the court directed that judgment should be entered only for the amount of the verdict less the sum taken out of court ; *Carr v. Montefiore*, *Q. B. Mich. T.* 1861, 13 *W. R.* 204.

ACTION ON POLICY ON LIVES.

Many of the cases and authorities on marine policies apply equally to policies on lives and against fire ; but the contract of life assurance is, in consideration of an annual payment, to pay a sum certain upon the death of a given life, and is not a contract of indemnity like that of marine and fire policies. The pleadings sufficiently point out the nature of the required evidence.

Interest.] A policy on lives or other event is unlawful and void, unless the person on whose account the insurance is made has an

interest, and the name of the person interested, or for whose use or benefit, or on whose account, it is made, be inserted therein; 14 Geo. 3, c. 48, ss. 1, 2. If A., having no interest in B.'s life, causes him to effect an insurance in his own name, but at A.'s expense and for A.'s benefit, this is a fraudulent evasion, and the policy is void under sect. 1; *Wainewright v. Bland*, 1 Mood. & Rob. 481; *Shilling v. Accidental Death Insurance Company*, 26 L. J. (Ex.) 266; 2 H. & N. 42; see also S. C., 27 L. J. (Ex.) 16. Every one is presumed to have an insurable interest in his own life, and if he insures, whether for life or a limited time, his executor is not bound to show any interest beyond this; *Wainewright v. Bland*, *suprà*. So, it is said, where a wife insures her husband's life; *Reed v. Royal Exch. Assur. Co.*, *Peake Add. Ca.*, 70. A creditor has an insurable interest in his debtor's life; *Anderson v. Edie*, *Park Ins.* 914-15, 8th ed. And in general the interest which the insurer is required to have in the life of the assured, under 14 Geo. 3, c. 48, s. 1, must be a pecuniary interest; and therefore the insurance by a father in his own name on the life of his son, without any pecuniary interest in it, is void; *Halford v. Kymer*, 10 B. & C. 724; as to what is sufficient pecuniary interest, see *Hebden v. West*, *infra*. If a father, being engaged in a hazardous employment, agrees with his son, that the father will insure his life and the son pay the premiums, and that the father shall leave the sum insured to his son by will, *semble per* Martin and Bramwell, BB., that the insurance would be the father's and valid; *Shilling v. Accidental Death Insurance Co.*, 26 L. J. (Ex.) 266; 2 H. & N. 42.

By sect. 3, a person who insures the life of another, or any other event, can recover from the insurer or insurers no greater sum than the amount or value of his interest in such life or event. The interest referred to is the interest at the time of making the policy, and this amount is recoverable whether the interest ceased or not before the death, or has been satisfied *aliunde*; *Dalby v. India and London Assur. Co.*, 15 C. B. 365; 24 L. J. (C. P.) 2; in the Ex. Ch., overruling *Godsall v. Baldero*, 9 East, 72. *Law v. The London Indisputable Policy Co.*, 1 K. & J. 223, 24 L. J. (Ch.) 196, is to the same effect. But by this section the assured can in no case recover more than this insurable interest, whether upon one policy or many; and if he has already received that amount on other policies, this is an answer to an action; *Hebden v. West*, 32 L. J. (Q. B.) 85; 3 B. & S. 579.

The assignee of a life policy is not within the act, and need not show any interest other than the original one on which the policy is founded, *Ashley v. Ashley*, 3 Sim. 149.

Misrepresentation.] The assured usually subscribes a declaration answering facts inquired of by the insurers, and it is made a condition that if any be untruly answered the policy is to be void; in such case the policy is avoided though there be no intentional untruth; *Duckett v. Williams*, 2 C. & M. 348; and though the misstatement is found by the jury to be immaterial: for as the basis of the contract is the truth of the representation, its materiality is not in question and ought not to be left to the jury; *Anderson v. Fitzgerald*, 4, H. L. C. 484; *Cazenove v. British Equitable Co.*, 6 C. B., N. S., 437; 28 L. J. (C. P.) 259. If there is such express condition on the policy, yet material and fraudulent concealment or misrepresentation, though the inquiry and statement be oral, will also avoid it; *Wainewright v. Bland*, 1 M. & W. 32; 1 Mood. & Rob. 481. But mere

representations or statements, which turn out untrue, will not avoid a life policy (as in some cases they do a marine policy), unless the policy purports to be based upon their truth, or there be fraud; *Wheelton v. Hardisty*, 8 E. & B. 232; 26 L. J. (Q. B.) 265; S. C. in Ex. Ch., 8 E. & B. 285; 27 L. J. (Q. B.) 241. If there be an untrue statement without fraud, and the policies of a company are expressed to be "indisputable except in case of fraud," the company will be estopped from relying on the misstatement; and this may be specially replied by way of equitable replication to the plea; *Wood v. Dwarrie*, 25 L. J. (Ex.) 129; 11 Ex. 493. And where the policy is issued by a company which circulates a prospectus purporting that their policies are indisputable, an equitable replication relying on this fact must be supported by proof that the prospectus had been seen or acted upon by the insured; and the mere proof of the public circulation of the prospectus before the policy was effected is not sufficient; *Wheelton v. Hardisty*, *suprà*, by Wightman, Crompton, and Erle, JJ., Id. Campbell, C.J., dissenting. The omission to state that the deceased had any occupation, in answer to questions in the proposal any misstatement or concealment in which was to vitiate the policy, is not such an untrue statement as to vitiate the policy; *Perrins v. The Marine and General Insurance Society*, 29 L. J. (Q. B.) 17; S. C., in Ex. Ch., *id.* 242; 2 E. & E. 317, 321. The person, whose life is the subject of insurance by another, has been held to be so far an agent for the assured that his false answers will vitiate the policy; *Raclins v. Desborough*, 2 Mood. & Rob. 328, and note, *id.* 334. But this case turned on the form of the particular policy; and in *Wheelton v. Hardisty*, *suprà*, it was held by the Exchequer Chamber, that the false and fraudulent statements of the person whose life is insured and of the medical referee will not vitiate the policy, as against an innocent person who effected the insurance, there being no condition that the untruth of the statement contained in the proposal should avoid the policy.

Suicide.] Clauses, avoiding a policy if the person, whose life is insured, "commits suicide," or "dies by his own hands," are construed to include all voluntary self-destruction, though not felonious; and consequently the unsoundness of the person's mind is not material; *Clift v. Schwabe*, 3 C. B. 437; *Dormay v. Borradaile*, 5 C. B. 380.

Where the policy was conditioned to be valid, notwithstanding suicide, to the extent of any *bonâ fide* interest acquired by any person by virtue of an equitable lien or security on it, on proof of such interest to the satisfaction of the directors of the company: held, that proof of the policy being held by the trustees of the wife of the insured by way of marriage settlement, supported the alleged lien where the deceased died by suicide; and that proof of the above facts was reasonable evidence for the directors which ought to have satisfied them, and which they could not reject; *Moore v. Woolsey*, 4 E. & B. 243; 24 L. J. (Q. B.) 40. But where a policy on the life of A. was conditioned to be valid, notwithstanding suicide, if any third party had acquired a *bonâ fide* interest therein by assignment or by legal or equitable lien for a valuable consideration, or as a security for money, and before the suicide A. became bankrupt abroad, and his estate was vested in assignees according to the laws of the country; such assignees are not third parties within the meaning of the condition; *Jackson v. Forster*, 28 L. J. (Q. B.) 166; 1 E. & E. 463; S. C. in Exch. Ch., 29 L. J. (Q. B.) 8; 1 E. & E. 470.

Insurance against accidents.] A policy of insurance was effected by A. against injury caused by accident or violence, provided the same should be caused by some outward and visible means, of which satisfactory proof should be furnished to the insurers. A. went to bathe in the sea, and was not seen again alive, his clothes being found on the beach, and a naked body, believed to be his by some of his friends, having been subsequently washed on shore at some distance from where the clothes were found: held by the Exchequer Chamber, reversing the decision of the Exchequer, that there was satisfactory evidence that A. was accidentally drowned, and that such a death was an injury insured against; *Trew v. The Railway Passengers' Assurance Co.*, 30 L. J. (Ex.) 317; 6 H. & N. 839. In such cases, where satisfactory proof of death or accident, &c., is made a condition precedent to recovering, is meant such as the insurers may reasonably require, and not such as they may capriciously demand; *Braunstein v. Accidental Death Insurance Co.*, 1 B. & S. 782; 31 L. J. (Q. B.) 17.

Death by sunstroke is not a death from the effects of an injury by accident; *Sinclair v. The Maritime Passengers' Assurance Co.* 30, L. J. (Q. B.) 77.

ACTION ON FIRE POLICY.

Interest.] It is necessary to show an interest in the subject insured at the time of insuring and of the fire; *Lynch v. Dalzell*, 4 Bro. P. C. 431 (2nd edit.); *Saddlers' Co. v. Badcock*, 2 Atk. 551. This interest need not be the absolute property; thus, an insolvent may insure a house, &c., to which his assignees are entitled, he being in possession and responsible to the real owners; *Marks v. Hamilton*, 7 Ex. 323; 21 L. J. (Ex.) 109. Warehousemen and wharfingers may insure their customers' goods in their custody, and may recover the whole value under a policy on goods "held in trust or on commission;" *Waters v. Monarch Assur. Co.*, 5 E. & B. 870; 25 L. J. (Q. B.) 102. And a carrier, who so insures, may recover the whole value of goods lost by fire, although the owner of the goods may be disabled from recovering from the carrier by reason of the value not being declared under the Carriers' Act; *London and North Western Railway Co. v. Glynn*, 28 L. J. (Q. B.) 188; 1 E. & E. 652. Such policy is not generally assignable at law except with the consent of the insurer; 3 Kent Com. 375; *Park Ins.* 978, 8th edit. Where the policy requires particulars of loss to be delivered by the plaintiff within a certain time of the fire, it is a condition precedent; *Mason v. Harvey*, 8 Ex. 819; 22 L. J. (Ex.) 336.

Description of the articles insured; alteration in premises, &c.] The property intended to be insured must be described; but substantial accuracy is sufficient. Thus, where the policy required the house or other building, in which the goods are, to be mentioned, the goods of a lodger may be called "goods in his dwelling-house;" *Friedlander v. London Assur. Co.*, 1 Mood. & Rob. 171. Where the premises are described as being where "no fires are kept, or hazardous goods deposited," this means where no fires are *habitually* kept; and the casual use of fire to repair the premises does not come within the condition;

Dobson v. Sotheby, Mood. & M. 90. So where the condition was against any alteration in the trade without notice, a single instance of drying bark in a kiln used and insured as a corn kiln will not avoid the policy; *Shaw v. Robberds*, 6 *Ad. & E.* 75. Where no steam-engine, stove, or other description of fire heat, was to be introduced, without notice to the insurers, the introduction of a stove and use of it on one occasion as an experiment, without notice, prevents the insured recovering; *Glen v. Lewis*, 8 *Ex.* 607; 22 *L. J. (Ex.)* 228. But where there is no condition relating to alterations in the premises after the policy, a subsequent change, as by setting up a more hazardous trade in them, if without fraud, will not avoid the policy; *Pim v. Reid*, 6 *M. & G.* 1. Policies usually provide for notice of any such change; and where the alteration is one which makes the subject-matter insured no longer substantially correspond with the property as particularly described in the policy, and varies the risk, it will avoid the assurance; for the description in such cases is equivalent to a warranty; *Sillem v. Thornton*, 3 *E. & B.* 868; 23 *L. J. (Q. B.)* 362. In this last case the house was enlarged so as no longer to agree with a description of it, annexed to the policy, and referred to in it so as to form a part of it. But without deciding how far and under what circumstances a description is equivalent to a warranty or condition, the Court of Exchequer Chamber held, that such a constructive warranty or condition was restrained by an express condition, requiring notice of any alteration increasing the risk and payment of a higher premium; *Stokes v. Cox*, 1 *H. & N.* 533; 26 *L. J. (Ex.)* 113.

Loss.] The policy covers a loss by fire owing to the negligence of the assured himself, if there be no fraud; *Shaw v. Robberds*, 6 *Ad. & E.* 75. In fire insurances a valued policy is considered an open one if the loss be not total, and damage and expenses caused by removing articles insured are also covered by the policy; 3 *Kent Com.* 375, and note.

ACTION ON CONTRACT OF AFFREIGHTMENT.

This action lies by or against a shipowner, whether the ship be general or chartered. The contract need not be under seal. In the case of a general ship, the bill of lading, or, in the case of a chartered ship, the charterparty is the proof of the contract. As the pleadings and proofs are substantially the same, whether the contract be or be not under seal, the following cases are to be taken as applicable to actions on contracts between shipper and shipowner, whatever the technical form of action may be, unless otherwise specified.

As to the admissibility of oral evidence to explain charterparties, bills of lading, or other like contracts, see *ante*, pp. 16 *et seqq.*

A charterparty, or memorandum in the nature of one, commonly contains clauses on the part of the shipowner for seaworthiness, the reception and delivery of the cargo, and performance of the voyage, with an exception of certain perils. On the part of the charterer or freighter, the clauses are to load in a given time, and to pay freight and demurrage.

A bill of lading contains a receipt for and description of the goods received on board, the names of the shipper and consignee, the place of delivery (certain perils excepted), and the freight; and it is signed (in three parts) by the master, as agent of the shipowners. The words "or assigns" are usually added to the name of the consignee, and it is questionable whether it be transferable by indorsement, unless those words be subjoined, except perhaps in the case of special custom in certain foreign trades; see *Renteria v. Ruding*, *Mood. & M.* 511. But see 18 & 19 Vict. c. 111, *infra*.

The captain or master of a ship is an agent of the owners with larger powers than an ordinary agent. As between him and third persons he is personally liable on contracts made in the course of his ordinary employment in his own name, or as agent of the owner, and he is able to sue on contracts so made. So where like contracts are made by him, whether he signs expressly as agent or not, the owners may sue or be sued on them. Hence he may sign a charterparty or bill of lading in his own name, and thereby bind his owners; 3 *Kent Com.* 161-4; Story on Agency, cap. 6, ss. 116-123. And he may sue in his own name for freight; *Shields v. Davis*, 6 *Taunt.* 65.

Although the indorsement of a bill of lading transferred the property in the goods, it conveyed no right of action to or against the indorsee in his own name as upon the original contract; *Thompson v. Dominy*, 14 *M. & W.* 403; *Howard v. Shepherd*, 9 *C. B.* 297; 19 *L. J. (C. P.)* 249. And the receipt of the goods by the indorsee was only evidence for a jury of a new contract to pay freight in consideration of the delivery, on which he might be sued; *Kemp v. Clark*, 12 *Q. B.* 647. But, by the 18 & 19 Vict. c. 111 (14th August, 1855), a bill of lading has become strictly negotiable; for it enacts (sect. 1), that every consignee of goods in a bill of lading, or indorsee of such bill, to whom the property in the goods therein mentioned shall pass by reason of such consignment or indorsement, shall have vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill had been made with himself. But (sect. 2) nothing therein shall prejudice or affect any right of stoppage *in transitu*, or claim of freight against the original shipper or owner, or any liability of consignee or indorsee by reason of his being such, or by reason of his receipt of the goods under such consignment or indorsement. Since this act, actions lie on the original contract by or against the indorsee of the bill of lading, and the shipowner or master may sue him for freight although he received the goods under circumstances which negative any intention or undertaking to pay. But an indorsee of a bill of lading, who has indorsed it over before the arrival of the vessel and delivery of the cargo, does not, under this statute, remain liable for the freight; *Smurthwaite v. Wilkins*, 11 *C. B., N. S.*, 842; 31 *L. J. (C. P.)* 214.

Shipowner against Charterer or Merchant.

Although there is a charter-party by deed, yet if there is a subsequent agreement by parol for the use of the ship at a period before the charterparty attaches, but embodying its terms, this may be proved, and the demand recovered as on a simple contract; *White v. Parkin*, 12 *East*, 578. So, for other matters of agreement, express or implied, *extra* the contract; *Fletcher v. Gillespie*, 3 *Bing.* 635.

In an action for not loading, the plaintiff must prove:—

Compliance with warranties or conditions.] On the mere contract by the shipowner to carry goods, shipped on board his vessel, there is no implied condition that his vessel shall be seaworthy; *Schloss v. Heriot*, 14 C. B., N. S., 59; 32 L. J. (C. P.) 211; *post*, p. 248. By undertaking that the vessel shall be seaworthy at the time of receiving the cargo, there is no warranty against "suspicion" of unfitness; therefore, where the master took antimony on board as ballast so as to fill no more room than ballast, and the jury found it not injurious to a cargo of tea, it was held that the charterers, who were bound to load a "full cargo" of tea, were liable for refusing to put it on board, although this ballast might raise "suspensions" as to the ship's fitness for such a cargo; *Towse v. Henderson*, 4 Ex. 890; 19 L. J. (Ex.) 163.

Where the ship was described as "to be ready to receive cargo all May," and was guaranteed to sail in June: held that, although the ship was ready to sail in June, the charterer was not bound to load if the ship was not ready to receive in May; *Oliver v. Fielden*, 4 Ex. 135; 18 L. J. (Ex.) 353.

The description of a ship in the charterparty may be a warranty or condition precedent. Thus, if it is described as of the class called A. 1, and it is not so, it would be an answer to an action for not loading; but such a warranty only applies to the classification at the time of the contract; *Hurst v. Osborne*, 18 C. B. 144; 25 L. J. (C. P.) 209; *Routh v. Macmillan*, 33 L. J. (Ex.) 38; 2 H. & C. 750. So "now at sea, having sailed three weeks ago," is a condition; *Oliver v. Booker*, 1 Ex. 416; 17 L. J. (Ex.) 21; though had "or thereabouts" been added, as is wrongly stated in the marginal note in 1 Ex., the decision would probably have been otherwise; *per curiam* in *Behn v. Burness*, *infra*. So a description of the ship as "now in a particular port," amounts to a warranty; *Behn v. Burness* (in Ex. Ch.) 32 L. J. (Q. B.) 201; 3 B. & S. 751; and in arriving at the true construction of the document, the Court must look at the surrounding circumstances (as found by the jury) at the time the contract is made; *S. C.* So a stipulation to sail or to be ready for loading on a particular day is a condition precedent; *Glaholm v. Hays*, 2 M. & G. 257; *Crocker v. Fletcher*, 1 H. & N. 893; 26 L. J. (Ex.) 153; *Seeger v. Duthie*, 8 C. B., N. S., 45, 72; 29 L. J. (C. P.) 253; 30 L. J. (C. P.) 65.

When the being ready to sail on a particular day is a condition precedent to the shipowner's right to recover, such readiness is not disproved by the fact that the captain, *bona fide*, though wrongly, thinking the ship already sufficiently loaded, refused to receive additional goods on board, and the dispute, decided ultimately against the captain, caused delay in sailing until after the day; *Seeger v. Duthie*, *supra*.

A statement of tonnage is not a warranty, or condition precedent; *Barker v. Windle*, 6 E. & B. 675; 25 L. J. (Q. B.) 349 (in Ex. Ch.). So stipulations in a charter that the vessel, being "right, staunch, &c., shall sail to the port of lading within a reasonable time," are not conditions precedent to the loading by the charterer, though noncompliance would be an answer to an action, if the object of the voyage be frustrated thereby; *Tarabochia v. Hickie*, 1 H. & N. 183; 26 L. J. (Ex.) 26. So to an action by shipowner, against shipper, for contributions to general average, it is no answer that the ship was not seaworthy, as there is no implied condition of seaworthiness from the mere contract of affreightment; but if it be shown that the unseaworthiness caused the loss, that is a good defence, in

order to avoid circuity of action; *Schloss v. Heriot*, 14 C. B., N. S., 59; 32 L. J. (C. P.) 211.

The question as to what representation amounts to a condition precedent, or to a warranty, depends entirely on the intention of parties as apparent on the contract itself; but there is no general rule that representations in a charterparty are equivalent to warranties or to conditions precedent; *Crookewit v. Fletcher*, *supra*.

When the charterparty is silent as to the time of loading, a reasonable time under ordinary circumstances is implied, and a strike in the collieries whence the freighter was to get his cargo is no excuse for delay; *Adams v. Royal Mail Co.*, 5 C. B., N. S., 492; 28 L. J. (C. P.) 33. The question as to whether the defendant has loaded within a reasonable time where the contract is "to be ready to load in regular turns of loading" is to be governed by the usage of the port as to the turns or order of loading; *Leideman v. Schultz*, 14 C. B. 38; 23 L. J. (C. P.) 17; see *ante*, pp. 19-20. The defendant, an English subject, chartered the plaintiff's ship to take on board a cargo at Odessa, a port of Russia, forty days being allowed for loading. When there the defendant's agent told the master that there was no cargo for him, and urged him to sail; the master refused; and continued to demand a cargo until, the remaining days not having expired, war was declared between England and Russia: Held, that no action would lie against the defendant, as the refusal by his agent not having been accepted by the master as a renunciation of the contract, there had been no breach of contract by the defendant when the war put an end to it; *Avery v. Bowden*, 5 E. & B. 714; 25 L. J. (Q. B.) 49; S. C. in *Ex. Ch.*, 6 E. & B. 962; 26 L. J. (Q. B.) 3; *Reid v. Hoskins*, 5 E. & B. 729; 25 L. J. (Q. B.) 55; S. C. in *Ex. Ch.*, 6 E. & B. 953; 26 L. J. (Q. B.) 5.

Freight and damages.] When the goods have been delivered according to contract, and nothing remains to be done, freight may be recovered on a common indebitatus count. Freight is regulated by the contract, or, if none, by usage, or a quantum meruit, or by the course of former dealing between the parties. As a general rule, no freight is due until the goods be carried to the destined port. But it is sometimes made wholly or partly payable at the port of loading. If part of the freight is made payable on the "final sailing" of the ship from the port of loading, it is not payable if the ship is wrecked in an artificial canal within the limits of the port on its way out to sea, with the clearances on board and all ready for sailing; *Roelandts v. Harrison*, 9 Ex. 444; 23 L. J. (Ex.) 169; and where the ship had got out of port and cast anchor some miles off, but was not in a condition to proceed on the voyage, the shipowner was held not entitled to freight payable "on sailing"; *Thompson v. Gillespie*, 5 E. & B. 209; 24 L. J. (Q. B.) 340. Where the freighter has contracted to pay a minimum freight, or the highest that the shipowner could "prove to have been paid" for ships on the same voyage, the plaintiff, who claims a higher freight, must prove by evidence that such higher freight was actually paid, or contracted to be paid, on a voyage between the two places: and proof of the highest current freight is not enough; *Gether v. Capper*, 15 C. B. 696; 24 L. J. (C. P.) 69.

Where the merchant agreed to find a full return cargo of various articles, each to pay a stipulated freight from the port, but he finds none, or articles not enumerated, the measure of damage is

the average freight of all the articles; *Thomas v. Clarke*, 2 Stark. 450; *Copper v. Forster*, 3 N. C. 938. When the owner stipulates for a full cargo, he is entitled to full freight, as if a full cargo had been put on board, irrespective of the tonnage of the ship mentioned in the charter; *Hunter v. Fry*, 2 B. & A. 421. Where the contract stipulated for a full cargo of wool, tallow, bark, hides, and other legal merchandize, fixing the freight and quantity of each except of wool and "other merchandize," it was held, that the merchant might load entirely with "other" legal merchandize, but must pay freight as if the cargo had consisted of the stipulated quantity of tallow, bark, and hides, and the residue of wool; *Cockburn v. Alexander*, 6 C. B. 791. In this case, the court considered the words "other merchandize" as applying to goods producing the amount of freight contemplated by the contract, and that the difference was the measure of damage. *Warren v. Peabody*, 8 C. B. 800, was decided on the same principle. The charterer has no right to fill the cabins as well as the carrying part of the ship, and if permitted by the master to do so, he is liable to pay the current freight for it, and cannot insist on paying only the charter price; *Mitcheson v. Nicol*, 7 Ex. 929.

The measure of damages for not loading any cargo is the amount of freight which would have been carried, deducting expenses and any profit earned during the time covered by the charter; but *semb.* the shipowner is not bound to take on board another cargo in order to reduce the damage; *Smith v. McGuire*, 3 M. & N. 554; 27 L. J. (Ex.) 465.

[*Freight pro rata.*] In cases where freight is recoverable for part of the goods, or part of the voyage, the general count is sufficient, and the circumstances which entitle the plaintiff to recover it are put in issue by the plea of "never indebted." If the shipper accepts part of the goods though carried under an entire contract for freight, *Mitchell v. Darthez*, 2 N. C. 555, or accepts the goods before the completion of the voyage, *Vlierboom v. Chapman*, 13 M. & W. 238, a new contract to pay *pro rata* may be inferred. But as a general rule, unless the article be carried to the destined port, no freight is due; as where the master, doing the best for the freighter, sold the goods at an intermediate port; *S. C.* If the master is disabled from carrying the goods further, he may tranship them, and, upon safe delivery at their destination, he is entitled to the whole freight as on the old contract, without reference to the contract with the new ship; *Shipton v. Thornton*, 9 Ad. & E. 314. The master while afloat, or in a foreign port where there is no agent of the shipper, becomes *ex necessitate* his agent as to the goods as well as of the shipowner as to the ship and freight; and he must do what in the exercise of a sound discretion is best for both parties; and in such a case, and not otherwise, the shipper is bound by his acts, so as to be liable for freight on a contract made by the master; *Matthews v. Gibbs*, 30 L. J. (Q. B.) 55.

[*Lien for freight.*] In addition to his remedy by action, the shipowner has a lien on the goods for freight; and where the charterer puts goods of his own on board under a bill of lading, there is a lien on the goods for the chartered freight, and this lien holds good against any one taking the bill of lading with knowledge of the terms of the charterparty; *Kern v. Deslandes*, 30 L. J. (C. P.) 297; 10 C. B., N. S., 205. The terms of the bill of lading may, however, be such as

to waive the lien, as where the freight is to be paid at the port of lading, or by the shipper at a given time after sailing, ship lost or not lost; *Kirchner v. Venus*, 12 *Moo. P. C.* 361; in which case the *P. C.* adhered to their former decision in *Hoo v. Kirchner*, 11 *Moo. P. C.* 21, and in effect overruled *Gilkißon v. Middleton*, 2 *C. B.*, *N. S.*, 134; 26 *L. J. (C. P.)* 209, and *Neish v. Graham*, 8 *E. & B.* 505; 27 *L. J. (Q. B.)* 15.

Implied contracts on part of charterer or shipper.] Where by a charterparty a ship is to proceed to "a safe port," to be named by charterers, they are not entitled to name a port, safe by nature, but closed by the local government, so that a vessel entering it without a permit would be liable to confiscation; and having named such a port they are liable for a breach of the contract implied on their part to name a safe port within a reasonable time; *Ogden v. Graham*, 1 *B. & S.* 773; 31 *L. J. (Q. B.)* 26.

There is an implied contract on the part of shippers not to put on board without notice packages of a dangerous or corrosive matter, the nature of which the shipowner or his agents could not be reasonably expected to know; *Brass v. Maitland*, 6 *E. & B.* 470; 26 *L. J. (Q. B.)* 19.

Defence.] A charterer whose cargo has been damaged by the fault of the master, so as to be worth less than the freight, cannot discharge himself from liability to freight by abandoning the cargo to the shipowner; *Dakin v. Orley*, 33 *L. J. (C. P.)* 115; 15 *C. B.*, *N. S.*, 646. Nor can the assignee of a bill of lading deduct from the freight the value of goods which, though mentioned in the bill of lading signed by the plaintiff, were not put on board; *Meyer v. Dresser*, 16 *C. B.*, *N. S.*, 646; 33 *L. J. (C. P.)* 289; see *post*, pp. 251-2.

Merchant against Shipowner or Master.

The master as well as the owner of a general ship is liable as a common carrier of goods; *Morse v. Shue*, 2 *L. r.* 69; 1 *Vent.* 238; *Story on Agency*, s. 315. His liability is limited by the same common law exceptions as in the case of land carriers, and by such further exceptions as may be expressed in the charter or bill of lading, or sanctioned by Act of parliament. See further, *Action against Carriers*, *post*.

Where a stevedore, or special agent, is appointed by the charterer to load and stow a ship which he puts up as a general ship, the master is exempt from liability for bad stowage, unless done under his particular orders; *Blakie v. Stenbridge*, 28 *L. J. (C. P.)* 329; 6 *C. B.*, *N. S.*, 894.

The various Acts for limiting the liability of shipowners are repealed and replaced by the Merchant Shipping Act, 1854 (17 & 18 *Viet. c.* 104). In Part 9 of this Act, s. 503, it is provided, that no owner of a sea-going ship, or share therein, shall be liable to make good any loss or damage that may happen, without his actual fault or privity, of or to goods or things taken on board, by reason of fire happening on board, or of or to any gold, silver, precious stones, or watches on board, by reason of robbery or embezzlement, unless the shipper shall have declared in writing to the master or shipowner at the time of shipping the true nature and value thereof. The 25 & 26 *Viet. c.* 63 (after repealing by s. 2 and sch. A the 504 and 505 sections of the Act of

1854) enacts (s. 54) that the owners of any ship shall not, in cases which occur without their fault or privity, be answerable in damages in respect of loss or damage to any goods, merchandize, or other things on board, to an amount exceeding £8 for each ton of the ship's tonnage,—registered tonnage in case of sailing ships, and in case of steam ships gross tonnage. The enactment applies to foreign as well as British ships, and there are provisions for the mode of ascertaining a foreign ship's tonnage. By sect. 516 of the Act of 1854, nothing shall be construed to lessen the liability of any master, or seaman, being also owner, or part-owner of the ship, to which he is subject as such master or seaman; and by sect. 506, the owner is liable for every loss or damage arising on distinct occasions as if no other loss had arisen. By sect. 502, the above provisions apply to the whole of the Queen's dominions. By sect. 388, neither owner nor master is liable for loss or damage occasioned by the fault or incapacity of a qualified pilot, where the employment of one is compulsory.

The master is not expressly protected in the above provisions, except in relation to loss by employment of a pilot; and this exception seems to be designed. The previous Acts included him in some cases and omitted him in others. On one of the previous Acts (26 Geo. 3, c. 86) it was decided that a loss by a fire on board a public lighter, employed by the shipowner to convey the goods on board, was not within the protection of the Act, which was in similar terms to the present Act; *Morewood v. Pollak*, 1 E. & B. 743.

Implied contracts on part of shipowner or master.] The master impliedly contracts that his vessel shall be fit for the purpose of carrying the goods; *Lyon v. Mells*, 5 East, 428. Where there is no stipulation as to time, the master must sail in a reasonable time, and proceed without deviation to the destined port, otherwise he will be liable for any loss to the plaintiff occasioned by the delay; or to any loss, whether by perils of the sea or otherwise, of which the deviation may be the proximate cause; *Davis v. Garrett*, 6 Bing. 716; 3 Kent Com. 209, 210. A well-founded fear of capture may justify a master in not leaving a port in performance of his contract; *Pole v. Ceteorich*, 30 L. J. (C. P.) 102; 9 C. B., N. S., 430.

Upon arrival at the port, the master is bound to deliver to the consignee or order of the shipper, on production of the bill of lading and payment of freight (and other lawful charges) for which the master has a lien on the goods, unless it appears on the bill of lading that freight has been paid, in which case it is an estoppel as against the master or owner; 3 Kent Com. 214; *Howard v. Tucker*, 1 B. & Ad. 712. A bill of lading, signed only by the master, is no estoppel as between shipowner and the person who has advanced money on the security of the bill of lading as to the receipt and shipment of the goods specified in it; *Grant v. Norway*, 10 C. B. 665; 20 L. J. (C. P.) 93; and the shipowner may show that the goods were not shipped; S. C.; or that the master had given other bills previously for the same goods; *Hubbersty v. Ward*, 8 Ex. 330; 22 L. J. (Ex.) 113. By the 18 & 19 Vict. c. 111, sect. 3, a bill of lading, in the hands of a consignee or indorsee for valuable consideration is conclusive evidence of the shipment, as against the master or person signing it, unless the holder had notice, at the time of receiving it, that the goods were not on board; but the master or person so signing may exonerate himself in respect of such misrepresentation by show-

ing that it was caused without default on his part, and wholly by the fraud of the shipper, holder, or person under whom the holder claims; see *Meyer v. Dresser*, 16 *C. B.*, *N. S.*, 646; 33 *L. J. (C. P.)* 289; *ante*, p. 250.

If the master has hypothecated or sold part of the cargo, although under circumstances which justify him in doing so, he is the agent of the shipowner only, and the shipper is entitled to sue the shipowner on the implied indemnity; *Benson v. Duncan*, 3 *Ex.* 644; 18 *L. J. (Ex.)* 169; and he may recover either the actual sum for which the goods were sold; *Campbell v. Thompson*, 1 *Stark.* 490; or the price which they would have fetched at the place of delivery; *Hallett v. Wigram*, 9 *C. B.* 580; 19 *L. J. (C. P.)*, 281; but not unless the ship eventually arrives there; *Atkinson v. Stephens*, 7 *Ex.* 567; 21 *L. J. (Ex.)* 329.

The power of the master of a ship to bind his owners personally is but a branch of the general law of agency; and where the master of a ship contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs; and the flag of the ship is notice to all the world that his implied authority is limited by the law of that flag. Therefore where the master of a French ship contracted in the West Indies to carry goods for an Englishman from thence to Liverpool, and on the voyage properly borrowed money on bottomry bonds for the use of the ship and crew; and the owner of the goods paid money to redeem his goods, and brought an action against the shipowners to recover the amount,—it is a good defence that they had abandoned the ship and freight; and that by the law of France such abandonment freed them personally from the engagements of the master in all that concerned the ship and voyage; *Lloyd v. Guibert*, 33 *L. J. (Q. B.)* 241.

What is a sufficient delivery of the goods depends either upon the contract or upon custom and usage. If there be no particular custom, the master must give the consignee reasonable time and opportunity to receive them; *Bourne v. Gutcliffe*, 7 *M. & G.* 850. As to evidence of custom in such cases, see *ante*, pp. 19, 20. Mere delivery at a wharf, and there leaving them, without notifying the arrival to the consignee, is not sufficient; and the responsibility continues until actual delivery to a person appointed to receive, or something equivalent to it; or at least until proper notice to the consignee has been given, and the goods separated and designated for his use; 3 *Kent Com.* 215. If they are sent for by the consignee by lighter, the captain is responsible for the safety of the goods till the lighter is fully laden; such at least is the custom in the port of London; *Cutley v. Wintringham, Peake, N. P.* 150, and *note*.

By the Merchant Shipping Amendment Act, 1862 (25 & 26 *Vict. c.* 63), ss. 67, *et seqq.*, certain powers are given to shipowners to land and enter goods from foreign ports, in default of the owner, and to retain the lien for freight by giving notice to the owner of the wharf, &c.

ACTION ON GUARANTEE.

Warranties and guarantees have acquired distinct technical meanings, and must be separately treated of. The former relate to things;

the latter to persons. A guarantee is a contract to answer for the payment of a debt or performance of a duty by another person.

By the Statute of Frauds (29 Car. 2, c. 3), s. 4, no action lies to charge the defendant on a promise to answer for the debt, default, or miscarriage of another, unless the agreement, or some note or memorandum thereof, be in writing, signed by the party to be charged, or by some other person thereunto by him lawfully authorised. It had long been held that, as an "agreement" includes the consideration for the promise, the consideration must also appear, at least from necessary inference, in the writing; *Wain v. Warlters*, 5 East, 10. But by 19 & 20 Vict. c. 97, s. 3 (July 29, 1856), no such promise shall be deemed invalid to support an action or other proceeding to charge the person, who makes the promise, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

Where an order for goods is given by A. for the use of B., and credit given to A., this is not within the statute; for it is the debt of A. and not of B.; *Birkmyr v. Darnell*, Salk. 27; 1 Sm. L. C. 262; and where there is no writing, whether A. or B. was made the debtor by the agreement of the parties, is a question for the jury; *Keute v. Temple*, 1 B. & P. 158. The question is, is it a promise to pay the debt of another for which the other was and still remains liable after the promise is made? If it be, then the statute requires a writing, for it is then a "collateral" and not an original promise; see notes to *Forth v. Stanton*, 1 Wms. Saund. 211b. If the effect of the agreement is to extinguish or satisfy the debt of another,—as if A. promises to pay the amount of B.'s debt to C., if C. will discharge B. from arrest under a *ca. sa.*,—then, as B.'s debt is discharged, the debt becomes the debt of A. only, and is not within the statute; *Goodman v. Chase*, 1 B. & A. 297. So where at defendant's request, and for his accommodation, plaintiff drew a bill on A., which was accepted by A., and indorsed by defendant, defendant promising at the time to indemnify plaintiff; and plaintiff was obliged to pay the bill: Held, that he might sue defendant as for money paid, and that no written guarantee was necessary; *Batson v. King*, 4 H. & N. 739; 28 L. J. (Ex.) 327. The promise must be made to the original creditor to be within the statute; *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Reader v. Kingham*, 32 L. J. (C. P.) 108; 13 C. B., N. S., 344. In the last case the plaintiff, a bailiff of a county court, being about to arrest A. under a warrant of commitment for not paying a judgment debt, the defendant promised the plaintiff, if he would forbear to arrest A., he would pay the debt on a given day or surrender A., and the promise was held not within the statute. There must be at least some implied obligation from the person for whom the surety becomes answerable towards the promisee, as that of an arrested debtor towards his bail to pay the debt or surrender, in which case a promise by a third person to hold the bail harmless is within the statute; *Green v. Cresswell*, 10 Ad. & E. 453; this case, however, has been doubted; see *Reader v. Kingham*, *suprà*, and *Cripps v. Hartnoll*, 32 L. J. (Q. B.) 381; 4 B. & S. 414; where the Exchequer Chamber (overruling the Queen's Bench, 31 L. J. (Q. B.) 150, 2 B. & S. 697) held that there was no debt or duty in the person bailed on a charge of misdemeanor towards his bail, and that consequently a promise of a third person to indemnify the bail was not within the statute. A "forbearing to press for immediate payment" implies giving a "reasonable time," and this,

though indefinite, is a sufficient consideration for a guarantee by a stranger to pay the debt; *semble*, *Oldershaw v. King*, 2 H. & N. 517; 27 L. J. (Ex.) 120; questioning *Semple v. Pink*, 1 Ex. 74, *contrà*. If the consideration for guaranteeing by the defendant the payment of past and future debts by A. to the plaintiffs, be the future supplying by them to A. of goods, and there be no agreement binding on them to supply the goods, and no goods are in fact supplied, the guarantee fails for want of consideration; *Westhead v. Sproson*, 30 L. J. (Ex.) 265; 6 H. & N. 728.

The language, as to the form of memorandum and signature thereto, is the same as in the 17th section of the same statute, for which see *Action for not accepting Goods*, *post*, p. 284. Although the signature only of the party to be charged is sufficient, the names of both the contracting parties must appear upon the guarantee; and therefore a guarantee on which the name of the person to whom it is given does not appear, is bad; *Williams v. Lake*, 29 L. J. (Q. B.) 1; 2 E. & E. 349. A letter of defendant to plaintiff, referring to a mortgage not complete, and stating defendant's "willingness to take any responsibility respecting it," is not sufficient to satisfy the statute, there being nothing to explain the transaction referred to, as to amount, interest, or property meant, without parol evidence; and, though since the 19 & 20 Vict. c. 97, s. 3, parol evidence may supply the consideration, it cannot go further and explain the promise; *Holmes v. Mitchell*, 28 L. J. (C. P.) 301; 7 C. B., N. S., 361.

An important point often arises, whether the guarantee is a continuing guarantee,—that is, whether the guarantee is confined to one transaction and is at an end when credit has been once given to the amount guaranteed, or whether it continues in respect of credit given, or debts contracted, from time to time. The answer depends on the language of the instrument, and the decision in one case is no certain guide to the construction of the contract in another. The statute 19 & 20 Vict. c. 97, enacts (sect. 4), that no promise to answer for the debt or default of another, made to a firm of two or more persons, or to one person trading under the name of a firm,—and no promise to answer for the debt or default of such a firm or person so trading,—shall be binding on the maker in respect of anything done or omitted to be done after a change in any one or more of the firm or persons so trading, unless the intention that the promise shall continue to bind notwithstanding such change shall appear by express stipulation, or by necessary implication from the nature of the firm, or otherwise. This clause seems to be only declaratory of the existing law; see *Holland v. Teed*, 7 Hare, 50, and 2 Report of *Mercantile Law Commission*. A guarantee, for twelve months for the payment of all bills the plaintiff might discount for D. to the extent of 600*l.*, was held revocable by a notice given during the twelve months, although some discount had been made and repaid before notice; *Offord v. Davies*, 31 L. J. (C. P.) 319; 12 C. B., N. S., 748. But in *Bradbury v. Morgan*, 31 L. J. (Ex.) 462; 1 H. & C. 249; it was held that the death of the guarantor did not revoke an engagement to guarantee the balance of a running account until notice, inasmuch as it was a contract and not a bare authority.

Damages.] A guarantee for payment by the acceptor of a bill of exchange includes interest; *Ackerman v. Ehrensperger*, 16 M. & W. 99. "We guarantee that 400*l.* shall be duly paid, in the proportion of 200*l.* each," signed by two persons, does not make them jointly liable

to 400*l.*, but is a separate contract as to 200*l.* by each; *Fell v. Goslin*, 7 *Ex.* 185; 21 *L. J. (Ex.)* 145. An agreement to be answerable for all the costs of and incidental to an action to be brought by the plaintiff, entitles him to recover the costs of his own attorney, though not actually paid at the time of suing on the guarantee; *Spark v. Heslop*, 28 *L. J. (Q. B.)* 197; 1 *E. & E.* 563. The defendant gave to plaintiffs the following guarantee:—"I promise to pay to Messrs. G. 300*l.* to secure an advance now or hereafter on a banking account with A." A. became insolvent, and paid by agreement with his creditors 16*s.* in the pound, and Messrs. G., having advanced much more than 300*l.*, received the dividend on the whole of their advance, which left a balance on the whole of more than 300*l.* But it was held that the defendant's promise was only to repay an advance of 300*l.*, and that he was therefore only liable for the balance of 300*l.*, after deducting 16*s.* in the pound on that amount; *Gee v. Pack*, 33 *L. J. (Q. B.)* 49.

Defence.] The want of a written memorandum is a defence under *non assumpsit*, or a denial of the contract of guarantee; *Reade v. Lambe*, 6 *Ex.* 130; 20 *L. J. (Ex.)* 161. And a like plea puts in issue the consideration also; *Lyall v. Higgins*, 4 *Q. B.* 528; *Bell v. Welch*, 9 *C. B.* 154; 19 *L. J. (C. P.)* 184.

It is a good defence (under a special plea) that the guarantee had been altered while in the hands of the plaintiff by attaching seals, so as apparently to make it a deed, without defendant's knowledge or assent, although the plaintiff has sued on it only as a simple contract; *Davidson v. Cooper*, 13 *M. & W.* 343 (*Ex. Ch.*).

There is no obligation on the part of the creditor to inform a person, who guarantees payment by the debtor, of material circumstances relating to the debtor and likely to influence his discretion, if the concealment be not an actual fraud; for the rule in policies of insurance does not apply to guarantees; *North British Assurance Company v. Lloyd*, 21 *L. J. (Ex.)* 14; 10 *Ex.* 523; following *Owen v. Homan*, 4 *H. L. C.* 997, and *Hamilton v. Watson*, 12 *Cl. & F.* 109.

Any alteration by a binding agreement in the relative position of the creditor and principal debtor, whereby the latter is released, or the remedy against him suspended, or the risk of the surety varied, without the surety's assent, will be a discharge of the guarantee, either at common law or in equity; see *Lewis v. Jones*, 1 *B. & C.* 506, and note (a), 515; and see cases cited *ante*, pp. 212-3.

In a contract by the defendant to guarantee to the plaintiff the due execution of certain work, there was a stipulation that the plaintiff should insure the work as it proceeded, and it was held that the omission to insure was an equitable defence, without reference to the amount of damage sustained by the omission; *Watts v. Shuttleworth*, 5 *H. & N.* 235; 29 *L. J. (Ex.)* 229.

ACTION ON WARRANTY ON SALE OF CHATTELS.

A warranty is either express or implied.

As to warranty of authority by agent, see *post*, title, *Action for Deceit*.

Warranty of title.] If a man sell goods, affirming them to be

his own, that amounts to a warranty of title; *Cross v. Garnet*, 3 Mod 261; 1 Show. 68; *Medina v. Stoughton*, 1 Salk. 210; 1 *Ld. Raym.* 593. But it would seem that there is in general no implied warranty of title, any more than of quality, on the bare sale of a personal chattel; *per curiam*, *Morley v. Attenborough*, *infra*. Where a pawnbroker sold an unredeemed pledge at an auction of such pledges, which was bought by the plaintiff, and was afterwards claimed by the right owner, it was held that no action lay by the plaintiff against the pawnbroker as on a warranty; *Morley v. Attenborough*, 3 *Ex.* 500; 18 *L. J. (Ex.)* 148. To make the seller liable for a bad title, there must be shown fraud, or express warranty, or an equivalent to it by declaration, or conduct, or usage of trade. When articles are bought in a shop professedly kept for the sale of goods, there can be no doubt that the shopkeeper must be considered as warranting that a purchaser will have a good title to keep the goods purchased. In such a case the vendor sells as his own, and that is what is equivalent to a warranty of title; *per curiam*, *S. C.*; and see *Eichholtz v. Bannister*, *infra*. In *Chapman v. Speller*, 14 *Q. B.* 621; 19 *L. J. (Q. B.)* 239, the defendant bought and paid for a lot of articles at a sheriff's sale under an execution, and the plaintiff having the same knowledge as the defendant, offered him an advanced price for the lot, which the defendant accepted, and the articles were afterwards claimed by a third party, and the plaintiff was obliged to give them up. It was held that there was no implied warranty of title by the defendant, and that the plaintiff could not recover back the price paid as upon a failure of consideration. But the Court added that, "in so deciding for the defendant under the circumstances, they wished to guard against being supposed to doubt the right to recover back money paid upon the ordinary purchase of a chattel, where the purchaser does not have that for which he paid." In *Sims v. Marryatt*, 17 *Q. B.* 281, the Court decided that the letters on which the sale took place amounted to an express warranty of title; but *Ld. Campbell, C. J.*, while he approves of the decision in *Morley v. Attenborough*, *supra*, adds, "It may be that the Court of Exchequer is correct in saying that on a sale of personal property, the maxim of *caveat emptor* does by the law of England apply to title as well as quality, but if so, there are many exceptions stated in the judgment which well-nigh eat up the rule. Executory contracts are said to be excepted; so are sales in retail shops, or where there is a usage of trade; so that there may be difficulty in finding cases to which the rule would practically apply." This passage was cited with approval by the Court of C. P. in the late case of *Eichholtz v. Bannister*, *Mich. T.* 1864; 13 *W. R.* 96. In that case the plaintiff had purchased some printed goods in the warehouse of the defendant, and received an invoice in which the defendant was described as dealer in prints; the goods turned out to have been stolen, and the true owner claimed them; and it was held that the plaintiff could maintain an action against the defendant to recover the price he had paid.

Warranty of quality.] There is no implied warranty of quality in the sale of a specific chattel; *Chanter v. Hopkins*, *infra*; *Ollivant v. Bayley*, *infra*; but if goods are ordered of a tradesman for a particular purpose known to the vendor, there is a tacit engagement that the goods shall be fit for it; *Jones v. Bright*, 5 *Bing.* 533; *Brown v. Edgington*, 2 *M. & G.* 279; *Shepherd v. Pybus*, 3 *M. & G.* 868; *Ollivant v. Bayley*, 5 *Q. B.* 288; *per cur.*, in *Morley v. Attenborough*,

suprà. Where the purchase is of a well-known and defined article, such as a patent stove, there is no warranty that it will suit the purpose for which the purchaser designed it, although this purpose may have been known to the vendor; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollicant v. Bayley*, *suprà*. On the sale of a patent there is no warranty that it is valid; *Hall v. Conder*, 26 L. J. (C. P.) 138; 2 C. B., N. S., 22. There is no implied warranty that an article exposed for sale as human food is fit for that purpose, at least, where a salesman sells a carcase wholesale to a retail dealer; *Emmerton v. Matthews*, 31 L. J. (Ex.) 139; 7 H. & N. 586.

By the 25 & 26 Vict. c. 88, ss. 19 and 20, after the 31st December, 1863, on the sale or contract to sell (whether in writing or not) any article with any trade mark on it, or on what it is contained in, or with any description or indication of the number, quality, measure, or weight, or of the place where it was manufactured or produced, there shall be deemed to have been a warranty of the genuineness of the trade mark, or of the truth of the description, &c., unless the contrary shall have been expressed in writing, signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

Remedy where there is a warranty.] When a horse or other article has been sold warranted, but is in fact not according to the warranty, the purchaser may of course maintain an action upon the warranty; but in some cases he may rescind the contract and recover the money paid under the count for money had and received: As, where by the contract the purchaser has the power of returning the article if not approved, *Towers v. Barrett*, 1 T. R. 133; or where the contract is rescinded with the assent of the defendant; *per Buller, J., Ib.*; and the article is returned within a reasonable time; *Compton's case*, cited by Buller, J., in 1 T. R. 136; *Adam v. Richards*, 2 H. Bl. 573; *Street v. Blay*, 2 B. & Ad. 456; and in the same state as sold, and without using the thing sold after discovery of the breach; *Harnor v. Groves*, 15 C. B. 667; 24 L. J. (C. P.) 53; *Curtis v. Hannay*, 3 Esp. 82.

But on the purchase of a specific chattel, it is only where there is a condition in the contract authorising the return, or the vendor has received back the horse or other article and has thereby rescinded the contract, or has been guilty of a fraud which avoids the contract altogether, that the purchaser may thus recover back the price; *Street v. Blay*, 2 B. & Ad. 462, and the cases there cited; *Gompertz v. Denton*, 1 C. & M. 207. Where there is a breach of warranty and no condition for rescinding the sale, the vendee must keep the article and rely upon a cross action, or prove the breach in reduction of damages when sued for the price; *Street v. Blay*, *suprà*; *Poulton v. Lattimore*, 9 B. & C. 259; *Dawson v. Collis*, 10 C. B. 523; 20 L. J. (C. P.) 116.

If the purchaser sue upon the warranty he need not return the article sold; *Fielder v. Starkey*, 1 H. Bl. 17; *Putishall v. Tranter*, 3 Ad. & E. 103.

Proof of the sale and warranty.] Where there is no written contract, and the warranty is (as it often is) mentioned in the receipt for the purchase-money, the sale and warranty may be proved by the production of the receipt without an agreement stamp; *Skrine v. Elmore*, 2 Camp. 407. If the sale was that of a horse, and the de-

venditor took another horse in part payment, it is no variance to state that the whole price was paid in money, provided the contract was in substance one of sale and not of exchange; *Hinds v. Burton*, 9 East, 349; *Brown v. Fry*, Selw. N. P. 652. A sale for the price of 10*l.* and upwards is within the Statute of Frauds, sect. 17; but as the breach of warranty is not usually discovered till after delivery and acceptance of the goods sold, the statute is then complied with, and the contract may be proved by parol.

The plaintiff must, in general, prove an express warranty; a high price is not tantamount to an implied warranty; *Stuart v. Wilkins*, 1 Doug. 20; *Parkinson v. Lee*, 2 East, 322. The word "warranty" is not essential; but there may be a mere representation or opinion of the seller without any intention on either side to give or require a warranty, and this will be a question for the jury. Generally, however, a representation made at the sale is part of the contract, and equivalent to a warranty; *Wood v. Smith*, 5 M. & R. 124; *Salmon v. Ward*, *infra*. But not if the contract be reduced into writing; *Pickering v. Downson*, 4 Taunt. 779. But where the evidence of the contract of sale consists of a series of letters which are ambiguous in their terms on the question of warranty, parol evidence of all the surrounding facts and circumstances of the sale is admissible, for the purpose of showing that a warranty was not contemplated between the parties; *Stuckey v. Bailey*, 31 L. J. (Ex.) 483; 1 H. & C. 405. On the sale of pictures, with a bill of parcels having the artist's name attached, it is for the jury to find whether the seller has guaranteed that they are really the works of the artist, or merely intimated his opinion as to the authorship; *Power v. Burham*, 4 Ad. & E. 473. A., a corn-dealer, sold to B., another corn-dealer, some barley as "seed barley," just before bought by sample from a third person. B. knew that A. had so bought it by sample as "seed barley," and that he had not seen it in bulk: Held, that this was not evidence of a warranty, but was a mere expression of A.'s belief; *Carter v. Crick*, 28 L. J. (Ex.) 238; 4 H. & N. 412. But where goods are sold under a certain denomination, the purchaser is entitled to have goods commercially known under that denomination, although he purchased after inspection of the bulk and without a warranty; *Josling v. Kingsford*, 32 L. J. (C. P.) 91; 13 C. B., N. S., 447. Where the plaintiff wrote to the defendant, "You will remember that you warranted a horse as a five-year-old," &c., to which the defendant answered, "The horse is as I represented it," it was ruled that this was evidence of a warranty at the time of sale; *Salmon v. Ward*, 2 C. & P. 211. Where the seller said, "The horse is sound to the best of my knowledge, but I will not warrant it," and the seller knew it to be unsound, he was held answerable on this qualified warranty, viz., that "it was sound to the best of his knowledge;" *Wood v. Smith*, *supra*. But *quære*: for this seems to be rather a case of fraud than of qualified warranty. Where the warranty was "To be sold, a black gelding five years old—has been constantly driven in the plough—warranted," this was held to be only a warranty of soundness; *Richardson v. Brown*, 1 Bing. 344. So, "Received of B., 10*l.*, for a grey four-year-old colt, warranted sound," is not a warranty of age; *Budd v. Fairmaner*, 8 Bing. 48. Where there is a manifest defect, a general warranty of soundness will not be deemed to extend to it; *Margetson v. Wright*, 7 Bing. 603. A splint has been held not to be such a manifest defect; *Margetson v. Wright*, 8 Bing. 454; nor convexity of the corner of the eye; *Holliday v. Morgun*, 1 E. & E. 1; 28 L. J.

(Q. B.) 9. When a horse is sold, with a warranty, by private sale at a repository for the sale of horses, where the terms of the sales are painted upon a board fixed up in a conspicuous situation, a purchaser must be taken to be cognizant of those terms, though nothing is said respecting them at the time of sale; and if one of the terms is that the horse, being found to be unsound, must be returned within twenty-four hours, it must be complied with, though the unsoundness is of such a nature as may not be discovered within that time; *Bywater v. Richardson*, 1 *Ad. & E.* 508. There are many cases on variances upon warranty of soundness, but the power of amendment makes it needless to notice them.

Warranty by agent.] A servant employed to sell a horse has been held to have an implied authority to warrant; *Alexander v. Gibson*, 2 *Camp.* 555 (the case of a sale at a fair); and even where the servant of a horse-dealer has express directions not to warrant, but does warrant, the master is said to be bound, unless he has notified to the world that the general authority is limited; *per* Bayley, J., in *Pickering v. Busk*, 15 *East*, 45; *Helyear v. Hawke*, 5 *Esp.* 72. But the doctrine has, according to some authorities, been confined to the case of sales by servants of horse-dealers, who may be supposed to possess a general authority; *Bank of Scotland v. Watson*, 1 *Dow*, 45; *per* Ashurst, J., in *Fenn v. Harrison*, 3 *T. R.* 760; *Anon.*, cited 15 *East*, 407. The Court of Common Pleas, in a considered judgment, have lately decided that the servant of an owner, not a horse-dealer, entrusted on one particular occasion to sell and deliver a horse, is not by law authorized to bind his master by a warranty; and the buyer, taking a warranty from such an agent, takes it at the risk of being able to prove that he had the principal's authority; *Brady v. Todd*, 30 *L. J. (C. P.)* 223; 9 *C. B.*, *N. S.*, 592. *Quære*, Whether, in the case of a foreman, alleged to be a general agent, or such a special agent as a person entrusted with the sale of a horse at a fair or other public mart, the authority would be implied; *per curiam*, *S. C.*; *semble*, *per* Ashurst, J., in *Fenn v. Harrison*, *suprà*, that in the latter case it would not. What is said at the time of the sale is evidence, and may amount to a warranty; *per curiam*, *Brady v. Todd*, *suprà*. If the seller repudiates the warranty made by his agent there is no sale; *per curiam*, *S. C.* Where the horse had been already sold, and the vendor's servant, on delivering him to the purchaser, made certain statements, and signed a receipt for the price containing a warranty, it was held that the vendor was not bound by such statements, nor by the receipt, no express authority to warrant being shown; *Woodin v. Burford*, 2 *C. & M.* 391.

Breach of warranty.] If the breach be denied, the plaintiff must give positive proof of unsoundness, &c., at the time of the sale; a suspicion that a horse was unsound is not sufficient; *Eaves v. Dixon*, 2 *Taunt.* 343. The term "sound," in the case of a horse, implies the absence of disease, or the seeds of a disease, which impairs the natural usefulness of the animal; *Kiddell v. Burnard*, 9 *M. & W.* 668. It was ruled by Lord Ellenborough, that an infirmity, as a temporary lameness, which renders a horse less fit for present use, though not of a permanent nature, and though removed after action brought, is an unsoundness; *Elton v. Brogden*, 4 *Camp.* 281; 1 *Stark*, 127. A cough, though not permanent, is therefore an unsoundness; *Coates v. Stephens*, 2 *Mood. & Rob.* 157; *Shillitoe v.*

Claridge, 2 *Chitty*, Rep. 425. But in *Garment v. Barrs*, 2 *Esp.* 673, it was ruled by Eyre, C.J., that a horse labouring under a temporary injury or hurt is not an unsound horse. Roaring is not, it is said, necessarily unsoundness, unless symptomatic of disease; *Bassett v. Collis*, 2 *Camp.* 523; but if it is of such a nature as to incommode the horse when pressed to his speed, it is an unsoundness; *Onslow v. Eames*, 2 *Stark*, 81. Mere badness of shape (such as may produce cutting or curbs), is not unsoundness; *Dickenson v. Follett*, 1 *Mood. & Rob.* 299; *Brown v. Elkington*, 8 *M. & W.* 132; but any defect in the structure of a horse, congenital as well as arising from subsequent disease or accident, which diminishes his natural usefulness; and renders him less than reasonably fit for present use, is unsoundness; and convexity in the cornea of the eye, making the horse short-sighted, and so inducing a habit of shying, is such a defect; *Holliday v. Morgan*, 1 *E. & E.* 1; 28 *L. J. (Q. B.)* 9. A nerved horse is unsound; *Best v. Osborne*, Ry. & *Mood.* 290. Crib-biting is not unsoundness, but vice; *Scholefield v. Robb*, 2 *Mood. & Rob.* 210. Whether thrushes, splints, or quidding be unsoundness, is a disputed question; *Bassett v. Collis*, 2 *Camp.* 524 (n); but a splint which produces lameness is an unsoundness, even before the lameness is produced; *Margetson v. Wright*, 8 *Bing.* 454. So a bone spavin; *Watson v. Denton*, 7 *C. & P.* 85. A chest-foundered horse is unsound; *Atterbury v. Fairmanner*, 8 *B. Moore*, 32. Proof that a horse is a good drawer will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness;" *Coltherd v. Punccheon*, 2 *D. & R.* 10.

It need not be averred, nor, if averred, proved, that the defendant knew of the unsoundness; *Williamson v. Allison*, 2 *East*, 446.

Damages.] If a horse has been returned, the plaintiff will be entitled to recover the whole price; if kept, the difference between the real value and the price; or the plaintiff may sell the horse for what he can get, and recover the residue of the price paid, in damages; *Cuswell v. Coare*, 1 *Taunt.* 566. If the horse is not tendered to the vendor, the vendee can recover no damages for the expense of his keep; *Ibid.* But if the vendee had tendered the horse, he may recover for the keep, for such time as would be required to sell him to the best advantage; *McKenzie v. Hancock*, Ry. & *Mood.* 436. So where, after notice to the vendor that the horse might be taken away, it was resold, the vendor is liable for the keep for a reasonable time, which is a question for the jury; *Chesterman v. Lamb*, 2 *Ad. & E.* 129. Where the vendor rescinded the contract, it was held that he was liable for the keep of the horse from the time of the contract; *King v. Price*, 2 *Chitty Rep.* 416. Where defendant warranted a horse to plaintiff, who resold him with a warranty to C., and the horse proving unsound, C. sued the plaintiff, and he gave notice to defendant of the action, and offered him the option of defending it, but receiving no answer, he defended the action and failed: it was held that defendant was liable, in an action on the warranty, for the costs of the action brought by C. against the plaintiff; *Lewis v. Peake*, 7 *Taunt.* 153. In *Cox v. Walker*, 6 *Ad. & E.* 523, n, the plaintiff had bought a horse of the defendant for 100*l.*, and had been offered 140*l.* for him, but the horse proving unsound, plaintiff had been obliged to give up the bargain and to sell it for 49*l.* 7*s.* Lord Denman, C.J., directed the jury that the plaintiff was entitled to recover the difference between the price at which he had sold and the actual value of

the horse if it had been sound at the time of such sale; and he left to the jury as a measure of such value the price offered for the horse while in the plaintiff's hands. This ruling was questioned, but the case stood over, after argument, for several terms, and was then compromised. The liability of plaintiff for the breach of warranty given on a resale by him may be alleged and proved as special damage, though the plaintiff has not actually paid the sub-vendee his demand; *Randull v. Roper, E., B. & E.* 84; 27 *L. J. (Q. B.)* 266. See also *Josling v. Irvine*, 30 *L. J. (Ex.)* 78; 6 *H. & N.* 512.

Defence.] In actions on a warranty, *non assumpsit*, or an equivalent plea, denying the contract, operates only as a denial in fact of the sale and warranty, but not of the breach. Matters in confession and avoidance of the declaration must be specially pleaded; *R. H. T.* 1853, No. 6, 8. It appears from the schedule of forms in the Common Law Procedure Act, 1852, that a plea of "did not warrant" may be pleaded. On such a plea it should seem that the warranty, and not the sale, would be put in issue; whereas the traverse of the sale *modo et forma*, will involve the warranty as well as sale, if the form of declaration prescribed in the schedule be adopted.

ACTION ON PROMISE OF MARRIAGE.

Either a man or woman may sue for breach of promise of marriage; *Harrison v. Cage*, 5 *Mod.* 411; although an attempt was made in that case to resist an action by the former, on the ground that marriage is not an advancement for a man. As an infant may enforce an advantageous contract, although not bound thereby, an infant may sue a person of full age for breach of promise of marriage; *Holt v. Ward*, 2 *Str.* 937; *per Lord Ellenborough, C.J.*, in *Warwick v. Bruce*, 2 *M. & S.* 209. A married man may be sued on a promise of marriage to the plaintiff, although he was married when he promised, provided the plaintiff was ignorant of the fact; and the plaintiff's remaining unmarried on the faith of such promise is a sufficient consideration, and the inability of the defendant to marry the plaintiff is a sufficient breach; *Milward v. Littlewood*, 5 *Ex.* 775; 20 *L. J. (Ex.)* 2; *Wild v. Harris*, 7 *C. B.* 999; 18 *L. J. (C. P.)* 297; and see *post*, *Defence*. This action falls within the general rule *actio personalis moritur cum personâ*, and cannot be maintained by an executor or administrator; *Chamberlain v. Williamson*, 2 *M. & S.* 408; unless perhaps under peculiar circumstances, as where a strictly pecuniary loss has accrued to the deceased and the personal estate been damaged accordingly; which special damage must be stated on the record, for it will not be intended; *per cur.*, *Id.* 416.

Proof of the contract.] To maintain this action, the plaintiff must prove, under a traverse, the contract and promise of the defendant as stated. The promises must be mutual, the reciprocity constituting the consideration; *Harrison v. Cage*, *supra*; 1 *Rob. Ab.* 22, pl. 20. At first it was held that mutual promises to marry came within the fourth section of the Statute of Frauds; *Com. Dig. action on the case upon assumpsit* (F. 3); but in *Bull. N. P.* 280 c, a contrary doctrine is laid down, and it is now settled that the promises need not be in writing; *Cook v. Baker*, 1 *Str.* 34; *Harrison v. Cage*, 1 *Ld. Raym.* 387, note at end of case. And if written evidence of the contract be pro-

duced, no stamp is required; *Orford v. Cole*, 2 Stark. 351. A promise on the part of a woman may be presumed from such circumstances of acquiescence or tokens of approval as usually attend the acceptance of an offer of marriage; her presence when the offer was made and the consent of parents asked, without her making any objection; her subsequent reception of the suitor's visits, and concurrence in the arrangements for the wedding; her demeanour as one consenting and approving, &c. Express consent in words is not necessary; *Daniel v. Bowles*, 2 C. & P. 553; *Hutton v. Mansell*, 3 Salk. 16. But to prove a promise by a man more would be necessary, neither the usages of society nor considerations of delicacy interfering to restrain an explicit declaration on his part. A promise to marry generally is, in law, a promise to marry within a reasonable time; and although an admission of a special promise to marry at a particular time should be proved in evidence, it may be left to a jury to infer from the circumstances a more general promise; *Potter v. Deboos*, 1 Stark. 82; *Phillips v. Crutcheley*, 1 Moore & P. 239. But a promise to marry after a certain event will not support a declaration stating a general promise; *Atchinson v. Baker, Peake, Add. Ca.* 103.

The breach of the promise.] To prove the breach of the promise, if denied, evidence must be given either that the defendant has married another, so that performance is no longer possible; or that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant. For this purpose it has been held sufficient that the father of a female plaintiff demanded performance of the defendant; *Gough v. Furr*, 2 C. & P. 631.

Damages.] The affluant circumstances of the defendant are evidence on the question of damages; and not merely the loss of an establishment in life, but the injury to the plaintiff's feelings, may be considered by the jury; and in this respect the measure of damages is different from that which is adopted in the case of other contracts; *per cur.*, *Hamlin v. Great Northern Railway Co.* 26 L. J. (Ex.) 23; 1 H. & N. 408.

Defence.

If, after entering into a contract of marriage, either party discover gross immorality or depraved conduct in the other, it may be pleaded in bar of the action; thus brutal and violent conduct in the man, accompanied with threats of ill usage to the woman, goes to the ground of the action; *Leeds v. Cook*, 4 Esp. 258; and if a man has made a promise of marriage to one whom he supposes to be a modest person, and he afterwards discovers her to be a loose and immodest woman, and he, on such account refuses to fulfil his promise, he is justified in so doing; *Irving v. Greenwood*, 1 C. & P. 350. A subsequent discovery of a bodily infirmity, which would affect the future happiness of the parties, has been considered to justify a breach of the contract; *Atchinson v. Baker, Peake, Add. Ca.* 104. But this was only an extra-judicial dictum at Nisi Prius, and the plaintiff eventually recovered damages from the female defendant; *S. C., Id.* 124. In *Hall v. Wright, E., B. & E.* 746, 765, 27 L. J. (Q. B.), 345, and 29 L. J. (Q. B.) 43, it was held by a majority of the judges, that supervening bodily infirmity, rendering it dangerous to the

defendant's life to marry, was no answer to an action for the breach of promise to marry; the court being equally divided in the Queen's Bench, and a majority of four to three in the Exchequer Chamber. And in *Baker v. Cartwright*, 30 *L. J. (C. P.)* 364, 10 *C. B., N. S.*, 124, the court held, on the authority of the last case, that insanity in the plaintiff, existing unknown to the defendant previously to his promise, was no defence. To entitle the defendant to a verdict on the ground of the bad character of the plaintiff, it is not sufficient to show that charges (as of pecuniary dishonesty or perjury, &c.) were made against the plaintiff, which plaintiff promised, but failed, to explain: the defendant must show that the charges are well founded; *Buddleley v. Mortlock*, 11 *Holt, N. P.* 151. To show the general bad character of the plaintiff, where such evidence is relevant, a witness may state what has been said by third persons as to character; *Foulkes v. Sellway*, 3 *Exp.* 236. Material misrepresentation of the real circumstances of the family and previous life of the plaintiff may be a good defence to the action; as where the plaintiff's father and brother told the defendant that she would have property from her father (who was insolvent), and denied that she had ever been (as in fact she had been) a barmaid; *Wharton v. Lewis*, 1 *C. & P.* 529. The plaintiff was, in this case, living with the relations who misrepresented her, and was probably presumed to be privy to their statements. Letters written by the plaintiff's father with her knowledge are evidence against her, though she would not be answerable for particular expressions in them; but a false representation, made orally by the father to a third person in the absence of the plaintiff and without her privity, and by such person communicated to the defendant, is not admissible; *Foot v. Hayne*, 1 *C. & P.* 546.

A pre-contract on the part of the plaintiff to marry another person, which the plaintiff concealed from the defendant at the time of his promise, is no defence to the action, without fraud; *Beechey v. Brown*, 29 *L. J. (Q. B.)* 105; *Ex. B. & E.* 796.

An exoneration by the plaintiff of the defendant from his promise may be implied from the conduct and demeanor of the parties; the total cessation of intercourse and correspondence for two or three years is evidence for the jury on a plea of exoneration; although on the last occasion they were seen together the plaintiff refused to give up the defendant's letters, saying it would be like giving him up altogether; *Davis v. Bomford*, 30 *L. J. (Ex.)* 139; 6 *H. & N.* 245.

ACTION ON AN AWARD.

In an action on an award, the plaintiff must prove the submission and award and the performance by himself of any conditions precedent put in issue by the pleadings. Where the submission is by a judge's order, which has been made a rule of court, it is sufficiently proved by production of the office copy of the rule; *Still v. Halford*, 4 *Camp.* 17; *Selly v. Harris*, 1 *Ld. Raym.* 745. But not when the submission is by deed or written agreement; for the rule gives it no binding effect, and is, or may be, obtained *ex parte*; *Berney v. Read*, 7 *Q. B.* 79. In that case the rule was evidently not obtained by the party against whom it was offered. If the time for making

the award has been enlarged, and the award made within the enlarged time, the plaintiff must show (if it be put in issue) that the enlargement was duly made according to the terms of the submission, or by the consent of the parties, or under the powers granted by sect. 15 of the Common Law Procedure Act, 1854. If the enlargement was irregularly made, such irregularity is waived by the appearance of the parties, having knowledge of it, without objection before the arbitrator after the enlargement; *Re Hick*, 8 *Tuunt*. 694; so if the time had not been enlarged at all; *Lawrence v. Hodyson*, 1 *Y. & J.* 16; but though the parties appear and take part in the reference, if they protest at the time, the objection is not waived; *Ringland v. Lowndes*, 33 *L. J. (C. P.)* 337, (Ex. Ch. overruling the C. P., *Id.* 25; 15 *C. B.*, *N. S.*, 173); so the objection is not waived, if it goes to the jurisdiction of the arbitrator over the subject-matter; *Davies v. Price*, 34 *L. J. (Q. B.)* 8, (Ex. Ch.). The plaintiff need not prove that the defendant had notice of the award; for he is bound to take notice of the award, as well as the plaintiff; 2 *Wms. Saund.* 62, note 4. Where the award states a "request" to the defendant to pay, this is equivalent to an order to pay; *Smith v. Hartley*, 10 *C. B.* 800; 20 *L. J. (C. P.)* 169. So where after issue joined a cause was referred, and although there was no power to direct a verdict to be entered, the arbitrator ordered that there should be a verdict for the plaintiff for a certain sum: this was held good as an award of that sum to the plaintiff, on which an action for the amount could be maintained; *Everest v. Ritchie*, 31 *L. J. (Ex.)* 350; 7 *H. & N.* 698; and where an award directs payment to an arbitrator, or to a stranger, for the use of the plaintiff, the plaintiff may sue on it for the money; *Wood v. Adcock*, 7 *Erch.* 468; 21 *L. J. (Ex.)* 204. An award to be made by two arbitrators must be signed by them in the presence of each other and at the same time and place, and it is no award unless so signed; *Wade v. Dowling*, 4 *E. & B.* 44; 23 *L. J. (Q. B.)* 302; *Peterson v. Ayre*, 15 *C. B.* 724.

If the award be by an umpire, his appointment must be proved. In the absence of any clause to the contrary, the arbitrators may make a valid appointment of an umpire after the time for making the award has expired, if it be within the time limited for the umpirage; *Harding v. Watts*, 15 *East*, 556; *Holdsworth v. Wilson*, 32 *L. J. (Q. B.)* 289; 4 *B. & S.* 1 (*Ex. Ch.*).

In practice there is usually a witness to the execution of an award, who, if the execution is disputed, is generally called; but unless the submission requires it, attestation is unnecessary; and in general, therefore, an award may be proved like any other deed or writing, viz., by proof of the arbitrator's handwriting.

Defence.

Under the plea of *no award* of and concerning the premises, the defendant may show that the award was invalid because the arbitrator had not disposed of all the matters submitted to him; *Dresser v. Stansfield*, 14 *M. & W.* 822; or that it was not final; *Armitage v. Coates*, 4 *Ex.* 641; *Roberts v. Eberhardt*, 3 *C. B.*, *N. S.*, 482; 27 *L. J. (C. P.)* 70. Where the defendant pleaded that the arbitrator "did not make his award of and concerning the matters in difference," it was held that the validity of the award, as appearing on the face of the declaration, was not in issue; *Adcock v. Wood*, 6 *Ex.* 814; 20 *L. J. (Ex.)* 435. Under a plea of *no award* it would seem that the defendant cannot show that it was set aside *Roper v. Lery*, 7 *Ex.*

55; 21 *L. J. (Ex.)* 28, (so held on a replication of "no award" to a plea alleging an award in bar).

A plea of a parol agreement to pay a less sum at an earlier date than that named on the award, and payment thereunder, is good by way of accord and satisfaction after breach by non-payment of the first instalment; and is proved although the payment was made and accepted after the substituted day, if the plaintiff received the payment and made no objection on the ground of its being too late; *Smith v. Trowsdale*, 3 *E. & B.* 83; 23 *L. J. (Q. B.)* 107.

Corruption or misconduct of the arbitrators is not matter of defence; at least, where application might have been successfully made to the court to set the award aside; *Wills v. Maccarmick*, 2 *Wils.* 148; *Braddick v. Thompson*, 8 *East*, 344; *Brazier v. Bryant*, 3 *Bing.* 167; *Grazebrook v. Davis*, 5 *B. & C.* 534; *Whitmore v. Smith*, 31 *L. J. (Ex.)* 107; 7 *H. & N.* 509. Nor can the award be impeached on the ground that the decision of the arbitrator has proceeded on a mistake; *Johnson v. Durant*, 2 *B. & Ad.* 925. But the defendant may show that it is not conformable to the submission, and this may be shown under a plea of no award.

Although an award is not final if it do not award costs in some way, where they are in the discretion of the arbitrator, yet if the submission can be made a rule of court, the amount need not be specified, as the taxing-master has jurisdiction over them; *Holdsworth v. Barsham*, 31 *L. J. (Q. B.)* 145; 2 *B. & S.* 480; *S. C. in Ex. Ch.*, 4 *B. & S.* 1; 32 *L. J. (Q. B.)* 289. The costs need not have been taxed before action brought; *S. C. in Ex. Ch.*, overruling the *Q. B.* on this point.

ACTION ON AN ATTORNEY'S BILL.

In an action upon an attorney's bill, the plaintiff must prove, under the general issue, (1.) his retainer as attorney by the defendant; which may be done by showing either an express retainer, or that the defendant attended at his office, and gave directions, or in other ways recognised his employment; (2.) that the business was done; which may be proved by a clerk, or other agent, who can speak to the existence of the cause or the business in respect of which the charges are made, and can prove the main items.

Retainer.] Proof of a judge's order referring the bill to be taxed, and of the defendant's undertaking to pay the taxed costs, and of the master's *allocatur*, will be sufficient proof both of the retainer and of the business having been done; *Lee v. Jones*, 2 *Camp.* 496. In an action against an ordinary corporation, the plaintiff must show a retainer under seal; *Arnold v. Mayor of Poole*, 4 *M. & G.* 860. But in the case of quasi corporations, as joint-stock companies or commercial companies incorporated by Act of Parliament, such as railway companies, there is usually a power to retain attorneys, solicitors, and other like officers without a retainer under seal. And where by an Act of Parliament the directors of a railway company had power to appoint and displace officers, this was held to extend to an attorney, who therefore need not be appointed

under the common seal of the company; *R. v. Justices of Cumberland*, 17 L. J. (Q. B.) 102. And where the retainer by a common law corporation is by resolution only, such retainer is sufficient to warrant payment by the corporation, though it may not be sufficient to found an action against them; *R. v. Lichfield*, 10 Q. B. 534. When several actions against several defendants are consolidated and are to abide the event of one, the same attorney having been retained by each of the defendants, he is entitled to hold all the defendants liable to the costs of the action tried, as on a joint retainer; *Anderson v. Boynton*, 13 Q. B. 308. Though a lessee or mortgagor is usually to pay the expenses of the lease or mortgage, yet he is not *directly* liable for them to the attorney of the lessor, or mortgagee, who prepared the instruments; *Rigley v. Daykin*, 2 Y. & J. 83; but slight evidence is sufficient to show direct liability, as that the attorney received instructions from the lessee, and was desired by him to send the bill of costs to him; *Smith v. Clegg*, 27 L. J. (Ex.) 300; *Webb v. Rhodes*, 3 N. C. 732. As to the liability of the husband for the costs of preparing a marriage settlement, see *Helps v. Clayton*, 31 L. J. (C. P.) 1.

[*Stat. 6 & 7 Vict. c. 73.*] The last act which requires delivery of a bill before action is 6 & 7 Vict. c. 73. By sect. 37 of that act, no attorney or solicitor, nor any executor, &c., shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney, &c., until the expiration of one [calendar] month after such attorney shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, &c., which bill shall either be *subscribed* by the attorney or by any of the partners, with his own name or with the name or style of the partnership, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill. Provided that it shall not be necessary in the first instance for such attorney to prove the contents of the bill delivered, sent, or left; but it shall be sufficient to prove that a bill, subscribed or enclosed as aforesaid, was so delivered, sent, or left; but nevertheless it shall be competent for the other party to show that the bill so delivered, &c., was not such a bill as constituted a *bond fide* compliance with this act.

Sect. 2 prohibits any person from acting in any way as attorney or solicitor unless duly admitted, enrolled, and qualified.

By sect. 26 no attorney or solicitor practising in any of the courts mentioned in the act without a stamped certificate shall maintain an action for any fee, reward, or disbursement for any business done by him as attorney or solicitor as aforesaid, whilst he shall have been without a certificate.

By sect. 31 no attorney or solicitor shall prosecute or defend suits, in his own or another's name, whilst in prison, nor sue for fees, rewards, or disbursements in respect of any business done by him whilst such prisoner.

The case of bills, for business in the House of Lords and Commons respectively, is provided for by 10 & 11 Vict. c. 69, and 12 & 13 Vict. c. 78.

The 6 & 7 Vict. c. 73, repeals 2 Geo. 2, c. 23, on which many cases have been decided, and the present act is expressed in language in general sufficiently different to make most of them inapplicable to it.

Those decisions only are here retained which, from the similarity of the language used, are not manifestly useless.

One distinction between this act and the former seems to be, that the power of taxing bills now extends to bills for *any business* done by an attorney or solicitor. It is no longer confined to business "at law or in equity," that is, to proceedings taken in a court, and the only qualification is one evidently implied, though not expressed, viz., that it should be done *as attorney at law or solicitor*. In all such cases a bill must be delivered, sent, or left in the manner required by sect. 37. See *Smith v. Dimes*, 4 *Ex.* 32, 40; 19 *L. J. (Ex.)* 60, *per Cur.* It has, however, been held that sect. 26 only disables an uncertificated attorney from suing for fees in respect of business done by him in some court referred to in the act; *Richards v. Suffield*, 2 *Ex.* 616; *Greene v. Reece*, 8 *C. B.* 88.

By 12 Geo. 2, c. 13, s. 6, an attorney might sue another attorney for agency business, without delivering any bill; but this act is repealed, and the present act contains no such exception. It also requires assignees and personal representatives of attorneys, &c., to deliver bills. In some cases (as *In re Gedye*, 2 *Dowl. & L.* 915, and *In re Simons*, 3 *Dowl. & L.* 156), it had been held that agency business was virtually excepted out of the 6 & 7 Vict. c. 73. But in *Billing v. Coppock*, 1 *Ex.* 14, where an attorney employed another attorney to defend an indictment, the bill delivered by the latter to the former was held taxable; and it seems to follow that the delivery of a bill is obligatory. And in the later case of *Smith v. Dimes*, 4 *Ex.* 32, 19 *L. J. (Ex.)* 60, the Court of Exchequer, after time taken for consideration, has again decided that agency business is subject to taxation. The cases on the effect of including taxable and untaxable items in the same bill are no longer retained, both because all business seems to be now taxable, and because many of the old distinctions were founded on no clear principle, and are not likely to govern the construction of the existing act.

An agreement entered into by a client with his attorney to pay him at a certain special rate for business to be done, is not binding, or, at all events, is not conclusive, upon the client; *Drax v. Scroope*, 2 *B. & Ad.* 581. Such an agreement is void, at least to the extent that the attorney cannot recover on it a larger sum than the master would allow on taxation; and therefore a bill, in which a gross sum is charged by the attorney as per agreement, without giving specific items, so as to enable the master to tax them, is not a compliance with the 6 & 7 Vict. c. 73, s. 37; *Philby v. Hazle*, 29 *L. J. (C. P.)* 370; 8 *C. B., N. S.* 647. An attorney, employed as clerk to a public board at a fixed salary, can recover his salary, although part of the work be done as an attorney, without having delivered a bill of such part; *Bush v. Martin*, 33 *L. J. (Ex.)* 17; 2 *H. & C.* 311.

An attorney of one court cannot practise in another court without signing the roll (s. 27), and he cannot recover his fees; *Latham v. Hyde*, 1 *C. & M.* 128; *Vincent v. Holt*, 4 *Taunt.* 452. So in an action by several partners, attorneys, for business done in a local court, it appearing that only one of the plaintiffs was an attorney of that court, it was held that they could not jointly recover; *Arden v. Tucker*, 1 *Mood. & Rob.* 191.

As to setting off an attorney's bill, see *post*, *tit. Defences—Set-off*.

An attorney's bill cannot be recovered on an account stated without proof of the delivery of the bill, though the amount has been ad-

mitted; *Eicke v. Nokes*, 1 Mood. & Rob. 359; *Brooks v. Bockett*, 9 Q. B. 847. But he may recover on a promissory note given for the amount; *Jefferys v. Evans*, 14 M. & W. 210.

Delivery of the bill, how and to whom.] Where the non-delivery of a signed bill is pleaded, plaintiff must prove that the bill was not only delivered, but left with the defendant for examination; *Brooks v. Mason*, 1 H. Bl. 290. Showing and explaining the bill without a regular delivery is not sufficient; *Crowder v. Shee*, 1 Camp. 437. It has been held not sufficient to prove that the bill was delivered at a particular place not shown to be the defendant's abode, and that the defendant afterwards delivered it to his attorney's clerk; *Eicke v. Nokes*, Mood. & M. 303; unless it appears that the defendant had it in his possession a month before action; *per Alderson, B.*, *Egginton v. Cumberledge*, 1 Ex. 271; in which case a delivery of a bill by a local attorney to the general attorney of a company, who submitted it to the provisional committee, one of whom present was the defendant, a month before action, was held sufficient; and the decision of the Exchequer Chamber is to the same effect, in *Phipps v. Daubney*, 16 Q. B. 514; 20 L. J. (Q. B.) 273. A delivery at the office of a public company, or to a person representing it, would be sufficient; but a delivery to one provisional committee-man at his private place of business is not sufficient alone as against a co-committee-man; *Edwards v. Lawless*, 6 C. B. 329; 17 L. J. (C. P.) 293; but if two be shown to be joint contractors, the delivery to one is good as against the other; *Mant v. Smith*, 4 H. & N. 324; 28 L. J. (Ex.) 234. See also *Blandy v. De Burgh*, 6 C. B. 623; 18 L. J. (C. P.) 2.

The delivery of the bill to the attorney of the party has been held good, if he himself afterward attend the taxation; *Warren v. Cunningham*, Gow. 71; *Vincent v. Slaymaker*, 12 East, 372. So a delivery to one of the retaining persons, who has been authorised to act for the others, is a delivery to all; *Finchett v. How*, 2 Camp. 277. Thus where an attorney had been retained jointly by several persons to defend several suits against each, in the subject-matter of which they had a common interest, it was held that the delivery of a bill to one was sufficient to enable the plaintiff to maintain a joint action against all; *Oxenham v. Lemon*, 2 D. & R. 461. Some of the above decisions were under the repealed statute, but they seem to be still applicable, as the wording of the two is very similar; for by the 2 Geo. 2, c. 23, s. 23, the bill is to be "delivered to the party to be charged therewith, or left for him at his dwelling-house or last place of abode."

Delivery of the bill, how proved.] An indorsement on a bill in the handwriting of the plaintiff's clerk, since dead, proved to have existed at the time of the date, stating that a copy was on such a day delivered to the defendant, together with proof that it was the clerk's duty to deliver the bill, and that such an indorsement was usually made in the course of business, will be sufficient *prima facie* evidence of the due delivery; *Champneys v. Peck*, 1 Stark. 404. Proof that the bill was inclosed in a letter and put into a box in the attorney's office from which the postman invariably took letters every day, is sufficient evidence of sending; *Skilbeck v. Garbett*, 7 Q. B. 846.

Delivery of the bill, at what time.] The bill must be proved to

have been delivered one *calendar* month before the commencement of the action; ss. 37 & 48; see *Ryals v. The Queen*, 11 Q. B. 781. The month must be reckoned exclusively of the days on which the bill is delivered and action brought; *Bynt v. Heslop*, 8 Ad. & E. 577; (under the 2 Geo. 2, c. 23, where the words are: "until the expiration of one month or more after," &c.); and see *Freeman v. Read*, 4 B. & S. 174. The Nisi Prius Record, though made up of the term in which issue was joined, was formerly sufficient *prima facie* evidence, when made up of a term commencing more than one month after the delivery of the bill, that the action had not been brought too soon; *Webb v. Pritchett*, 1 B. & P. 263; and made it incumbent on the defendant to prove, if the fact was so, that the action was commenced too soon, by producing a copy of the writ; *Rhodes v. Gibbs*, 5 Esp. 163; or the declaration delivered by the plaintiff; *Harris v. Orme*, 2 Camp. 497 (n). But now, by the Uniformity of Process Act (2 Wm. 4, c. 39, s. 11), the issuing of the writ of summons is for all purposes the commencement of the suit; *Alston v. Underhill*, 1 C. & M. 492; and the date of the issuing appears on the Nisi Prius Record.

Proof, and form of the bill.] * The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered; *Anderson v. May*, 2 B. & P. 237; *Colling v. Treweek*, 6 B. & C. 394. But it is not now necessary in the first instance for the plaintiff to prove the contents; it is enough to prove that a bill of fees, &c., subscribed or inclosed in a signed letter, was duly delivered, and the defendant may show that it was not a *bonâ fide* compliance with the act; see 6 & 7 Viet. c. 73, s. 37, *supra*, p. 266. The act does not prescribe any form of making out the bill, as 2 Geo. 2, c. 23, s. 23, did; see *Reynolds v. Caswell*, 4 Taunt. 193, on the old act. And this has not been sufficiently attended to in cases decided since the last act, in which the courts have been influenced too much by the strict requirements of the old one. Thus it has been held that the bill must still show in what court the business was done; *Engleheart v. Moore*, 15 M. & W. 548; but it is sufficient if the court appear by reasonable inference; *Martindale v. Falkner*, 2 C. B. 706; *Sargent v. Gannon*, 7 C. B. 742. It has, however, been decided that, the authority to tax and the scale in all the superior courts of law being now the same, it is *prima facie* enough if it appears to be business done in any of those courts, and that the defendant ought to apply for a better bill, if it be *bonâ fide* necessary; *Cozens v. Graham*, 12 C. B. 398; 21 L. J. (C. P.) 206; *Cooke v. Gillard*, 1 E. & B. 26; 22 L. J. (Q. B.) 90. And the cases *contrâ*, decided shortly after the passing of the present act, must not be relied on. It has been held, too, that the bill must contain the name of the cause, if the business arises in one; *Martindale v. Falkner*, 2 C. B. 706. But if the cause is sufficiently described to be understood, the technical title of it need not appear; *Anderson v. Boynton*, 13 Q. B. 308. The bill must show, either by the heading, or by the accompanying letter, or envelope, the party charged; *Taylor v. Hodgson*, 3 Dowl. & L. 115; *Lucas v. Roberts*, 24 L. J. (Ex.) 227; 11 Ex. 41; *Gridley v. Austen*, 16 Q. B. 504; *Champ v. Stokes*, 30 L. J. (Ex.) 242; 6 H. & N. 683. A mistake in the date of the items, which does not mislead, will not vitiate the bill; *Williams v. Barber*, 4 Taunt. 806. So a mistake in the name of the parties to the cause at the head of the bill, if not of a nature to mislead, or if the right name appears

indorsed; *Sargent v. Gannon*, 7 C. B. 742. If part of the business was done in a court named in the bill, and part in an unnamed one, it has been considered that the plaintiff cannot recover any part; *Ivimey v. Marks*, 16 M. & W. 843; *Dimes v. Wright*, 8 C. B. 831; 19 L. J. (C. P.) 137. But this is the rule only where there is not enough in the bill to show on what scale the costs should be taxed; and where a part of the business appeared to have been done in an unnamed superior court of law, but the bulk of it in a named court of law at Westminster, this was held enough; *Keene v. Ward*, 13 Q. B. 515. The reasoning of the Court of Queen's Bench, in *Cooke v. Gillard*, ante, p. 269, and *Keene v. Ward*, seems to impugn the doctrine of *Ivimey v. Marks*, and *Dimes v. Wright*, that a bill insufficient for part is bad altogether; which is, however, supported in *Pigot v. Cadman*, 1 H. & N. 837; 26 L. J. (Ex.) 134. On the other hand, *Keene v. Ward*, and *Cooke v. Gillard* are adhered to, and the cases in the Exchequer dissented from, in *Haigh v. Ousey*, 7 E. & B. 578; 26 L. J. (Q. B.) 217. And the Court of Queen's Bench point out that the Court of Common Pleas had expressly decided in *Waller v. Lacy*, 1 M. & G. 54, that an attorney may recover for such of the items of his bill as are sufficiently described, although, as to others, the bill is insufficient.

Defence.

Non-delivery of Bill.] The defence of non-delivery of a bill is only available under a special plea; *Lane v. Glenny*, 7 Ad. & E. 83. The plea need only negative every mode of delivery in the terms of the 37th section; *Tate v. Hitchins*, 7 C. B. 875; 18 L. J. (C. P.) 256; and if the plaintiff reply that the bill was delivered to the defendant, evidence that the bill was delivered to a servant of the defendant at his house, will support this issue; *Macgregor v. Keily*, 3 Ex. 794; 18 L. J. (Ex.) 391.

Disputed charges.] Where a bill has been delivered containing taxable items (and almost all items are so now), it has been held, under the old act, that the defendant cannot object to the reasonableness of the charges at the trial; *Williams v. Frith*, 1 Doug. 198; *Anderson v. May*, 2 E. & P. 237; *Lec v. Wilson*, 2 Chit. Rep. 65. The reason seems to have been that the defendant might have had them taxed by more competent persons than a jury, and must therefore be taken to have acquiesced in them conclusively. But by the present act (section 37) it is only after a verdict or writ of inquiry, or the expiration of one year from the delivery of the bill, that the reference to taxation at the request of the party chargeable is not grantable of course; and in point of practice a verdict is almost always taken subject, as to the amount, to taxation by the proper officer.

The delivery of a former bill is conclusive against an increase of charge on any of the same items contained in a subsequent bill for the same business, and strong presumptive evidence against any additional items; but real errors or omissions are to be allowed for; *Loveridge v. Botham*, 1 B. & P. 49. Where the bill has been taxed previously to the signed bill being delivered, the master's *allocatur* is not conclusive against the plaintiff on a plea of *nunquam indebitatus*, but only strong evidence that no more is due; *Beck v. Cleaver*, 9

Dowl. 111; there the difference of amount depended on when the retainer of the plaintiff was revoked. It is a good defence that the plaintiff undertook the cause *gratis*; and the declaration of his clerk to that effect, when he attended to tax costs, is evidence for the defendant; *Ashford v. Price*, 3 *Stark.* 185. To an action for work done as an attorney, on a plea of payment of money into court, and *nunquam indeb.* to the residue, the defendant may show that the plaintiff had agreed, on a certain event (which had occurred), that the work should be done for costs out of pocket, which did not exceed the sum paid in; *Jones v. Reade*, 5 *Ad. & E.* 529. If an attorney undertakes to charge a client only costs out of pocket "in case the damages or costs should not be recoverable," and the client recovers, but the defendant becomes insolvent, the attorney is not limited to costs out of pocket; *In re Stretton*, 14 *M. & W.* 806. The plaintiff is *prima facie* entitled to be paid for professional services; but where the defendant proves facts which are evidence of gratuitous services, the jury ought not to be told "to find for the plaintiff unless the defendant has established his defence," but should be asked whether, taking all the evidence together, the plaintiff has proved his title to payment; for the onus of proof lies on him, and if the matter is made *doubtful* in their minds by the evidence, they ought to find for the defendant; *Hingston v. Kelly*, 18 *L. J. (Ex.)* 360.

Negligence or misconduct of plaintiff.] The plaintiff's negligence in the conduct of the business cannot be set up as a defence, if it has not been such as to deprive the defendant of all benefit; *Templer v. McLachlan*, 2 *N. R.* 136; but where such has been the case, as where the defendant's appeal against the removal of a pauper wholly failed from the plaintiff going to the wrong sessions and wrongly signing the notices himself, the plaintiff cannot recover; *Huntley v. Bulwer*, 6 *N. C.* 111; and if an attorney conducting a suit commits an act of negligence by which all the previous steps become useless in the result, he can recover for no part of the business; *Bracey v. Carter*, 12 *Ad. & E.* 373. Such failure of consideration is evidence on the general issue, and is for the jury to decide; *S. C.*; *Hill v. Allen*, 2 *M. & W.* 283. So where an indictment for perjury failed for misnomer of the commissioner before whom it was committed, and the jury found gross negligence, the plaintiff cannot recover; *Lewis v. Samuel*, 8 *Q. B.* 685; even though the client was only to pay costs out of pocket, which was all the plaintiff sought to recover; *S. C.* If an attorney sues in a court which is without adequate powers to examine material witnesses out of the jurisdiction, and the suit fails accordingly, he cannot recover his costs of the suit; but he may recover the costs of letters before suit demanding the debt; *Cox v. Leach*, 1 *C. B., N. S.*, 617; 26 *L. J. (C. P.)* 125. So where an attorney commences an action on two foreign bills, without having first ascertained whether they had been specially indorsed to his client, which the attorney knew was necessary by the foreign law, and the action is discontinued for want of such indorsement, he can recover no costs; *Long v. Orsi*, 18 *C. B.* 610; 26 *L. J. (C. P.)* 127. If an attorney, through inadvertence or inexperience, does useless work, he cannot recover anything for it; *Hill v. Featherstonhaugh*, 7 *Bing.* 569. And entire items for useless work may be expunged; *Shaw v. Arden*, 9 *Bing.* 287. But if there are other causes conducing to the loss of the benefit besides the plaintiff's negligence, the negligence is no

defence; *Dax v. Ward*, 1 Stark. 409. It is no defence to an action for business done in defending a suit, that the plaintiff was instructed to put in a plea for delay, which he neglected to do; *Johnson v. Alston*, 1 Camp. 176. Nor that the plaintiff refused to go on with a suit in chancery, if the defendant did not supply him with money; *Rowson v. Earle*, Mood. & M. 538; for though an attorney cannot suddenly and without notice abandon a cause, yet if he gives reasonable notice, he is at liberty to discontinue the conduct of it, on a refusal by the client to supply him with money; and he may recover for the work done; *Vansandau v. Browne*, 9 Bing. 402. Where an attorney prepares for a client a document which turns out to be illegal, but with regard to the legality of which there was reasonable doubt, he is entitled to recover for preparing it; *Potts v. Sparrow*, 6 C. & P. 749. The illegality must at all events be pleaded; *S. C.* 1 N. C. 594; unless it makes the work done wholly useless; *semb. Tabram v. Warren*, 1 Tyr. & G. 153; *Roberts v. Barber*, Chitty Preced. by Pearson, p. 225. So the misinterpretation of a rule or order (such as a standing order of the House of Lords, by an attorney acting as a parliamentary agent) the construction of which is doubtful, is not such culpable negligence as to disentitle the plaintiff to recover for his work, although in consequence of the mistake the bill is withdrawn; *Bulmer v. Gilman*, 4 M. & G. 108. It is a good defence, under the general plea, that the plaintiff paid no attention to the defendant's case, but resided at a distance from the place where his business was carried on, and that, in fact, it was transacted there by another person employed by the plaintiff; *Taylor v. Glassbrook*, 3 Stark. 75; *Hopkinson v. Smith*, 1 Bing. 13; and this was ruled without reference to the success or miscarriage of the business done.

Want of certificate, admission, &c.] The defendant may put the plaintiff to prove, under a special plea, that the plaintiff had a certificate, see s. 26, *supra* p. 266; or was duly admitted; *Hill v. Sydney*, 7 Ad. & E. 956. By the 23 & 24 Vict. c. 127, s. 22, the Law List, purporting to be published by the authority of the Commissioners of the Inland Revenue, and to contain the names of the attorneys who have obtained stamped certificates for the current year (from 16th November or any later day to 15th November in the next year), on or before the January in the same year, shall, until the contrary be made to appear, be evidence in all courts, &c., that the persons named in it as such attorneys are so certificated; and the absence of the name of any person from the List shall be *prima facie* evidence that he is not so qualified to practise as an attorney under a certificate for the current year; but in the latter case an extract from the Roll of Attorneys under the hand of the registrar for the time being (or of the secretary of the Law Society, while that society acts as registrar) shall be evidence of the facts appearing in the extract. Before 6 & 7 Vict. c. 73, an attorney might maintain an action for business done at a time when he was uncertificated, provided a certificate were taken out by him before the end of a year after the expiration of the period to which the prior certificate extended; *Bowler v. Brown*, 2 Ad. & E. 116; but by sect. 26 of that act he cannot maintain an action for any fees, &c. in respect of any business done in any action carried on or defended while he was uncertificated; but this section only applies to business done in the courts mentioned in the act, and not to business done out of court; *Richards v. Suffield*, 17 L. J. (Ex.) 362; 2 Ex. 616; *ante*, p. 267.

Agency business.] Where one attorney does business for another, the attorney who does the business universally gives credit to the attorney who employs him, and not to the client for whose benefit it is done; and this can be shown on the general issue. If the attorney in such case intends not to be personally responsible, it is his duty to give express notice that the business is to be done on the credit of the client; *per cur.*, *Scrace v. Whittington*, 2 B. & C. 13. But such notice, though it may protect the attorney from liability, will not necessarily make the client liable; see *Robbins v. Fennell*, 11 Q. B. 256.

Statute of Limitations.] The contract to conduct a suit is entire, and can only be determined on reasonable notice that the attorney will not proceed without payment or advances from the client; and where the suit ended within six years, the Statute of Limitations will not bar the demand for any part of the business; *Harris v. Osbourn*, 2 C. & M. 629; *Martindale v. Falkner*, 2 C. B. 706; for the attorney cannot in general sue for his costs until the suit is ended or his client dead, and the statute does not run till the happening of one of those events; *Whithead v. Lord*, 7 Ex. 691; 21 L. J. (Ex.) 239.

ACTION AGAINST ATTORNEY FOR NEGLIGENCE.

What amounts to actionable negligence.] An error of judgment on a point of law, open to reasonable doubt, is not sufficient; *Kemp v. Burt*, 4 B. & Ad. 424; there must be gross ignorance, or gross negligence in the performance of his professional duties; *Purres v. Landell*, 12 Cl. & Fin. 91. The attorney is bound to bring a fair amount of skill, care, and knowledge to the performance of his duty, and this will be a question of fact for the jury under the direction of the judge, who will explain the nature of the duty, and the degree of negligence which makes him responsible; *Caldwell v. Hunter*, 10 Q. B. 82.

The omission to bring a writ (issued to save the Statute of Limitations) to the office to be returned *non est inventus* and entered of record, within one month after its expiration, as required by the 2 & 3 Will. 4, c. 39, s. 10, is actionable negligence; *Hunter v. Caldwell*, 10 Q. B. 69, 83. Where a mortgage was prepared under the defendant's advice, and the solvency of the mortgagor was questionable to the knowledge of the attorney, it was held his duty to search at the Insolvent Debtors Court; and if the language of the defendant shows that he considered the search expedient, this is evidence of his suspicions; *Cooper v. Stephenson*, 21 L. J. (Q. B.) 292. But the court declined to say whether or not searches of this kind are necessarily, and in all cases, essential; *Ibid.* It may not be part of the duty of an attorney to know the legal operation of conveyances, but it is his duty to take care not to draw wrong conclusions from deeds before him, but to lay them before counsel, or draw the conclusions at his own peril; and therefore where an attorney acted on the advice of counsel to whom he had mis-stated the legal effect of certain deeds which did not accompany the case, this was held evidence for the jury of negligence for which he was responsible; *Ireson v. Pearman*, 3 B. & C. 799.

An attorney, instructed to take or to defend legal proceedings, is liable for failure by reason of his own culpable neglect; as where he was retained to proceed on a statute against an apprentice, and he proceeded under a wrong section of the statute as against a servant; *Hart v. Frame*, 6 Cl. & Fin. 193; or where the attorney and his witnesses were absent when a cause was called on; and such facts support a declaration for not instructing counsel, though the counsel had a brief and was present, but was obliged to withdraw the record; *Hawkins v. Harwood*, 4 Ex. 503; 19 L. J. (Ex.) 33.

Above are only a few of the instances in which the liability of an attorney for negligence has come before the courts. "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking and that *crassa negligentia*, or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, in general, that an attorney is liable for the consequence of ignorance or non-observance of the rules of practice of the court in which he sues; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or such as are usually intrusted to men in the higher branch of the profession of the law. . . . We lay no stress upon the fact that the attorney had consulted counsel; because we think his liability must depend upon the nature and description of the mistake or want of skill which has been shown; and he cannot shift from himself such responsibility by consulting another where the law would presume him to have the knowledge himself;" *per Tindal, C. J.*, delivering the judgment of the court, in *Godfrey v. Dalton*, 6 Bing. 467-9.

An attorney will be liable to an action, at least for nominal damages, for compromising an action against the express directions of his client, though the compromise be really for the benefit of the client; and under such circumstances it is no defence that the attorney acted under the advice of counsel retained to conduct the cause; *Fray v. Voules*, 1 E. & E. 839; 28 L. J. (Q. B.) 232; but in the absence of express directions to the contrary, an attorney retained to conduct a cause has power in the exercise of his discretion to enter into a compromise, if he does so reasonably, skilfully, and *bona fide*; *per Lord Campbell, C. J.*, *S. C. Chown v. Parrott*, 32 L. J. (C. P.) 197; 14 C. B., N. S. 74.

Defence.

The plea of non-assumpsit (*Aldis v. Gardner*, 1 C. & K. 564), or other general plea denying the retainer or employment for the purpose mentioned in the declaration, will be necessary to put the plaintiff to proof of such retainer or employment; and the breach of duty must be traversed; see *Pl. R.*, H. T. 1853, No. 6. As this is one of the actions referred to in sect. 74, of Common Law Procedure Act, 1852, which may be treated as founded on either contract or tort, it follows that Not Guilty will be generally a good plea to it: but its effect will not be the same as non-assumpsit. It will, it seems, only put in

issue the breach of duty, and not the introductory statement of the retainer; see *Pl. R., H. T.* 1853, No. 16.

Damages.] This action is maintainable, though the damages be only nominal; *Godefroy v. Jay*, 7 *Bing.* 413, adopting the rule in *Marzetti v. Williams*, 1 *B. & Ad.* 415; *Fray v. Voules*, *ante*, p. 274; and where the plaintiff shows that the attorney has been guilty of negligence, as by letting judgment go by default in an action which he was retained to defend for plaintiff, it is for the defendant (the attorney) to show that the plaintiff had no defence in that action, and not for the plaintiff to begin by showing he had a good defence, and so had been damaged by the judgment by default; *Godefroy v. Jay*, *supra*.

Statute of Limitations.] As the action can be maintained without showing special damage (*supra*) it follows that the statute of limitations runs from the breach of duty complained of; *Howell v. Young*, 5 *B. & C.* 259; and not from the first discovery of the default, *S. C.*; *Short v. McCarthy*, 3 *B. & A.* 626; nor from the occurrence of the consequential damage; *S. CC.*; *Smith v. For*, 6 *Hare*, 386; nor is the remedy kept alive by the defendant's admission of his responsibility within six years; *Short v. McCarthy*, *supra*.

ACTION BY SURGEONS, OR OTHER MEDICAL PRACTITIONERS.

The various statutes which relate to the qualifications of medical practitioners, and their capacity to sue, are superseded (though not repealed) by the Medical Act, 21 & 22 *Vict. c.* 90 (amended in a few particulars by the 22 *Vict. c.* 21, and the 23 *Vict. c.* 7).

This act provides for the formation of a general "medical register" of all persons qualified to practise in medicine or surgery; and (s. 31) a person so registered is entitled to practise medicine or surgery or both, according to his qualifications, in any part of the Queen's dominions, and to demand and recover in any court of law, with "full costs of suit," reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances, rendered or supplied to patients. By sect. 32, as amended by 23 *Vict. c.* 7, s. 3, after 1st January, 1861, no person shall be entitled to recover any charge in a court of law for medical or surgical advice and attendance, or for the performance of an operation, or for medicine which he shall have both supplied and prescribed, unless he shall prove at the trial that he is registered under this act.

By sect. 27, the Registrar of the General Council formed under the act shall yearly cause to be printed and published, under the direction of the council, a register of the names and residences of all persons entitled to be registered under it and appearing in it on the 1st January in each year with their medical titles, diplomas, and qualifications, &c.; and a copy of this "medical register" for the time being purporting to be so printed and published shall be evidence in all courts, and before all justices and others, that the persons there specified are registered according to the act; and the absence of the name of any person from such a copy shall be evidence, until the contrary appear, that he is not registered. (*In Pedgrift v. Chevallier*,

29 *L. J. (M. C.)* 225, 8 *C. B.*, *N. S.* 240, a question was raised as to whether the register produced was a compliance with the act, and admissible in evidence; but it being unnecessary, the Court expressed no decided opinion on the point). Provided that in the case of a name not in the copy of the register, a certified copy under the hand of the registrar of the General Council, or of any branch Council, of the entry of the name on the general or local register, shall be evidence of registration.

By sect. 55 the act does not extend to prejudice or affect the lawful business, trade, or occupation of chemist and druggist, and dentist, so far as the same extend to selling, compounding, or dispensing medicines. But if a chemist prescribes he must show registration, as sect. 55 exempts chemists only so far as selling, compounding, and dispensing medicine; see *Apothecaries' Co. v. Greenough*, 1 *Q. B.* 799.

The language of the present Medical Act (s. 32, *ante*, p. 275) resembles that of the Apothecaries' Act, 55 Geo. 3, c. 194, s. 21, under which it has been decided that proof of qualification is a condition precedent to recovery, and must be given, although there be no special plea relying upon the want of qualification. Proof of registration therefore lies on the plaintiff, though the plea only denies the debt; *Wagstaffe v. Sharpe*, 3 *M. & W.* 521; or a tender be pleaded as to part; *Shearwood v. Hay*, 5 *Ad. & E.* 383. The provisions above as to proof of registration are probably only cumulative, and plaintiff may prove it by production of a "local register," or, *ut sembl.*, by an examined copy, or by a copy certified as in the case of public books under 14 & 15 Vict. c. 99, s. 14; see *ante*, p. 72. As in the case of certificates under 55 Geo. 3, c. 194, the identity of the plaintiff and the person named in the register will probably be presumed; *Simpson v. Dismore*, 9 *M. & W.* 47. In *Thistleton v. Frewer*, 31 *L. J. (Ex.)* 230, it was held that the 32nd sect. did not apply to an action commenced before the 1st January, 1861, but tried after; nor does it apply to medical attendance, &c., given before the act passed; *Wright v. Greenroyd*, 1 *B. & S.* 758; 31 *L. J. (Q. B.)* 4. The register only shows registration down to the preceding January, but the plaintiff's continuance on the register will probably be presumed, in conformity with the ordinary presumption of things remaining in *statu quo*; *ante*, p. 33. It is sufficient if the plaintiff be registered at the time of trial, although after the attendance and even after action brought; *Turner v. Reynall*, 14 *C. B.*, *N. S.* 328; 32 *L. J. (C. P.)* 164; agreeing with the decision in the Irish Court of Exchequer, in *Huffield v. Mackenzie*, 10 *Ir. C. L. Rep.* 289. If two medical practitioners are in partnership, and one is duly registered, but the other not, they can jointly maintain an action for medical services by the firm; *per Erle, C. J.*, and Byles, J., in *Turner v. Reynall*, *supra*. Section 32 is not confined in its operation to actions against the patients themselves, but extends to a case where a third person has guaranteed payment for medical attendance, &c., or is primarily liable for it as supplied on his credit. So, a medical practitioner, engaged by another to attend his patients in his absence, cannot recover the price of his services without proof of registration; *De la Rosa v. Prieto*, 16 *C. B.*, *N. S.* 578; 33 *L. J. (C. P.)* 262; but *semble*, that an unregistered assistant may recover his salary from a registered practitioner; *per cur. S. C.* By sect. 46 of the act, the General Council may dispense with the provisions of the act,

or its own regulations, in favour of certain persons practising before the act passed. A resident physician or medical officer of a hospital solely for foreigners (not being a British subject) is not affected by the act if he has a foreign degree or diploma of M.D., and has passed such examination as entitles him to practise in his own country, and is in no other medical practice except as such resident officer; 22 Vict. c. 21, s. 6. Where the plaintiff sues the maker of a promissory note given to plaintiff for his medical attendance, in order to show consideration, plaintiff must prove registration; *Blogg v. Pinkers*, Ry. & Mood. 125 (under 55 Geo. 3, c. 194).

If the register specifies the department of practice in respect of which the plaintiff is registered as qualified to practise, questions may arise similar to those under the former acts, *e.g.*, as to whether a person registered as qualified to practise as a surgeon can recover for attendance as an apothecary or physician. See *Allison v. Haydon*, 4 Bing. 619 (in which it was held that a certificated surgeon could not recover for attending a patient in a fever, without a certificate from the Apothecaries' Company); and sects. 30 and 31, and Schedules; and Bramwell, B.'s, judgment in *Ellis v. Kelly*, 30 L. J. (M. C.) 37.

The superintendent of a station of a railway company cannot, as such, and without express authority, make the company liable for a surgeon's bill for attendance on a person injured by an accident on the railway; *Cox v. Midland Counties Railway*, 3 Ex. 268; 18 L. J. (Ex.) 65.

Defence.

If the defendant has received no benefit, in consequence of the plaintiff's want of skill, the latter cannot recover; *Kannen v. M'Mullen*, Peake N. P. 59; *Duffit v. James*, cited 7 East, 480. But the remuneration of a practitioner who has used due skill and diligence does not depend on his effecting a cure. In the case of a surgeon, if an operation which might have been useful has failed in the event, he is nevertheless entitled to charge; but if it could have been useful in no event, he has no claim; *per Alderson, J.*, in *Hill v. Featherstonhaugh*, 7 Bing. 574.

Physicians' Fees.

At common law, a physician could maintain no action for his fees; *Chorley v. Bolcot*, 4 T. R. 317; nor for travelling expenses; *Veitch v. Russell*, 3 Q. B. 928; unless there was a special contract proved by unambiguous evidence, and not by mere letters acknowledging a "debt," or an "account," in vague general terms; *S. C.*; *Attorney-General v. Royal College of Physicians*, *infra*; or unless he had rendered services as a surgeon; *Battersby v. Lawrence*, Car. & M. 277. But sect. 31 of the present Medical Act (*ante*, p. 275) gives a general right of action to all registered medical practitioners; and a physician, if registered, may now maintain an action for attendance since the passing of the act, without proof of any express contract or implied understanding with the patient that he should be paid; *Gibbon v. Budd*, 32 L. J. (Ex.) 182; 2 H. & C. 92. But by that section, any college of physicians in the United Kingdom may make a bye-law that their fellows or members shall not sue for their fees; and if they do, the bye-law may be pleaded in bar. It appears from the report of *Gibbon v. Budd*, *supra*, that the Royal College of Physi-

cians has passed a bye-law that no *Fellow* of the College shall be entitled to sue; but this does not include members. From the *Attorney-General v. The Royal College of Physicians*, 1 J. & H. 561, 30 L. J. (Ch.) 757, it appears that the College of Physicians can grant licences without restricting their licentiates from compounding and selling the medicine they prescribe.

ACTION FOR WAGES, AND WRONGFUL DISMISSAL.

In an action by a servant for his wages, the plaintiff must prove a hiring, of which service will be evidence, the length of time of service, and the amount of wages due.

An indefinite hiring in the case of servants, without mention of time, is presumably a hiring for a year; *Lilley v. Elwin*, 11 Q. B. 742; *Turner v. Robinson*, *infra*. The fact that the wages are payable monthly makes no difference. And if, during the year, the master dismisses his servant without cause, the latter is entitled, as damages, to his wages until the end of the year; *Beeston v. Collyer*, 4 Bing. 309; *Fawcett v. Cash*, 5 B. & Ad. 904. If the servant leaves his service during the year without good cause, he cannot recover any of the current wages; *Huttman v. Boulnois*, 2 C. & P. 510. So, if he is discharged for good cause during the year, either by his master or a magistrate's order; *Lilley v. Elwin*, *supra*; *Ridgway v. The Hungerford Market Company*, 3 Ad. & E. 171. Even though the master has recovered damages against him for the misconduct; *Turner v. Robinson*, 5 B. & Ad. 789. So if the servant die during the year; *Plymouth v. Throgmorton*, 1 Salk. 65. The rule that an indefinite hiring is to be taken as a yearly one, is not a rule of law; but the jury are to say what the terms of hiring were, judging from the circumstances of the case, including evidence, if any, of usage; thus, on an indefinite hiring at certain weekly wages, the jury may infer that the hiring is weekly; *Baxter v. Nurse*, 6 M. & G. 935. Where the plaintiff was engaged by the defendant as a clerk at a yearly salary of 150*l.*, and was paid his wages weekly, and accepted a month's notice as determining his service; and afterwards he re-entered the defendant's service at a salary of 250*l.*, no other terms being expressly agreed upon, and he was paid weekly a sum equal to a week's salary; it was held properly left to the jury to say, whether the last hiring was on the same terms as the first, and well determined by a month's notice; *Fairman v. Oakford*, 29 L. J. (Ex.) 459; 5 H. & N. 635.

With regard to a domestic servant, there is a common understanding (except where a different custom is shown to prevail), though the contract is for a year, that it may be dissolved by either party on giving a month's warning or a month's wages; *Beeston v. Collyer*, 4 Bing. 313; *Fawcett v. Cash*, 5 B. & Ad. 908; *Noulan v. Ablett*, 2 C. M. & R. 54. And this by custom of trade may be engrafted on a general hiring of an agent, though the contract be in writing, if the terms are not inconsistent with the custom; and they are not inconsistent where the hiring was at a yearly salary, stipulating for a gratuity at the end of a year on approval; *Parker v. Ibbetson*, 4 C. B., N. S. 346; 27 L. J. (C. P.) 236. Whether the contract excludes the custom, is for the judge and not for the jury; *S.C.* In such case, if the master without reasonable cause turns the servant away without notice, the latter would be enabled to recover a month's wages

beyond the arrears; *Robinson v. Hindman*, 3 *Esp.* 235: which must be sued for on a special count, and not on one for work and labour; *Fewings v. Tisdal*, 1 *Ex.* 295; 17 *L. J. (Ex.)* 18; recognising *Smith v. Hayward*, 7 *Ad. & E.* 544, and dissenting from *Eardly v. Price*, 2 *N. R.* 333. On this special count, the servant can only recover the month's wages, and not the wages down to the dismissal; *Hartley v. Harman*, 11 *Ad. & E.* 798.

A governess has been held not a menial servant within the above rule; *Todd v. Kerrich*, or *Kellage*, 8 *Ex.* 151; 22 *L. J. (Ex.)* 1; but a head gardener is such a servant, though living in a separate house in his master's grounds; *Nowlan v. Ablett*, 2 *C. M. & R.* 54; *Johnson v. Blenkinsop*, 5 *Jurist*, 870 (*Q. B.*); so a huntsman is a menial servant, and liable to be dismissed at a month's warning; although he be hired at yearly wages with perquisites that cannot be fully realised till the end of the year; *Nicoll v. Greaves*, 33 *L. J. (C. P.)* 259; 17 *C. B., N. S.* 27.

It has never been decided whether, on a hiring for a year without any express contract as to notice, if the service continues beyond the first year, either party can determine the contract at the end of the current year without notice, or whether a reasonable notice ought to be given previously; see *Beeston v. Colyer*, 4 *Bing.* 309. An agreement between master and servant, "to be binding between the parties for twelve months certain from the date, and to continue from time to time until three months' notice be given by either party," may be determined by three months' notice expiring at the end of the first year; *Brown v. Symons*, 29 *L. J. (C. P.)* 251; 8 *C. B., N. S.* 208. Where wages are payable quarterly, and a clerk is tortiously discharged in the middle of the quarter, he has been allowed, on a tender of his services, to recover for the whole quarter on the general *indebitatus* count; *Gandell v. Pontigny*, 4 *Camp.* 375; 1 *Stark.* 198. But this is doubtful law; see *Smith v. Hayward*, *supra*; *Goodman v. Pocock*, 15 *Q. B.* 576. He may, at all events, recover, *pro ratâ*, on the general count; but for further damages he must, it seems, declare specially on the contract, and will then be entitled to recover for the broken quarter, and such other damages as he may show; *S. C.* If the master has renounced and dispensed with the plaintiff's services before he has entered on the service, and has refused to abide by his contract, the servant may bring an action on the contract before the time for its commencement has arrived; *Hochster v. De la Tour*, 2 *E. & B.* 678; 22 *L. J. (Q. B.)* 455. See 2 *Sm. L. C.* 1, notes to *Cutter v. Powell*. An offer by the plaintiff to serve is unnecessary; readiness and willingness to serve, which implies ability, is sufficient; *Wallis v. Warren*, 4 *Ex.* 361; 18 *L. J. (Ex.)* 449.

If a servant misconduct himself, the master may turn him away without any warning; *Spain v. Arnott*, 2 *Stark.* 256. A refusal to obey a lawful order (as to remain at home at a certain time, or to do a proper day's harvest work, &c.) is a good ground of dismissal; *S. C.*; *Lilley v. Elwin*, 11 *Q. B.* 742; however reasonable or urgent the excuse for the servant's wilful absence may be; *Turner v. Mason*, 14 *M. & W.* 112. If a clerk wrongfully claims to be a partner, the master may dismiss him forthwith as clerk; *Amor v. Fearon*, 9 *Ad. & E.* 548. So where a clerk disobeys a direction to apply remittances in a particular way; *Smith v. Thompson*, 9 *C. B.* 44; 18 *L. J. (C. P.)* 314; or where a servant embezzles, though his wages due exceed what he has embezzled; *Brown v. Croft*, 1 *Chitty, Prac. of the Law*, 82. The master is not bound to assign the cause at the time of the dis-

missal; and where good ground for dismissal existed at the time, it is immaterial whether or not it was the real cause; *Ridgway v. Hungerford Market Company*, 3 *Ad. & E.* 171. But where, in an action for dismissing the plaintiff, the defendant alleged a dismissal by reason of certain acts of the plaintiff which had come to his knowledge, on a general traverse of the plea, the defendant was held bound to show that he knew; *Mercer v. Whall*, 5 *Q. B.* 447. This however turned on the form of plea; and it is not generally necessary to show more than good ground of dismissal; and, even when the plea alleges a dismissal "by reason of the premises," the general replication puts in issue only the misconduct of the plaintiff and not the plaintiff's motive or his knowledge of the misconduct; *Spotswood v. Burrow*, 5 *Ex.* 110. The bankruptcy of the master is not a dissolution of the contract of hiring; *Thomas v. Williams*, 1 *Ad. & E.* 685. Dissolution of the partnership of the employers is not necessarily a breach of the contract of the firm to employ the plaintiff; at all events, if plaintiff entered into the service of the altered firm, this is evidence in proof of a plea of voluntary exoneration from the first contract before breach; *Hobson v. Cwoley*, 27 *L. J. (Ex.)* 205. If there be an agreement for service between the plaintiff and A. & B. then in partnership, the death of one of the partners puts an end to the contract, though the service was for a time certain; and no action can be maintained against the survivor for not employing the plaintiff; *Tusker v. Shepherd*, 6 *H. & N.* 575; 30 *L. J. (Ex.)* 207. But a voluntary parting with the business is a breach of the contract to employ; *Stirling v. Maitland*, 34 *L. J. (Q. B.)* 1. Incapacity of the servant from sickness is not a determination of the contract, nor will it justify dismissal without regular notice; *semble, R. v. Winterset, Cald.* 298. So where a person entered into service as a brewer for a term certain at weekly wages, and became disabled by illness for several months, but afterwards returned to work, and was employed by the defendant as before,—held that this inability did not suspend the right to wages; nor did such involuntary disability negative the allegation of readiness and willingness to serve; *Cuckson v. Stones*, 28 *L. J. (Q. B.)* 25; 1 *E. & E.* 248. But permanent disability, such as paralysis, &c., would have justified putting an end to the contract, *per curiam*; *S. C.* Total inability to perform his duty will not prevent a servant from recovering wages, for the time he actually served, where the agreement is not for any specific term; *Bayley v. Rimmeli*, 1 *M. & W.* 506. A seaman disabled in the course of his duty is entitled to wages for the whole voyage; *Chandler v. Grieves*, 2 *H. Bl.* 606, n. Inability to perform his duty by reason of incompetency or ignorance will justify the dismissal of an artificer notwithstanding a contract for a term, where he was hired on the express representation that he had the requisite skill; *Harmer v. Cornelius*, 5 *C. B., N. S.* 236; 28 *L. J. (C. P.)* 85; and where a person is employed to do something requiring skill, there is an implied warranty that he possesses the requisite skill; *per curiam, S. C.* Where the contract of yearly service is determined by consent in the middle of a quarter, there is no necessarily implied contract to pay *pro rata*; but a jury may infer such an agreement from circumstances; *Lamburn v. Cruden*, 2 *M. & G.* 253; *Thomas v. Williams*, 1 *Ad. & E.* 685. As to agreements for service within the 4th sec. of the Statute of Frauds, see *post*, p. 283.

Damages.] A dismissed servant may (and, if he can, ought to)

enter into another service; *per curiam* in *Hochster v. De la Tour*, 2 E. & B. 690; 22 L. J. (Q. B.) 458.

Defence.

Where the declaration is special, dismissal for misconduct must be specially pleaded; but not where the count is on an *indebitatus assumpsit*; for there the plaintiff is put to show an executed contract of service so as to entitle him to the wages; *Lilley v. Elwin*, 11 Q. B. 742. Where there were two pleas; 1, alleging a dismissal by the defendant for misconduct; 2, alleging misconduct and a consequent discharge by a magistrate under 4 Geo. 4, c. 34, at the instance of defendant; it was held that the replication *de injuriâ* put in issue the misconduct as well as the discharge by the magistrate; and that the defendant was entitled to a verdict on the first plea on proof of the facts alleged in the second; for the discharge being on the complaint of the master was for this purpose the act of the master; *S. C.* A plea, traversing the *wrongful* dismissal alleged in the declaration, seems to have been held not to put in issue the wrongfulness, but only the dismissal in fact; *Powell v. Bradbury*, 7 C. B. 201; 18 L. J. (C. P.) 116; but the traverse being special, the correctness of this decision has been questioned; *Lush v. Russell*, 5 Ex. 203; 19 L. J. (Ex.) 244; in which case, to a declaration for wrongfully dismissing the plaintiff *without reasonable cause*, the defendant pleaded disobedience of lawful orders, without this, that he wrongfully dismissed the plaintiff without reasonable cause, and it was held that although the want of reasonable cause was unnecessarily alleged, still having been traversed and an issue expressly taken upon it, the reasonableness of the grounds of the dismissal was put in issue.

ACTION FOR NOT ACCEPTING GOODS.

On a contract of sale of goods and chattels, the obligations of the seller are—1. To deliver, or preserve for delivery, to the buyer; 2. To perform warranties express or implied; 3. Neither wilfully to misrepresent nor fraudulently to conceal anything relating to the thing sold. The obligations of the buyer are—1. To accept the article sold; and 2. To pay the price. The precise time of the change and vesting of the property, and the risk of loss (*periculum rei venditæ*) are also questions incidental to this contract.

Though the price to be paid may in part consist of an article to be given in exchange, the entire contract is in substance one of sale, and (except as to the form of declaring upon it) may be so treated; *Bach v. Owen*, 5 T. R. 409; *Pothier, Contrat de Vente*, par. 30. But a mere exchange cannot be treated as a sale; *Harrison v. Luke*, 14 M. & W. 139. The subject of warranties has been already under consideration, *ante*, pp. 250, *et seqq.* That of misrepresentation and fraud will be found under the head of *Fraud* as a defence to actions on contracts, and under that of *Action for Deceit, post.* The remaining obligations, and the evidence relating to them, are the subject of this and the next following heads.

At common law, and independently of the Statute of Frauds, a sale of personal property is good, though the bargain be oral; and Kent (2 *Comm.* 492) says, that when the terms are agreed upon and bargain struck, and everything to be done by the seller is complete, "the contract becomes absolute without payment or delivery, and the property and risk of accident vest in the buyer." Blackstone lays down the common law rather differently (2 *Comm.* 447-8). He says that—if the vendor names the price and the vendee agrees to give it, the bargain is struck, and neither is at liberty to be off, provided immediate possession be tendered; but if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods be delivered by way of earnest, the property is absolutely bound by it, and the vendee may recover the goods and the vendor the price.—An examination of the authorities supports the statement of Blackstone; see *Shep. Touchst.* 224-5; the cases cited, *per cur.*, in *Thorpe v. Thorpe*, 1 *Lutw.* 252; the old authorities in 1 *Reeves, Eng. L.* 166; 3 *Id.* 372-4; *Noy's Maxims*, 87; *Bach v. Owen*, 5 *T. R.* 409, 410. It is observable, however, that the earlier dicta chiefly relate to simple oral sales for ready money, which suppose immediate performance on both sides. In such cases, neglect to perform on one side releases the other. Several cases in *Brooke's Ab.* (cited in 5 *Vin. tit. Contract and Agreement*) throw light on the law of sales without writing, and seem to be good law at this day. Thus (apart from the Statute of Frauds) a mere oral agreement for sale without payment or giving day of payment, is not a binding bargain; 1 *Dyer*, 30, pl. 203; 5 *Vin.* 506, pl. 4; but if the buyer produces and begins to count the money, it binds, *Id.* 510, pl. 5; so if he goes to fetch the money with consent of the seller; *Id. Ib.* pl. 6.

When the contract is complete and object of sale ascertained, the property is transferred. But the doctrine that the property is changed on the making of an effectual bargain applies only to cases where the article sold is ascertained and in *esse* at the time; for if the bargain requires anything further to be done by the seller, as to make the article, or to set apart, or ascertain the price of the goods sold, by weight, number, measurement, selection, or otherwise, the property does not pass until they are in a state fit for delivery; *Blackburn on Contract of Sale*, 152; *Gilmour v. Supple*, 11 *Moo. P. C.* 531; 2 *Kent, Comm.* 495, 496, 504. But if it appear from the agreement that the intention of the parties is that the property shall pass presently, the property does pass, though there remain acts to be done by the vendor before the goods are deliverable; *Blackburn on Contract of Sale*, 160; *Furley v. Bates*, 33 *L. J. (Ex.)* 200. The cases on the vesting of property by sale are collected, *post*, under the head of *Action for detaining or converting goods*, where also will be found the cases on Lien and Stoppage *in transitu*. The subject of delivery is treated of under the heads of *Action for not delivering goods*, and *for goods sold and delivered, post*, pp. 302, 306.

Points often arise respecting the effect of a contract or negotiation relating to a sale, contained in a written correspondence. On this some cases have been already cited under a former head, p. 152. The rule is that as soon as an offer by A. is accepted by B. in a letter duly posted and addressed by B. to A., the contract is complete, although the letter may not reach A.; *Duncan v. Topham*, 8 *C. B.*

225; *Dunlop v. Higgins*, 1 H. L. C. 381. The acceptance must be unconditional in order to bind the party offering; *Chaplin v. Clark*, 4 Ex. 403. If, therefore, the acceptance introduces any variation, there is no contract, unless there be evidence of assent by the other party to the alteration, either express or implied. Illustrations of this rule will be found in *Wontner v. Shairp*, 4 C. B. 404; *Duke v. Andrews*, 2 Ex. 290; *Cheveley v. Fuller*, 13 C. B. 122; *Hutton v. Upfill*, 2 H. L. C. 674; *Barker v. Allan*, 5 H. & N. 61.

A bidding at an auction may be retracted before the hammer is down; *Payne v. Cave*, 3 T. R. 148.

In an action for not accepting goods sold, the plaintiff may be put to proof of the contract, the performance of all conditions precedent on his part, the refusal to receive, and the amount of damage.

It is most commonly in an action for not accepting that the question as to the validity of a contract of sale without writing arises, although it occurs in other actions, &c. The principal decisions on the Statute of Frauds, so far as relates to contracts not to be performed within a year, and for the sale of goods and merchandise, therefore may be collected here.

The contract.—*Statute of Frauds*, 29 Car. 2, c. 3, s. 4.] By section 4, no action lies "to charge any person upon any agreement that is not to be performed within one year from the making thereof, unless the agreement on which the action is brought, or some memorandum or note thereof, be in writing signed by the party to be charged, or some other person thereunto by him lawfully authorised." This section applies "to contracts, the complete performance of which is of necessity extended beyond the space of a year. The rule being that where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply;" *per Tindal, C. J.*, *Souch v. Strachbridge*, 2 C. B. 815; *Boydell v. Drummond*, 11 East, 142; *Peter v. Compton*, and notes thereon in 1 Sm. L. C., 142.

Where the agreement was to serve at a salary of 70*l.* the first year; 90*l.* the second, and so on, it was held to be within the Statute of Frauds, section 4, and to require a writing; and such writing could not be explained by showing a contemporary or subsequent agreement to pay the salary quarterly; *Giraud v. Richmond*, 2 C. B. 835.

A contract for a year's service, to commence on a subsequent day, is within the statute; *Bracegirdle v. Heald*, 1 B. & A. 722; *Snelling v. Huntingfield*, 1 C. M. & R. 20. And this, although such service is subject to be determined by a notice within the year; *Dobson v. Collis*, 1 H. & N. 81; 25 L. J. (Ex.) 267. But where A. verbally agreed to serve B. for a year, the service to commence on a subsequent day; and A. entered upon the service upon the day named, and B. paid him wages on account; it was held that the jury might infer a new implied contract from that day, and that a claim for wages was not defeated by the statute; *Cawthorn v. Cordrey*, 32 L. J. (C. P.) 152; 13 C. B., N. S. 406.

The statute applies only to contracts which are not to be performed on either side within the year; *Bracegirdle v. Heald*, 1 B. & A. 722; *Donellan v. Read*, 3 B. & Ad. 899. If all that is to be done

by one party, as the consideration for the promise of the other, can be done within the year, it is not within the section; *Donellan v. Read*, 3 B. & Ad. 899; *Smith v. Neale*, 2 C. B., N. S. 67; 26 (C. P.) 143.

The contract.—*Statute of Frauds*, s. 17.] By the 17th section, “no contract for the sale of any goods, wares, or merchandises for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.”

Contracts within sect. 17 of Statute of Frauds.] Where the subject-matter of the contract did not exist *in esse*, and was therefore incapable of delivery and of part acceptance at the time of the bargain, it was held not to be within the statute; *Groves v. Buck*, 3 M. & S. 178. But now by Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 7, the above provision of the Statute of Frauds “shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.”—The effect of this last act is to substitute the word “value” for “price” in section 17 of Statute of Frauds, and both acts are now construed together; *Scott v. E. Counties Railway Co.*, 12 M. & W. 33, 38; *Harman v. Revere*, 18 C. B. 587; 25 L. J. (C. P.) 257.

Executory contracts relating to goods *in esse* are within section 17 of the Statute of Frauds, and were so held before Lord Tenterden's Act; *Rondeau v. Wyatt*, 2 H. Bl. 63. So sales by auction are within the statute; *Kemworthy v. Schofield*, 2 B. & C. 945. A sale of shares of a joint-stock banking company is not within section 17; *Humble v. Mitchell*, 11 Ad. & E. 205. Nor of shares in a canal company; *Latham v. Barber*, 6 T. R. 67. Nor of railway shares; *Bowlby v. Bell*, 3 C. B. 284; *Tempest v. Kilner*, 3 C. B. 249. Nor of shares in a mining company; *Watson v. Spratley*, 10 Ex. 222. Nor is a sale or contract to deliver foreign stock consisting of bonds and certificates; *Heseltine v. Siggers*, 1 Ex. 856; and, *per curiam*, *ibid*, a sale of such securities is not like a sale of specific goods; it passes no property till delivery, and, in effect, it means only a contract to deliver some shares. Sales of timber and growing crops, where they are not an “interest in land” within s. 4, may be within s. 17. See the cases cited *ante*, pp. 150-2, and also the cases under the fourth exemption from the Stamp Act as to Agreements, *ante*, pp. 124-5. Trees lying felled are within the 17th section; *Acraman v. Morrice*, 8 C. B. 449. A contract for work and labour, as an agreement by a printer to print a work, although it involves finding materials and is the subject of a count for work done and materials supplied, is not within the 17th section; *Clay v. Yates*, 25 L. J. (Ex.) 237; 1 H. & N. 73. But a contract to make a set of artificial teeth to fit the mouth of the employer, is a contract for the sale of a chattel, and therefore within the section, and a count for work done and materials is not sustainable; *Lee v.*

Griffin, 30 *L. J. (Q. B.)* 252; 1 *B. & S.* 272. If the substance of the contract be goods to be sold and delivered by the one party to the other, it is within the section; *S. C.*; *Atkinson v. Bell*, 8 *B. & C.* 277; *Grafton v. Armitage*, 2 *C. B.* 336; 15 *L. J. (C. P.)* 20. "In *Clay v. Yates* (*supra*) the circumstances were peculiar, but had the contract been completed, it could scarcely perhaps have been said that the result was the sale of a chattel;" *per Blackburn, J., Lee v. Griffin, supra*. A sale is not less within the statute because it also includes an exchange; *Bach v. Owen*, 5 *T. R.* 409; or a collateral agreement touching the thing sold; *Harman v. Reeve*, 18 *C. B.* 587; 25 *L. J. (C. P.)* 257. In the last case, the plaintiff agreed to sell a horse to defendant, and to agist the horse sold and also another horse of the defendant for a fixed time, and defendant was to pay 30*l.*; and it was held, in an action for non-payment, that the contract was within the 17th section, the horse sold being shown to be of the value of 10*l.*

Acceptance and receipt within s. 17 of Statute of Frauds.] Where goods above the value of 10*l.* have been sold, and there is no note or memorandum in writing, and no earnest has been given, or payment made, then there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking to the possession as owner; *per cur. Phillips v. Bistolli*, 2 *B. & C.* 513. Acceptance without a delivery is insufficient, for the words are "accept and actually receive;" but the acceptance may be prior to the actual receipt, and need not be contemporaneous with or subsequent to it; *Cusack v. Robinson*, 30 *L. J. (Q. B.)* 261; 1 *B. & S.* 299; *Morton v. Tibbett*, 15 *Q. B.* 428; 19 *L. J. (Q. B.)* 382. Where the vendee ordered the goods to be marked while in the hands of the vendor's agent, and to be sent to a certain place, the sale was held insufficient without a writing; *Bill v. Bament*, 9 *M. & W.* 36; and see *Saunders v. Topp*, 4 *Ex.* 390; for there can be no acceptance and receipt by the purchaser while the lien of the vendor remains, for the vendor's lien necessarily supposes that he retains possession of the goods; *Morton v. Tibbett, supra*; *Carter v. Toussaint*, *Baldey v. Parker*, and other cases, *post*, pp. 286-7. Bulk samples were sent to the vendee by coach, pursuant to the contract, but he returned them as not answering to the samples shown to him when he bought: The jury in an action for the price of the goods found that the samples *did* answer the contract: Held that there was no acceptance; *Johnson v. Dodgson*, 2 *M. & W.* 653. It has been thought that there is not a sufficient acceptance so long as the buyer continues to have a right to object either to the quantity or the quality of the goods; *Hanson v. Armitage*, 5 *B. & Ald.* 559; *Smith v. Surman*, 9 *B. & C.* 561. This has, indeed, been directly denied as a test in *Morton v. Tibbett, supra*; while in *Hunt v. Hecht*, 8 *Ex.* 814, it was held that there is no acceptance (although there may be a receipt), unless the vendee has had an opportunity of judging whether the article corresponds with the order. As an acceptance of a part, however small, of articles sold by a single oral contract lets in the parol terms of the entire bargain (*Elliott v. Thomas*, 3 *M. & W.* 170), it should seem that there certainly may be an acceptance without an opportunity of examining the whole; though the buyer may, of course, reject the residue if it does not correspond with the part received; for this he

may do when the contract is a written one; see *Morton v. Tibbett*, *supra*, and the judgment there; and see *Cunliffe v. Harrison*, 6 *Ex.* 903. There may be delivery to and acceptance of the goods by the vendee, so as to satisfy the statute, although it may still be open to him to dispute the terms of the contract as alleged by the vendor; *Tomkinson v. Staight*, 17 *C. B.* 697. And it would seem that, though the purchaser has used more of the goods than (in the opinion of the jury) was necessary for the purpose of trying experiments to ascertain their quality, this does not necessarily amount to an acceptance; *Elliott v. Thomas*, 3 *M. & W.* 170; *Curtis v. Pugh*, 10 *Q. B.* 111.

Where the defendant bought of the plaintiff's agent twelve bushels of tares, part of a larger quantity in bulk, and the agent measured the twelve bushels and set them apart for the vendee to remain till called for, it was held that there was no acceptance; *Howe v. Palmer*, 3 *B. & A.* 321. So where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon, and about the expiration of that time A. rode the horse by way of trial, and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; these circumstances were held not to constitute an acceptance; *Tempest v. Fitzgerald*, 3 *B. & A.* 680. A horse was sold, and no time fixed for payment, and the horse was to remain with the vendors for twenty days without any charge to the vendee, at the expiration of which time the horse was sent to grass by the direction of the vendee, and by his desire entered as the horse of one of the vendors: It was held that there was no acceptance, as the vendors' possession and lien still remained; *Carter v. Toussaint*, 5 *B. & A.* 855; accord. *Holmes v. Hoskins*, 9 *Ex.* 753. A delivery of goods to a wharfinger or agent, who has been accustomed to forward goods from the plaintiff to the defendant, and a delivery by him to the carrier, is not an acceptance, the carrier having no authority, though named by the vendee, to accept the goods for him; *Hanson v. Armitage*, 5 *B. & A.* 557; *Meredith v. Meigh*, 2 *E. & B.* 364. So where goods, bought abroad, were delivered at a foreign port on board a ship chartered by the purchaser, this was held to be no acceptance; *Acebal v. Levy*, 10 *Bing.* 376. So where the purchaser appointed the mode in which the goods should be conveyed, and directed a third person, in whose possession the goods temporarily were, to see them delivered and measured and put up properly, and they were accordingly sent to another warehouse of the vendor, where the clerk gave an invoice to the purchaser, who did not pay for the goods, but the same day gave notice that he would not accept them,—these circumstances were held not to amount to an acceptance; *Astey v. Emery*, 4 *M. & S.* 262. The same principle was recognised in the following case: A. went to the shop of B. & Co., and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon. Some A. marked, others were measured in his presence, and others he assisted in cutting from larger bulks. He then desired that an account of the whole might be sent to his house, and went away; a bill of parcels was accordingly sent, together with the goods, which A. refused to accept. It was held that this was all one contract, and therefore within the Statute of Frauds; and that there was no acceptance; *Baldey v. Parker*, 2 *B. & C.* 37. "The ground of that

decision was pointed out by Holroyd, J.,—Upon the sale of specific goods for a specific price; by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute. The principle so laid down has been repeatedly recognised; "*per curiam*, in *Cusack v. Robinson*, 30 *L. J. (Q. B.)* 264; 1 *B. & S.* 308, *post*, p. 288. So where a hogshead of wine in the warehouse of the London Dock Company was sold for 13*l.*, and a delivery order given to the vendee, but there was no assent on the part of the Dock Company to hold the wine as the agents of the vendee, it was held that there was no actual receipt within the statute; *Bentall v. Burn*, 3 *B. & C.* 423; *Farina v. Home*, 16 *M. & W.* 119. Where A. employed B. to construct a waggon, and while it was in B.'s yard unfinished, A. employed a third person to fix upon it some iron work and a tilt; it was held that this did not amount to an acceptance; but, *per Tindal, C. J.*, it might perhaps have been otherwise if these acts had been done after the waggon was completed; *Maberley v. Sheppard*, 10 *Bing.* 99. Where the goods were sent with an invoice, and the vendee declined to receive them of the carrier, who kept them for a month, and until the end of that time the vendee, who had received the invoice, did not communicate with the vendor, it was held that there was not sufficient evidence of acceptance to justify a jury in finding one; *Norman v. Phillips*, 14 *M. & W.* 277. Where the consignee of goods sold by sample sent for a bulk sample on their arrival at the carrier's warehouse, but refused to remove the bulk in order to favour the right of stoppage *in transitu*, though the goods did, in fact, answer the sample; held that, assuming the *transitus* to be ended, there was yet no acceptance; *Nicholson v. Bower*, 28 *L. J. (Q. B.)* 97; 1 *E. & E.* 172; but see *Cusack v. Robinson*, *supra*; and *Heinekey v. Earle*, 8 *E. & B.* 428, 28 *L. J. (Q. B.)*.

There may, however, be a *constructive acceptance* by acquiescence. Thus, where the goods were sent by a named carrier, and a letter of advice was forwarded to the vendee stating that the credit was three months, and the goods after arrival were seen by him in the warehouse of the carrier, when he told the carrier that he refused to take them, but made no communication whatever to the vendor till after five months; it was held that this was evidence to be left to the jury of acceptance and actual receipt; *Bushel v. Wheeler*, 15 *Q. B.* 442. In another case, where wheat was sent by a carrier named by the vendee, who was to take it to a market town, where the vendee resold them by the same sample which he had taken from the vendor himself, but never inspected the bulk, this was held to be evidence of acceptance and receipt; *Morton v. Tibbett*, *Id.* 428. Goods not specified in the original contract, but selected by the vendor, and shipped by him for delivery to an inland carrier named by the vendee, who was to convey them to the vendee's residence, were lost at sea; a bill of lading had been sent to the inland carrier;—held that this was not evidence of an acceptance and receipt by the vendee, though it would have been a sufficient delivery to him, if the contract had been binding; and that the mere silence of the vendee, on hearing that the goods were shipped, would not justify a verdict for the vendor; neither the selection by the vendor nor the receipt by the carrier being an acceptance of those particular

goods by the vendee; *Meredith v. Meigh*, 2 *E. & B.* 364 (overruling *Hart v. Sattley*, 3 *Camp.* 528); accord. *Hart v. Bush*, 27 *L. J. (Q. B.)* 271; *E. B. & E.* 494. In *Meredith v. Meigh*, it was said, *per curiam*, that if the vendee had received the bill of lading, and dealt with it as owner of the property, this would have been evidence of an acceptance and receipt. And it has since been ruled, on the authority of that case, and of *Morton v. Tibbett* (*supra*), that keeping and dealing with a bill of lading is evidence of acceptance; *Currie v. Anderson*, 29 *L. J. (Q. B.)* 87; 2 *E. & E.* 592. Where the vendee receives the articles sold, but disputes the alleged terms of sale on the delivery, the sale is good, and the terms may be proved by parol; *Tomkinson v. Staight*, 17 *C. B.* 697; 25 *L. J. (C. P.)* 85.

The circumstances in the following cases were held to constitute an acceptance and receipt within the statute. Where A. agreed to sell to B. twenty hogsheads of sugar then in bulk, and filled up and delivered four, and afterwards filled up the remaining sixteen, and gave notice to the defendant, who said he would take them away as soon as he could, this was held to be an acceptance of the whole number of the hogsheads; *Ronde v. Thwaites*, 6 *B. & C.* 388. Where there was a written contract to deliver to defendant by A. as agent of another, and defendant accepted part after knowledge that A. was principal and not agent; held that he could not refuse to accept the residue, and might be sued by A. for non-acceptance: *Rayner v. Grote*, 15 *M. & W.* 359. The defendant bought a quantity of hay from the plaintiff, and sold it to another person, by whom it was taken away: It was held that the jury might presume an acceptance by the defendant; *Chaplin v. Rogers*, 1 *East*, 193. Where defendant selected and verbally agreed to purchase certain goods of the plaintiff, and directed them to be sent to a particular wharf, where he was in the habit of warehousing his goods,—that was held sufficient to constitute an acceptance; and the goods having been placed on the wharf under the control of the defendant, so as to put an end to any rights of the plaintiff as unpaid vendor,—that was held a sufficient actual receipt; *Cusack v. Robinson*, 30 *L. J. (Q. B.)* 261; 1 *B. & S.* 299. Though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept not as vendor but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute; *per curiam*, *S. C.*, citing *Beaumont v. Brengeri*, and *Marrin v. Wallis*, *infra*. The defendant bought two horses from the plaintiff, a livery-stable keeper, and desired him to keep them at livery for him; it was held that the plaintiff, by assenting to this order and changing the horses from the stables in which they had been kept to his livery-stables, had relinquished his lien, and that there was a constructive delivery of them to the defendant; *Elmore v. Stone*, 1 *Taunt.* 458; *Beaumont v. Brengeri*, 5 *C. B.* 301, accord. So where, on a sale of a horse by A. to B. by word of mouth, B., without having had it in his possession, lent it to A. at his request for a few weeks, and B. afterwards refused to receive or pay for it; and the jury found that the contract of sale was completed before the loan of it to the vendor. Held that there was an acceptance and actual receipt within the statute; *Marrin v. Wallis*, 6 *E. & B.* 726; 25 *L. J. (Q. B.)* 369. Where the act done by the vendee is an ambiguous act, which may or may not be done as an act of ownership, it is evidence on which it

ought to be left to the jury to say whether or not there had been an acceptance; *Parker v. Wallis*, 5 E. & B. 21. The defendant bought some spirits from the plaintiffs, who sent an invoice of certain specified casks, terms six months' credit, and to lie in plaintiffs' warehouse till wanted, free six months. The plaintiffs kept a general bonded warehouse, and transferred the particular casks to the defendant's name in their warehouse-book, as sold to him, after which the plaintiffs could not take them out. At the end of the six months the defendant asked the plaintiffs to take them back, or sell them for him; held there was evidence of a receipt and acceptance, as the character of the plaintiffs had changed from vendors to warehousemen or agents of the defendant; *Castle v. Swoorder*, 30 L. J. (Ex.) 310; 6 H. & N. 828, in the Ex. Ch., reversing decision of Exchequer.

* Wool bought by defendant was removed to the warehouse of a third person, M., by defendant's direction, and weighed and packed by him; this was held a delivery and acceptance, though the course of dealing was, that it should not be taken out of M.'s warehouse till payment, as the vendor had parted with possession, and had no lien, properly so called; *Dodsley v. Varley*, 12 Ad. & E. 632. Where the goods sold were in the defendant's possession at the time of the sale, a dealing with them by the defendant, and an account rendered to the plaintiffs by defendant, debiting himself with the price, are evidence of an acceptance by defendant; *Edan v. Dulfield*, 1 Q. B. 302. A. bargained for a horse then in a stable, and soon afterwards brought in a third person and stated to him that he had bought the horse, and offered to sell it to him for a profit of 5*l.*; it was held that it ought to be left to the jury to say whether this was or was not a delivery and acceptance; *Blenkinsop v. Clayton*, 7 Taunt. 597; and see *Phillips v. Bistolli*, 2 B. & C. 511. A wrongful taking by the vendor after a tender and refusal of the money, is not an acceptance to bind the vendor; *Taylor v. Wakefield*, 6 E. & B. 765.

There need not be an actual delivery, but there may be something tantamount; such as the delivery to the buyer of a key of the warehouse in which the goods are lodged, or the delivery of other indicia of property; per Lord Kenyon, C.J., *Chaplin v. Rogers*, 1 East, 192; and this is evidence of acceptance as well as of delivery; *Elmore v. Stone*, 1 Taunt. 460. A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them to the buyer, is a sufficient receipt within the statute, provided the person to whom it is directed accepts the order for delivery, and assents to hold the goods as the agent of the buyer; *Searle v. Keeres*, 2 Esp. 598; *Bentall v. Burn*, 3 B. & C. 426; *Salter v. Woollams*, 2 M. & G. 650.

When a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, under this section; *Elliot v. Thomas*, 3 M. & W. 170; and *Thompson v. Maceroni*, 3 B. & C. 1, *contra*, is there explained. And part acceptance is sufficient, although the rest are not even made; *Scott v. Eastern Counties Railway Co.*, 12 M. & W. 33; for Lord Tenterden's act, we have seen, is to be read as part of the Statute of Frauds, and acceptance of part, and part payment, apply to contracts for goods to be made. But the contract for several things must be a joint one. Thus if A. gives to B. an absolute order for one, and a conditional order for another article, and B. sends both, A.'s acceptance of the former is not an acceptance of the latter; *Price v. Lea*, 1 B. & C. 156. Where a buyer selected separate lots of timber, at

different and distant places, and various prices, shown to him by the same seller on one day, and afterwards included in one unsigned note, acceptance of one lot dispenses with a signed note; *Bigg v. Whisking*, 14 C. B. 195. The delivery of a sample, if considered to be part of the thing sold, is a sufficient acceptance; *Hinde v. Whitehouse*, 7 East, 558; but otherwise where it is a sample merely, and forms no part of the bulk; *Talver v. West*, Holt, N. P. 178; *Cooper v. Elston*, 7 T. R. 14.

Earnest, or part payment.] If there be no note or memorandum in writing, and no acceptance or receipt of the goods, then, to satisfy the statute, the buyer must give something in earnest to bind the bargain, or in part payment. Earnest is given by the buyer, and not by the seller, and the part delivery of goods is not (as Blackstone assumes, in the passage above cited, p. 282) by way of earnest. In cases of sale at common law, earnest has an effect different from that of the *arras* of the civil law, by binding the bargain, instead of merely affording additional proof of it. It is either money or other thing given to bind the bargain, and to show that it is concluded, and no longer remains in mere proposal or *in fieri*. If given in money, it presumably forms part of the price, like a deposit at an auction; *Pordage v. Cole*, 1 Saund. 320. If it be some other article, it is in the nature of a pledge; *Pothier, Cont. de Vente*, p. 6, c. 1, art. 3, s. 2. Acceptance of earnest changes the property; *Langfort v. Tiler*, 1 Salk. 113; *Hinde v. Whitehouse*, 7 East, 558, 571. Customary forms of concluding bargains, as where the purchaser draws the edge of a shilling across the hand of the vendor and returns the money into his own pocket, are not equivalent to earnest, or part payment, within the statute; *Blenkinsop v. Clayton*, 7 Taunt. 597. A bargain, that the vendor should take in part payment a debt due from him to the vendee, is not in itself a sufficient part payment to dispense with a writing; no money having actually passed, nor receipt for the debt given by the vendee; for this would in effect let in proof of the contract itself in order to evade the statute; *Walker v. Nussey*, 16 M. & W. 302.

What note is sufficient within section 17 of the Statute of Frauds.] The word *bargain* used in the 17th sect. (like the word "agreement" in sect. 4, *ante*, p. 150) means the terms upon which the parties contract; *Kenworthy v. Schofield*, 2 B. & C. 947. The note in writing must contain all the terms of the agreement, or be connected with some other document which does; *S. C.* Several documents, if sufficiently connected, will constitute a good memorandum within the statute; *Jackson v. Lowe*, 1 Bing. 9; *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennett*, 3 Taunt. 169. It must contain the names of both the contracting parties or their agents; *Champion v. Plummer*, 1 N. C. 252; *Graham v. Masson*, 7 Scott, 769; 5 N. C. 603. After a correspondence between the plaintiff and defendant, in which the plaintiff offered to sell some growing seed at a certain price, the defendant wrote a letter, accepting the terms as to a portion, and ended with "waiting your reply," and the plaintiff verbally accepted, held sufficient; *Watts v. Ainsworth*, 31 L. J. (Ex.) 448; 1 H. & C. 83.

Where there is an insufficient memorandum, such as an unsigned order for goods, a subsequent letter signed by the defendant, referring to the order, is sufficient; *Saunderson v. Jackson*, 2 B. & P. 238;

but the plaintiff cannot avail himself of a subsequent letter from the defendant, in which, though he recognises the order, he disaffirms or adds to the terms of the memorandum; *Cooper v. Smith*, 15 East, 103. The defendant signed an order for goods to be supplied by the plaintiff on a paper containing a list of the prices, but the prices agreed upon were 25 per cent. lower: this was held an insufficient memorandum; and the plaintiff having sent an invoice with the true prices marked, the defendant returned it in a letter, "declining to take the goods as per invoice returned," on account of unfavourable intelligence from abroad; held that, as the letter did not admit the invoice to state the contract correctly, there was no memorandum of the contract binding on the defendant; *Goodman v. Griffiths*, 1 H. & N. 571. But where the vendee wrote a letter to the vendor, in which, after referring to all the essential terms of the contract, he stated he had not received and declined to have the goods because they had been damaged by the carriers, it was held there was a sufficient note in writing, notwithstanding its containing such repudiation; *Bailey v. Sweeting*, 30 L. J. (C. P.) 150; 9 C. B., N. S. 843. The omission of the particular mode, or time of payment, or even of the price itself, does not necessarily invalidate the contract; *Valpy v. Gibson*, 4 C. B. 837. Where the price is omitted, and it does not appear upon the evidence that any specific price was agreed upon, a reasonable price must be presumed, and the contract should be so stated; *Hoadly v. M'Laine*, 10 Bing. 482; but where the memorandum is silent as to price, and it appears by the evidence that a specific price was agreed upon, the written memorandum is imperfect, and cannot be given in evidence; *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, *supra*. A distinction was indeed suggested in *Acebal v. Lery*, 10 Bing. 382, by the Court, that where the contract is silent as to the price, but has been *executed*, a reasonable price will be inferred; though it was thought questionable whether it is so when the contract is *executory* only, and the goods are still in the possession or power of the seller. But the case of *Hoadly v. M'Laine*, *supra*, which was for not accepting a carriage made to order, does not sanction this distinction, nor was any made in *Valpy v. Gibson*, 4 C. B. 837, where *Hoadly v. M'Laine* was recognised. The inconvenience of the above rule is obvious: If a contract omitting the price has the legal effect of a contract for a reasonable price, then parol evidence of a fixed price ought to be excluded as being inconsistent with the written contract. (See cases, *ante*, p. 15.) Yet, according to the above ruling, the evidence is to be admitted; and that for the purpose, not of supporting, but of destroying the efficacy of the writing, and defeating the demand by proof of a fact which, if true, ought to entitle the opposite party to recover.

An agreement to sell "on moderate terms" is enough; *Ashcroft v. Morrin*, 4 M. & G. 450. Where the price is ambiguous; as where hops are sold "at 100s.," this may be explained by parol to mean *per cwt.*; *Spicer v. Cooper*, 1 Q. B. 424, see *ante*, pp. 18-20. A buyer wrote his address in the seller's order book, which had the seller's name on the fly-leaf, and a description and the price of the article: Held a sufficient note of the buyer, though it did not specify an alteration in it to be made by the seller; *Sarl v. Bourdillon*, 1 C. B., N. S. 188; 26 L. J. (C. P.) 78. See *Goodman v. Griffiths* and *Elmore v. Kingscote*, *supra*.

The written memorandum must be made before action brought; *Bill v. Bument*, 9 M. & W. 36. Where a written order was given

by defendant for goods of the price of 10*l.* and upwards, which defendant *accepted* with the accompanying invoice, and neither order nor invoice mentioned the time of payment, defendant was allowed to prove a previous conversation between plaintiff and defendant showing that the sale was to be on credit; *Locket v. Nicklin*, 2 *Ex.* 93. In this case the acceptance was sufficient within the statute, and no written memorandum being necessary, the parol evidence was admitted as not inconsistent with the writing, and forming with it the complete contract; see *ante*, p. 25. But the terms of the written contract cannot be varied by parol; *Marshall v. Lynn*, 6 *M. & W.* 109; *Stead v. Dawber*, 10 *Ad. & E.* 57; *Stowell v. Robinson*, 3 *N. C.* 928. Where the buyer, after an oral contract, receives without objection an invoice or sold note, signed by the seller, differing from the contract, he cannot, in a case within the statute, set up the original terms to contradict the sold note; *Harnor v. Groves*, 15 *C. B.* 667.

To be made and signed by the parties to be charged.] It is not necessary that the note or memorandum should be signed by both parties to the contract. It is sufficient if it be signed by the party to be charged; *Laythorp v. Bryant*, 2 *N. C.* 735. And it makes no difference that there is no remedy against the person who does not sign; *Allen v. Bennet*, 3 *Taunt.* 169. It is immaterial where the signature is placed in the document. A person writing at the head of a note, I, A. B., agree, or A. B. agrees, is sufficient, although the document is not signed at the bottom; *Knight v. Crockford*, 1 *Esp.* 190; *Saunderson v. Jackson*, 2 *B. & P.* 238; *Schneider v. Norris*, 2 *M. & S.* 286. So where the only signature of the defendant was his name, written by the plaintiff's agent on the top of a sale note, the contents of which were known to the defendant at the time, and subsequently altered at his request, it was held sufficient; *Durrell v. Evans*, 31 *L. J. (Ex.)* 337; 1 *H. & C.* 174; *post*, p. 293. This question, however, being always open to the jury, whether the party, not having regularly signed it at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it; but where it is ascertained that he meant to be bound by it as a complete contract the statute is satisfied, there being a note in writing showing the terms of the contract, and recognised by him; *per Lord Abinger*, in *Johnson v. Dodgson*, 2 *M. & W.* 659; in which case the defendant wrote, "Sold J. Dodgson (his own name), so and so," and requested the plaintiff's agent to sign the entry; and the Court held the defendant bound by such entry. Where a person is in the habit of printing instead of writing his name, that will be a sufficient signature, *per Eldon, C. J.*, *Saunderson v. Jackson*, *supra*. Where the name of the vendor is printed on a bill of parcels, on which the name of the vendee is written by the vendor, that is a sufficient signature to charge the vendor; *Schneider v. Norris*, 2 *M. & S.* 286. See some additional cases, *ante*, p. 153.

Where a person cannot write, a signature by mark, if properly identified, may be sufficient; *Baker v. Deering*, 8 *Ad. & E.* 94. A signature by initials is not enough; *Jacob v. Kirk*, 2 *M. & Rob.* 221; *Sweet v. Lee*, 3 *M. & G.* 452.

Or by their agents thereunto lawfully authorised.] An agent, to bind the defendant by his signature, must be some third person, and not the other contracting party; *Farebrother v. Simmons*, 5 *B. &*

A. 333; *Wright v. Dannah*, 2 Camp. 203; *Bird v. Boulter*, ante, p. 154.

It is not necessary that an agent should have the authority of his principal by a written instrument; *Graham v. Musson*, 5 N. C. 603; 7 Scott, 769. A parol authority is sufficient; *Bucker v. Cammeyer*, 1 Esp. 105. Although the agent may not have had authority at the time of signature, it will be sufficient if the principal subsequently recognises the agent's act, and adopts the contract; *Maclean v. Dunn*, 4 Bing. 722. Where A. by his traveller B. sold goods to C., and at the time of the sale B., at the request and in the presence of C., made an entry of the sale in C.'s book, and signed it in his, B.'s, own name, it was held there was no sufficient note within the statute to bind C., because the circumstances did not show any authority to B. to sign on C.'s behalf; *Graham v. Musson*, 5 N. C. 603. The plaintiff, one of the defendants, and N., the plaintiff's agent, met together, and after agreeing upon the price of certain hops, N. drew out a sale note, on the top of which he wrote "Messrs. Evans" (the defendants' name), "bought of," &c. The defendant asked to have an alteration made in one of the terms of the note, which was done, and the note then given to him. It was held that N. might be considered the agent of the defendants as well as of the plaintiff to draw up a record of the contract between them, and that being so, his writing the defendants' name on the document was a signature binding on the defendants within the statute; *Durrell v. Evans*, 31 L. J. (Ex.) 337; 1 H. & C. 174; in *Ex. Ch.*, reversing judgment of Exchequer. "If the name appears on the contract, and be written by the party to be bound, or by his authority, and issued or accepted by him, or intended by him as the memorandum of a contract, that is sufficient;" per Blackburn, J., *S. C.*

[*Sale by auction.*] A sale of goods by auction is within 17th sect.; *Kenworthy v. Schofield*, 2 B. & C. 945. Where the same person buys several lots, and the auctioneer writes down the vendee's name each time, there is a distinct and independent contract as to each lot; *Roots v. Lord Dormer*, 4 B. & Ad. 71; *Emmerson v. Heelis*, 2 Taunt. 38. An auctioneer is for some purposes an agent for both parties; therefore where an auctioneer writes down the buyer's name in the catalogue, opposite the lot, together with the price bid, it is a sufficient memorandum; *Emmerson v. Heelis*, *supra*; *Kenworthy v. Schofield*, 2 B. & C. 945. But where the conditions of sale are not annexed or referred to in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute; *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, *supra*. It must, however, be observed that the auctioneer only becomes the vendee's agent after his bid is accepted, before then he is exclusively the owner's agent; *Warlow v. Harrison*, 28 L. J. (Q. B.) 18; 29 L. J. (Q. B.) 14; 1 E. & E. 295, 309. Where the auctioneer himself sues, his signature for the defendant cannot be relied upon as a compliance with the statute; see *Fairbrother v. Simmons*, 5 B. & A. 333, and cases cited, ante, pp. 153-4. Where a person, to whom money was due from the owner of goods sold by auction, agreed with the owner before the auction that goods bought by him should be set against the debt, and he became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the conditions of sale which specified that purchasers should pay part of the price at the time of the sale

and the rest on delivery; *Bartlett v. Purnell*, 4 *Ad. & E.* 792. But, in general, where there are printed conditions of sale, no verbal declaration made by the auctioneer at the time of the sale is admissible in evidence to alter them; *Shelton v. Livius*, 2 *C. & J.* 411. Though where the goods are of less value than £10, and there is no signature, such declarations are admissible; *Eden v. Blake*, 13 *M. & W.*; and *semble*, per Rolfe, B., *S. C.*, that as the contract would be complete on the fall of the hammer, a subsequent signing by the auctioneer would make no difference.

Sale by broker.] Where a broker is the agent of both parties, he may bind them by signing the same contract on behalf of the buyer and seller. See the usual forms, and the effect of brokers' notes fully considered in Blackburn's *Treatise on Contract of Sale*, Part 1, ch. 5. The practice (at least among London brokers) is to make an entry of the contract in his book and sign it, and then to send a copy of it to each party, and, in general, the "bought note" to the buyer, and "sold note" to the seller, and these notes duly delivered by the broker to the parties have been held, if not the contract itself, proper evidence of the contract, and constitute a sufficient note in writing to bind each party; *Rucker v. Cammeyer*, 1 *Esp.* 105; *Thornton v. Meux*, *Mood. & M.* 43; *Trueman v. Loder*, 11 *Ad. & E.* 589. And such notes are admissible, where the entry in the broker's book has never been signed by him; *Groom v. Astalo*, 6 *B. & C.* 117. But if the entry in the book has been signed, it is questionable whether this is not the best evidence, as being the original entry of the contract; see *Heyman v. Neale*, 2 *Camp.* 337. "Where there has been an entry of the contract by the broker in his book, signed by him, I should hold, without hesitation, notwithstanding some dicta and a supposed ruling of Lord Tenterden in *Thornton v. Meux* (*supra*) to the contrary, that this entry is the binding contract between the parties, and that a mistake made by him when sending them a copy of it, in the shape of a bought or sold note, would not affect its validity. . . . But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends bought and sold notes as before. If these agree they are held to constitute a binding contract. If there be any material variance between them they are both nullities, and there is no binding contract;" per Id. Campbell, C. J., in *Sievwright v. Archibald*, 17 *Q. B.* 124-5; 20 *L. J. (Q. B.)* 538; and see, per Patteson, J., *S. C.* But where there is a material variance between the bought and sold notes, and the broker has not signed the contract in his book, there is no valid contract; *Grant v. Fletcher*, 5 *B. & C.* 436. *Gregson v. Ruck*, 4 *Q. B.* 737; *Conie v. Remfry*, 5 *Moo. P. C.* 232. Where the differences can be reconciled by oral testimony of mercantile usage, and shown to be only apparent, such evidence is admissible; *Bold v. Rayner*, 1 *M. & W.* 343. Where the sold note is in the name of an agent, it may be shown by parol on behalf of the buyer, that in all previous transactions between them the vendor had contracted in the agent's name; *Trueman v. Loder*, 11 *Ad. & E.* 589. So where the contract was made by a broker on behalf of principals whose names were not disclosed, parol evidence that by the usage in London in such a case the broker is liable to be treated as principal, is admissible to charge the broker; *Humfrey v. Dale*, 7 *E. & B.* 266; 26 *L. J. (Q. B.)* 137; *S. C.*, in *Ex. Ch.*, *E. B. & E.* 1004; 27 *L. J. (Q. B.)* 390. In an action by the purchaser

against the vendor of goods for not delivering them, it has been held that the bought note *per se* is evidence of the contract against the vendor on proof of the employment of the broker by him, and that, if the vendor intends to insist on a variance between the bought and sold note, it is for him to produce and prove the latter; *Huues v. Forster*, 1 Mood. & Rob. 368. So the sold note signed by the broker acting for both parties, and delivered by him to the purchaser, is a sufficient memorandum to bind the purchaser within the 17th sect. in the absence of proof of any variance between it and the bought note; *Parton v. Crofts*, 33 L. J. (C. P.) 189; 13 C. B., N. S. 11. Even if they differ, yet if one be signed by a principal in the contract, it will be evidence of the contract as against him; *Rowe v. Osborne*, 1 Stark. 140. So where the notes disagree, the entry in the book, if brought home to the knowledge of the parties, or even if not known to them, may be evidence of the contract; *semb. Thornton v. Charles*, 9 M. & W. 802; and see the observations of Parke, B., in that case; but the point is not a settled one; see *Heyman v. Neale*, *Sievwright v. Archibald*, and *Parton v. Crofts*, *supra*. Where the broker in the bought and sold notes described the sellers' firm as A., B., and C.; but the firm had, unknown to the broker, been changed to A., D., and E., it was held that A., D., and E. might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs; *Mitchell v. Lapage*, *Holt*, N. P. 253.

A material alteration in the sale note by the broker, at the instance of the seller, after the bargain made and without the consent of the purchaser, has been held to preclude the seller from recovering; *Powell v. Direct*, 15 East, 29. So where the buyers altered the bought note in a material thing by an addition at the foot of it (referred to by an asterisk in the body of it), it was held that this avoided the contract, and might be pleaded to an action for non-delivery, though the declaration relied only on the unaltered contract, and the breach was unconnected with the alteration; *Mollett v. Wackerbath*, 5 C. B. 181. Where the sold note was sent back altered and signed by the seller, and the buyer proceeded on it as the contract, it was held to be a question for the jury whether this was a contract, or only an offer by the seller provided a bought note to the like effect were signed by the buyer. In this case, there was no bought note in evidence at all, and the broker was agent of the buyer only; *Moore v. Campbell*, 10 Ex. 323. If the two principals agree in the broker's presence, and the broker's note does not correspond with the terms agreed upon, then there is no written contract by an agent lawfully authorised, and a party, who did not assent to the alteration, is not bound; *Pitts v. Beckett*, 13 M. & W. 743; *contra*, where there is evidence from which a subsequent assent to such alteration may be implied; *Harnor v. Groves*, 15 C. B. 667.

A distinction has been made between a contract in writing and a note or memorandum in writing of a contract within the Statute of Frauds. See the judgments in *Sievwright v. Archibald*, 17 Q. B. 107, 114, 124; and in *Parton v. Crofts*, *supra*; but in many cases this distinction seems to have been lost sight of.

Readiness of the plaintiff to deliver.] It has been not unusual to aver in the count an offer and tender of the goods sold, as well as a readiness to deliver; but recent cases show that an averment of

readiness and willingness to deliver is sufficient, where delivery and payment are to be concurrent acts; *Boyd v. Lett*, 1 C. B. 222; *Jackson v. Allaway*, 6 M. & G. 942. It is enough for the plaintiff to show, under this allegation, either that he has offered to deliver, or that the defendant has dispensed with delivery, or has made it an idle and useless form to attempt to deliver. The averment involves the ability of the plaintiff to deliver; *Lawrence v. Knoles*, 5 N. C. 399; *De Medina v. Norman*, 9 M. & W. 820; *Spotswood v. Burrow*, 1 Ex. 804. On a count averring readiness of the plaintiffs to manufacture certain articles ordered by the defendant, it is enough to show that the defendant had countermanded the manufacture while in progress and after delivery of some, and had notified his refusal to accept any more; and, *per curiam*, "In common sense, the meaning of such an averment must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendant;" *Cort v. Ambergate Railway Co.*, 17 Q. B. 127, 144; *Baker v. Firminger*, 28 L. J. (Ex.) 130. In the case of a sale of real property, the averment has even been held to imply a sound disposing mind; *per Rolfe, B.*, in *Kirtley v. Copeland*, 1 Cur. & K. 319; but *quære*, for the incapacity of the plaintiff seems rather to be the subject of a special plea. A breach of the implied warranty to supply goods fit for use may be shown under the traverse of this allegation; *Griffith v. Selby*, 9 Ex. 226. Under this issue, the plaintiff must be shown to have the article ready for delivery; and it must correspond with that which was contracted for; *per Cresswell, J.*, in *Boyd v. Lett*, *supra*; and an opportunity must be given for examination; *Isherwood v. Whitmore*, 10 M. & W. 757.

[*Refusal to receive.*] It must be shown that the defendant has refused to receive under circumstances which do not warrant a refusal. Therefore, where a tender is necessary, it must be made at a reasonable time and place, and be such as to afford the defendant an opportunity of examining and receiving the goods; for without such opportunity, it is no tender. Thus, a tender of articles in closed casks, so as to prevent inspection, is no tender on issue joined on a traverse of it; *Isherwood v. Whitmore*, 10 M. & W. 757. Nor is it sufficient to show a tender of the goods at the defendant's warehouse at a late hour after it is shut up, and the defendant has left it. But if the defendant is present, and able to examine and receive them, the tender will not be bad merely because the hour is late and unreasonable; *Startup v. Macdonald*, 6 M. & G. 593. The tender must not be of a larger quantity than was bought; *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; at least, unless the tender be divisible, or the surplus not charged for. If the buyer give a limited order for certain specified goods, and the seller sends those and others from a distant place in one package, charged at a lump sum, the consignee may repudiate the whole and refuse to receive the package; *Lery v. Green*, 8 E. & B. 575; 27 L. J. (Q. B.) 111; Coleridge and Erle, JJ., dissenting; *affirm.* in *Ex. Ch.*, 28 L. J. (Q. B.) 319; 1 E. & E. 969; and see *McDonald v. Longbottom*, 28 L. J. (Q. B.) 293; 29 L. J. (Q. B.) 256; 1 E. & E. 977, 987; *Tanraco v. Lucas*, 28 L. J. (Q. B.) 301; 1 E. & E. 581. If the defendant notifies his intention to refuse, and forbids the plaintiff to deliver goods ordered to be made, then the plaintiff need not proceed to complete the contract on his part, and may show this under

an alleged refusal to accept, although the goods are not ready for delivery, and could not be delivered; for the plaintiff is thereby discharged from proceeding further; and such a notice to the plaintiff will support an allegation that the defendant "prevented and discharged" the plaintiff from supplying the goods and executing the contract; *Cort v. Ambergate Railway Co.*, 17 Q. B. 127. And a countermand by the person ordinarily representing the defendant in his dealings with the plaintiff (as the engineer of a railway) is sufficient, although the defendant be a corporate body, and the notice not under seal; *S. C.* See further, as to readiness to receive, *post*, pp. 301-2.

Damages.] In an action for not accepting goods, the difference between the contract price and the market price on the day the contract was broken is the ordinary measure of damages; *Boorman v. Nash*, 9 B. & C. 145; *Roswell v. Kilburn*, 8 Jur. N. S. 443. And the right to re-sell (though not the obligation to do so) exists in all cases of sale where the vendee wrongfully refuses to receive, and there is no express stipulation precluding such right; *Nucleon v. Dunn*, 4 Bing. 722, 728; *Barrow v. Arnaud*, 8 Q. B. 609-610. And it makes no difference in this respect whether there be or be not an express condition of re-sale; *Lamond v. Davall*, 9 Q. B. 1030. Where goods were to be delivered at a certain time, and while on their way the vendee gave notice that he would not accept, the measure of damages is the difference between the contract price and the market price on the day fixed for the delivery, and not that on the day on which the seller received the notice; *Philpotts v. Evans*, 5 M. & W. 475. Where the defendant has ordered goods and then wrongfully countermanded the order, and thereupon the vendor ceases to manufacture them, he is entitled to damages for the goods in hand, and to such profit as he would have made if the contract had been fully carried out; *Dunlop v. Higgins*, 1 H. L. C. 381. Where the payment was to be by bill, plaintiff may recover the amount which would have accrued on it for interest; *Boyce v. Warburton*, 2 Camp. 480.

Defence.

The admissibility of evidence under certain common pleas will be found hereafter under the general head of *Defences in Actions on simple contracts*, *post*, pp. 380, *et seqq.*

General issue.] A plea of non-assumpsit, or other appropriate plea denying the contract, puts the plaintiff on proof of a note in writing, where one is necessary; *Fricker v. Thomlinson*, 1 M. & G. 772; *Leaf v. Tuton*, 10 M. & W. 393.

Where the defence is that the contract is materially different from the one declared on, or that the goods were in fact sold with a qualification or condition annexed, which the goods tendered did not satisfy, this is evidence under a denial of the contract as stated; *Nash v. Breeze*, 11 M. & W. 352. But a special plea setting forth the real contract, and showing performance or excuse of performance of it, as stated in the plea, would now be good, being objectionable only as an argumentative denial; see *Canham v. Barry*, 15 C. B. 597.

The following defences are also admissible on a general denial:—

Where a joint order is given for several articles at several prices, the contract is entire, and the purchaser may refuse to accept one, unless the others are delivered; *Champion v. Short*, 1 *Camp.* 53; and where goods are sold as "about" a certain quantity, "more or less," the latter words are intended to provide only for a small excess, and the purchaser is not bound to accept 350 tons on a bargain for "about 300 tons, more or less;" at least, not, unless it be shown that a large excess was contemplated; *Cross v. Eglin*, 2 *B. & Ad.* 106; *Tanvaco v. Lucas*, *ante*, p. 296.

Where goods are supplied under a single special contract with a committee of several persons, and a new member of the committee is added before the contract has been performed, he cannot be joined as co-defendant in an action for not accepting, though he assented to and recognised the contract after he had become a member; *Beale v. Moulds*, 10 *Q. B.* 975; accord. *Newton v. Watkins*, 12 *Q. B.* 921; and it matters not whether the property in the goods sold vested in successive portions during the execution of the contract, or whether the declaration be special, or for goods bargained and sold. But it might be otherwise if the circumstances were such that a new contract could be implied on successive deliveries or successive acts done by the plaintiff; as on a standing contract to work for a firm, on certain terms, when required; see the cases *supra*, and *Helsby v. Mears*, 5 *B. & C.* 504. It may be shown under the general plea that the contract was not under seal, and that the plaintiffs are an incorporated company not authorised to make such a parol contract with the defendant; as where a company, incorporated by charter to deal in copper, contracted for supplying the defendant with iron; *Copper Miners' Co. v. Fox*, 16 *Q. B.* 229.

Repudiation of the goods.] Where time is essential, defendant may refuse to receive the goods delivered after the time. Thus, where plaintiff sold to defendant 667 tons of iron, to be shipped in four successive named months "in about four equal portions," and plaintiff only sent 21 tons in the first month, which reached the defendant after the end of it, it was held that the defendant was entitled to refuse any of the iron, the facts appearing in a special plea alleging the tardy delivery of the insufficient quantity in answer to the general allegation of performances on the part of the plaintiff; *Hoare v. Rennie*; 29 *L. J. (Ex.)* 73; 5 *H. & N.* 19. In the case of sales by sample, if the bulk does not correspond with it, the defendant may refuse to receive it, and may keep the article a reasonable time to examine, and then repudiate it; *per cur.*, *Street v. Blay*, 2 *B. & Ad.* 463; *Bannerman v. White*, 31 *L. J. (C. P.)* 28; 10 *C. B.*, *N. S.* 844. Whether the non-correspondence with the sample requires a special plea, depends on the form of the declaration. If it alleges a contract of sale in general terms, and non-acceptance, it may sometimes be necessary to plead the matter specially as a collateral agreement defeating the contract; *Parker v. Palmer*, 4 *B. & A.* 387; *Sieeking v. Dutton*, 3 *C. B.* 331. But see *Weedon v. Woodbridge*, 13 *Q. B.* 462, 478, 483. Where the articles tendered do not correspond with the description of them in the contract as set forth, and are objected to on that ground, this is evidence on a traverse of the plaintiff's tender or readiness to deliver; *ante*, p. 295. The defendant was permitted to show, on a plea of *non assumpsit* to a general count for goods sold, that the sale was by sample, and that the goods did not correspond with it;

and he was allowed to show that all sales of tobacco are by sample by general usage in that trade, though there was no mention of sample in the contract; *Syers v. Jonas*, 2 *Ex.* 111. And the plaintiff may show in reply the custom of certain markets as to the time for objecting to the bulk, or as to returning, or allowing for, articles not answering the sample; *Sanders v. Jameson*, 2 *C. & K.* 557; *Cooke v. Riddeliën*, 1 *C. & K.* 561.

There is a distinction made between the sale of a specific article with a warranty, and an executory contract for the supply of goods of a particular quality. In the last case the goods may be refused or returned if not of the kind contracted for; but in the former case the remedy is either an action by the buyer on the warranty, or proof by him in reduction of damages in an action by the vendor, unless there be not merely misrepresentation or breach of warranty, but fraud; or unless there be a condition in the contract providing for the return of the goods in such case; *Street v. Blay*, *suprà*; *Dawson v. Collis*, 10 *C. B.* 523; 20 *L. J. (C. P.)* 116. But where a contract is made for the purchase of hops by sample, but the contract is made conditional on sulphur not having been used in their growth, if sulphur has been so used, the defendant is at liberty to reject the hops, although they correspond with the sample by which they were sold; *Bannerman v. White*, 31 *L. J. (C. P.)* 28; 10 *C. B., N. S.* 814; and where goods are sold under a certain denomination, the defendant is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk and without warranty; *Josling v. Kingsford*, 32 *L. J. (C. P.)* 94; 13 *C. B., N. S.* 447; and see *Hopkins v. Hitchcock*, 32 *L. J. (C. P.)* 154; 14 *C. B., N. S.* 65. But, generally, where the seller produces a sample, and represents that the bulk is of equal quality, and the sale-note does not refer to any sample, the defence that the goods are not equal to it is inadmissible; *Meyer v. Everth*, 4 *Camp.* 22; *Pickering v. Dowson*, 4 *Taunt.* 779; *Kain v. Old*, 2 *B. & C.* 634.

The purchaser by sample has a right to inspect the whole in bulk at any proper and convenient time; and if the seller refuses to show it, he may rescind the contract; *Lorymer v. Smith*, 1 *B. & C.* 1; see *Parker v. Palmer*, 4 *B. & A.* 387.

Fraud.] A wilful misrepresentation by the vendor, which induced the defendant to purchase, will warrant the defendant in refusing to complete the contract; but this must be pleaded specially. Even where the sale is "with all faults," any artifice to disguise a fault may vitiate the sale; *Baglehole v. Walters*, 3 *Camp.* 151.

Goods bargained and sold.

Where the property has passed to the buyer, if the vendor should fail on the special count, he may sometimes resort to the count for goods bargained and sold, and will be entitled to recover the whole value of the goods; *Hankey v. Smith*, *Peake N. P.* 42 (n). But there must have been an acceptance of part, or part payment, or earnest, or a note or memorandum in writing, within the Statute of Frauds, must be shown. It must appear that the property passed; therefore where a machine is ordered to be made, the maker, having completed it, cannot sue for goods bargained and sold, if there be no appropriation of it assented to by the buyer; *Atkinson v. Bell*, 8

B. & C. 277. So where goods in bulk are sold at so much per ton, an action for goods bargained and sold will not lie before they have been weighed; *per Littledale, J., Simmons v. Swift, 5 B. & C. 865.* If anything remains to be done on the part of the seller, until that is done the property is not changed, *per Bayley, J., S. C.* The general rule—"that where anything remains to be done to the goods for the purpose of ascertaining their price, as by weighing, measuring, or testing the goods, where the price is to depend on the condition of the goods, the performance of these things shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they ought to be accepted"—(*Blackburn on Sales, 152*) is not to be taken to include cases where everything that remains to be done is to be done by the buyer, with full authority from the seller, but only those cases where something remains to be done by the seller; *Furley v. Bates, 33 L. J. (Ex.) 43; 2 H. & C. 200.* The plaintiffs in London sold to the defendants a quantity of butter expected from Sligo of specified quality and price. The butter was to be shipped for London in October, and paid for by bill at two months from the landing. The butter was not shipped till November; but the defendants waived the objection, and accepted the invoice and bill of lading. The butter having been lost by shipwreck on the passage, it was held that the property had passed to the defendants; and that they might be sued for goods bargained and sold, or, *per Park, J.,* for goods sold and delivered; *Alexander v. Gardner, 1 N. C. 671.* The vendor cannot recover on this count where, before action brought, he has re-sold the goods; see *Hagedorn v. Laing, 6 Taunt. 166; Lamond v. Davall, infra.* He must sue for *not accepting.*

To a count for goods bargained and sold, the plea of "never indebted" operates as a denial of the bargain and sale in point of fact, or of facts implying such contract. Matters in confession and avoidance, or discharge, must be specially pleaded. Where the circumstances do not allow this form of action, as where no property passed, or where the property is divested, as by a re-sale, this is evidence under the general plea; *Lamond v. Davall, 9 Q. B. 1030.*

ACTION FOR NOT DELIVERING GOODS.

In an action against the vendor of goods for not delivering them, the plaintiff may be called upon, by proper pleas, to prove the contract and the breach, the performance of all conditions precedent on his part, and the amount of damages. Much of the matter under the last preceding head applies equally to this action.

Construction of the contract. Time, &c.] Where L. & Co., brokers, sold hemp by auction (described in the invoice as bought of "L. and Co."), and received part of the price, it was held that they had made themselves responsible as sellers, and that they could not defend themselves in an action for non-delivery, by evidence that they sold as agents only, and that the invoice had been made out in their names according to a local custom of brokers to secure the passing of the purchase money through their hands; *Jones v. Littledale, 6 Ad. & E. 486.* But where the invoice does not itself constitute

a contract (as in fact it rarely does), but is only used to show that the defendant was the vendor of goods sold by a previous contract, the defendant may contradict it by showing that he was not the real vendor, and that his name was put in the invoice at the plaintiff's request; *Holding v. Elliott*, 5 H. & N. 117; 29 L. J. (Ex.) 134; and, *per Cur.*, an invoice is, generally, not *per se* a contract or any estoppel; S. C.

Where the contract was for the sale of sponge, to be paid for by ochre, at, &c., the value to be delivered on or before the 24th inst., in an action for not delivering the sponge it was held that the delivery of the ochre on the 24th was a condition precedent to the plaintiff's right of action; *Parker v. Raulings*, 4 Bing. 280. But time is not generally of the essence of a contract for sale of goods, unless expressly made so by the contract. If, therefore, the defendant sells to plaintiff specific goods to be taken and paid for at a certain time, and the plaintiff fails to pay at the end of that time, the defendant, though he retains a lien on them if in his possession, cannot re-sell them; but the plaintiff, on tendering the money at a subsequent day, will entitle himself to receive them; *Martindale v. Smith*, 1 Q. B. 389. Where the defendant undertook to supply a steam-engine for a vessel of the plaintiff according to drawings and specifications of P. B., and the specification required its completion within two months; the court held that time was essential, and that an action lay for non-delivery within that time; *Winshurst v. Deeley*, 2 C. B. 253. If there is a sale of goods to be delivered to the vendee "as required," it may be that he ought to require them within a reasonable time; but the vendor cannot rescind the contract till he has called on the vendee to require or take them, even though an unreasonable time has elapsed; *Jones v. Gibbons*, 8 Ex. 920; 22 L. J. (Ex.) 347. Where the agreement on a sale of straw was to pay "for each load of straw delivered on the premises," it was held that this imported payment for each load as delivered, and that on the purchaser refusing generally so to pay, the vendor was not bound to send any more; *Withers v. Reynolds*, 2 B. & Ad. 882; and this defence may be set up on a traverse of the readiness to pay. An invitation to tender for supplying meat to a workhouse specified that a written contract would be required to be signed upon acceptance of the tender: Held that a written tender, retracted by the defendant, though accepted by the plaintiff, was not a contract on which he could sue; *Kingston-on-Hull, Guardians of, v. Petch*, 24 L. J. (Ex.) 23. A contract to deliver 150 tons of girders by three deliveries of 50 each on certain days, according to drawings provided by the plaintiff, is one entire contract; and if the plaintiff does not supply drawings within a reasonable time, the defendant is under no obligation to deliver any girders; *Kingdom v. Cox*, 5 C. B. 522. The intention of the parties is to be looked at in the construction of all contracts; and the decision on one is seldom a guide to the construction of another; *Bannerman v. White*, 31 L. J. (C. P.) 28; 10 C. B., N. S. 844.

Readiness to receive and to pay.] In support of the averment that the plaintiff was ready and willing to accept the goods and to pay for the same, it will not be necessary to prove a tender of the money; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447; and a demand of the goods is sufficient evidence that the plaintiff was ready and willing to pay; *Wilks v. Atkinson*, 1 Marsh.

412; *Levy v. Lord Herbert*, 7 Taunt. 318; and this, though the demand may be by the plaintiff's servant; *Squier v. Hunt*, 3 Price, 68.

In *Bentley v. Dawes*, 9 Ex. 666, 23 L. J. (Ex.) 220, the court held that a general averment in the declaration of performance of conditions precedent, and that all things had been done and happened to entitle plaintiff to delivery of the goods sold, includes an allegation of readiness of plaintiff to pay for them. If this be so, the plaintiff need not also aver readiness, and the defendant must state a breach of this condition in his plea. It is observable, however, that s. 57 of Common Law Procedure Act, 1852, only allows a general averment of performance of conditions, though it is a common practice of pleaders to enlarge this into an averment that "all things had happened to entitle," &c.

Non-delivery.] If the vendor is to deliver, but the contract does not (expressly or impliedly) provide where the delivery is to take place, as on board ship, he is not bound to deliver, or offer to deliver, till the place of delivery is notified by the vendee; *Armitage v. Insole*, 14 Q. B. 728. Where the contract does not provide for delivery by either party, the buyer is bound to fetch the goods; 2 Kent Com. 605; *Pothier, Cont. de Vente*, par. 52; and if a place of delivery is fixed by the contract, the vendee is not bound to accept elsewhere, nor the vendor to deliver elsewhere; *Id.* par. 51. Hops, when sold by the defendant to the plaintiff, were lying at a warehouse to the use of the defendant. The plaintiff paid for them and took away part from the warehouse with the consent of the warehouseman, but before he had carried away the rest, they were seized by a creditor of the defendant's vendor under a claim of right: Held that the plaintiff could not sue the defendant for non-delivery, although the latter had given no delivery order to the plaintiff; *Wood v. Tussell*, 6 Q. B. 234. In this case the warehouseman had, in fact, become the agent of the plaintiff, and it was not shown that the seizure was rightful. If it had appeared that the warehouseman had, from the first, refused to deliver on the order of the vendor, an action for non-delivery would have lain against the vendor; *Semb. Thol. v. Hinton* (Exch.), *Weekly Rep.* for 1855-1856, p. 26. If goods sold are in a carrier's hands subject to lien, an action for non-delivery lies against the vendor, if the carrier refuses to deliver on readiness to pay charges by the buyer; *Buddle v. Green*, 27 L. J. (Ex.) 33.

Damages.] Where goods are to be delivered at a future day, the damages for breach of contract are the difference between the contract price and the market price of the goods at the day when they ought to have been delivered; *Boorman v. Nash*, 9 B. & C. 145; *Valpy v. Oakley*, 16 Q. B. 941; *Peterson v. Eyre*, 13 C. B. 353; *Josling v. Irvine*, 30 L. J. (Ex.) 78; 6 H. & N. 512; *Wilson v. Lancashire and Yorkshire Railway Company*, 30 L. J. (C. P.) 232; 9 C. B., N. S. 632.

Where the goods delivered were of inferior quality to that contracted for, and plaintiff (vendee) had paid for them in advance, but objected to them when delivered and resold them at a reduced price, and the re-sale was within a reasonable time, the measure of damages is the difference between the market price of goods of the quality contracted for at the date of delivery and the re-sale price; *Loder v. Kekulé*, 27 L. J. (C. P.) 27; 3 C. B., N. S. 128.

A. contracts to repair an engine for B. within a certain time; C. agrees to execute part of the work for A. within a less time, but *without any knowledge of the contract between A. and B.* C. fails to do his part within the time stipulated by him; A. cannot recover from C., as special damage, compensation made by A. to B. for delay in the completion of A.'s contract occasioned by C.'s breach of contract; *Portman v. Middleton*, 27 L. J. (C. P.) 231; 4 C. B., N. S. 322; for this consequence could not have been contemplated by C. Defendant contracted to deliver a steam threshing-engine on a day fixed, at which time he knew the plaintiff would want to thresh his wheat. He failed to deliver it till six weeks after the day. He was held liable for damage and expense occasioned by long exposure of the corn, kiln-drying, stacking, &c.; but not to the loss caused by a fall in the market price of corn; *Smeed v. Foord*, 28 L. J. (Q. B.) 178; 1 E. & E. 602. Plaintiff, being under contract to deliver coals at a certain time in a distant colony, engaged defendant to convey them, defendant being aware of the contract: Held that, on failure of the defendant, he was liable to the extra expense of conveyance by other means, incurred by plaintiff, as special damage; *Prior v. Wilson*, 8 Weekly Rep. 260, Q. B. Hil. T. 1860. The above cases proceeded on the principle enunciated in *Hadley v. Barendale*, 9 Ex. 341; 23 L. J. (Ex.) 179; that the damages recoverable are such as in the ordinary course of things arise from the breach itself, or such as may be reasonably supposed to have been in the contemplation of the parties, when making the contract, as the probable result of the breach; see post, p. 374, *Action against carriers—damages*.

Defence.] Where goods sold under a contract required by the Statute of Frauds to be in writing were to be delivered at a certain place, and the parties afterwards orally varied their stipulation as to delivery, it was held that this did not support a plea of rescission of the original contract; but, *semble*, if the goods had been actually accepted, or even a delivery order accepted under the agreement as so varied, that would have been a defence under a plea of accord; *Moore v. Campbell*, 10 Ex. 323; 23 L. J. (Ex.) 310. Though a contract made in error may be avoided, yet the vendor cannot treat as void, at law or in equity, a sale to the vendee of an article misrepresented by vendor in error, unless the vendee consents; *semble*, *Scott v. Littledale*, 8 E. & B. 815. As to rescission of a contract before breach, see *Release*, under *Defences in Actions on simple contracts*.

Special finding of the jury at Nisi Prius.] By 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856), sect. 2, in actions in the superior courts, or any court of record, for breach of contract to deliver specific goods for a money price, on application of the plaintiff and by leave of the judge, the jury shall, if they find the plaintiff entitled to recover, find what are the goods which remain undelivered; the sum which the plaintiff was liable to pay on delivery; the damages sustained if the goods should be delivered under execution, and the damages if not so delivered; and thereupon, if judgment be given for the plaintiff, the court, or any judge thereof, at their or his discretion and on application of the plaintiff, may order execution to issue for delivery of the goods on payment of the

sum found payable by the plaintiff, without giving the defendant the option of retaining the goods on payment of the damages assessed.

ACTION FOR GOODS SOLD AND DELIVERED.

The plaintiff in an action in the *indebitatus* form for goods sold and delivered must be in a condition to prove, 1. The contract of sale; 2. The delivery of goods according to contract; 3. The value or price. And all these facts are put in issue by the plea of "never indebted."

The contract of sale.] As to contracts requiring a writing, the authorities will be found under the previous head of *Action for not accepting Goods*, pp. 284 *et seqq.*, and the general rule relating to sales is there stated. But the necessity of a writing under the Statute of Frauds more rarely comes in question in this action, because the delivery, on which the action is founded, generally, though not necessarily, amounts also to a receipt and acceptance by the defendant. In general, proof of the delivery of the goods to, and receipt of them by, the defendant is *prima facie* evidence of the contract, and supersedes the proof of an order; *Bennett v. Henderson*, 2 Stark. 650. But this may, of course, be rebutted; as by proof that the defendant was in the habit of selling such goods for the plaintiff on commission; *Miller v. Newman*, 4 M. & G. 646. Defendant sent an order to A., who had meanwhile sold his business to B.; B. supplied goods to defendant, who consumed them, and was sued for them by B.; on *nunquam indebitatus*: Held that the defendant having a previous set-off against A., and never having contracted with B., nor been informed of B.'s position and ownership till after the goods had been consumed, so that they could not be returned or refused, the defendant was not liable on a contract express or implied; *Boulton v. Jones*, 27 L. J. (Ex.) 117; 2 H. & N. 564.

In some cases where goods have been wrongfully taken, the plaintiff may waive the tort and sue on the implied contract. Thus where the defendant by fraud procured the plaintiff to sell goods to an insolvent, and afterwards got them into his own possession, he was held liable in an action for goods sold; *Hill v. Perrott*, 3 Taunt. 274; accord. *Abbotts v. Barry*, 2 B. & B. 369. But see *B. N. P.* 130; *Bennett v. Francis*, 2 B. & P. 554. So where a father fraudulently represented that he was about to relinquish his business in favour of his son, to whom (being a minor) goods were, upon such representation, supplied, which the father took into his own hands, he was held liable for goods sold and delivered; *Biddle v. Lery*, 1 Stark. 20. Where the owner of property, which has been taken away by another, waives the tort, and seeks to raise an implied assumpsit, it is incumbent on him to show a title to the property; and mere possession is not sufficient; *per Abbott, C. J.*, *Lee v. Shore*, 1 B. & C. 94. A carrier misdelivered teas to the defendant of more value than the teas which he had really ordered. The defendant kept them in ignorance, and mixed and sold part. On the discovery of the error, defendant offered to pay the carrier for tea of the price really ordered: Held,

that this was some evidence of goods sold and delivered by the carrier to the defendant; *Coles v. Bulman*, 6 C. B. 184; 17 L. J. (C. P.) 302.

Where goods are lent, and if damaged to be taken by the bailee at a certain price, if they are damaged, an action for goods sold lies; *Bianchi v. Nash*, 1 M. & W. 545; so if goods are delivered on terms of approval or return, and they are retained an unreasonable time; *Begerley v. Lincoln Gas Co.*, 6 Ad. & E. 829; *Moss v. Sweet*, 16 Q. B. 493; 20 L. J., Q. B. 167; and the cases of *Lyons v. Barnes*, 2 Stark. 39, and *Iley v. Frankenstein*, 8 Scott, N. R. 839, probably misreported, are not law.

The value of fixtures cannot be recovered under a count for goods sold and delivered; *Lee v. Risdon*, 7 Taunt. 188; 2 Marsh. 495. But the value of trees, which the defendant has purchased and carried away, may be recovered under a count for trees sold and delivered; *Bragg v. Cole*, 6 B. Moore, 114. The value of growing crops may be recovered on a count for crops bargained and sold; *Parker v. Staniland*, 11 East, 362; and the value of crops, taken by an incoming from an outgoing tenant, may be recovered under a count for goods sold; per Holroyd, J., in *Mayfield v. Wudsley*, 3 B. & C. 364; *Poulter v. Killingbeck*, 1 B. & P. 397. The price of railway shares may be recovered in a count for "goods and chattels sold and delivered;" *Lawton v. Hickman*, 9 Q. B. 563. A builder is not entitled to recover the value of the building materials under a count for goods sold and delivered; *Cotterell v. Apsey*, 6 Taunt. 322; nor can one who contracts to make and erect a steam-engine on the defendant's premises recover the contract price in this form; *Clark v. Bulmer*, 11 M. & W. 243.

Where the contract was, that certain goods should be paid for partly in money and partly in buttons, Buller, J., held that the plaintiff could not recover under a count for goods sold, but should have declared specially; *Harris v. Fowle*, cited 1 H. Bl. 287; *Talver v. West, Holt*, N. P. 179. But see *Hands v. Burton*, 9 Egat, 349. And generally, a contract of barter must be declared upon as such, and the mere neglect or omission of the defendant to send his goods will not make it a contract of goods sold; *Harrison v. Luke*, 14 M. & W. 139. However, where A. agreed to give a horse in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, it was held that A. might recover for a horse sold and delivered; *Sheldon v. Cox*, 3 B. & C. 420. So, in an action to recover the value of a gun for which the defendant was to give another gun and fifteen guineas, Lord Ellenborough held that, upon the refusal of the purchaser to pay for the gun in that mode, a contract resulted to pay its value in money; *Forsyth v. Jervis*, 1 Stark. 437; accord. *Ingram v. Shirley*, 1 Stark. 185.

An auctioneer may maintain an action in his own name against the buyer of goods sold and delivered by him in the course of his employment, though known to be the principal's, for he has possession, and an interest in respect of his lien, and is not a mere servant; *Williams v. Millington*, 1 H. Bl. 81. Therefore, payment to his employer is no answer to an action by the auctioneer; *Robinson v. Rutter*, 4 E. & B. 954; 24 L. J. (Q. B.) 250. But the auctioneer has only the same right as the party employing him to sell, and the defendant may therefore show that the rightful owner has claimed the value; *Dickenson v. Naul*, 4 B. & Ad. 638.

Corporations may sometimes sue or be sued on parol sales of goods, and the contract may be express or implied, as in the case of private persons; but this power is confined to cases where, from the nature and object of the incorporation, a power to make parol contracts is implied; as in the case of trading corporations; *Beverley v. Lincoln Gas Co.*, 6 *Ad. & E.* 829. Thus a gas company incorporated by statute may be sued for gas-meters sold and delivered; and it makes no difference, whether the incorporation be by charter or by statute; *S. C.* So where a contract for the sale of articles to be supplied to an incorporated body by order of its servants has been executed, and adopted by the corporation in furtherance of the purposes of its incorporation, they are liable for work done, goods sold, &c.; *Sanders v. St. Neot's Union*, 8 *Q. B.* 810. And even where the corporation is not a trading one, there is a distinction between contracts *executory* and *executed*, and suits may be sustained in the latter case on contracts not under seal, where the defendant corporation has received the goods or accepted the benefit of the contract. See, *per Id.* *Campbell, C. J.*, in *Lowe v. London and North-West. R. Co.*, 18 *Q. B.* 632, 636; *Australian Mail Co. v. Marzetti*, 11 *Ex.* 228. See further, *post*, *Action for work and labour*, and *Actions by and against Companies*. Where a railway company ordered sleepers from the plaintiff by their agent, and actually accepted them, this was held evidence from which the jury might infer a regular contract binding on the company; *Pauling v. London and North-West. R. Co.*, 8 *Ex.* 867. In this last case, the powers of contracting by parol under the Companies Clauses Consolidation Act, 1845, were referred to; but it does not appear that the judgment turned upon that act. The facts were held evidence of a regular contract in whatever form such contract ought to be.

Proof of delivery.] A party cannot maintain this action unless he has either delivered the goods or done something equivalent to delivery; *Smith v. Chance*, 2 *B. & A.* 755. It has been contended (*Smith's Mercantile Law*, p. 472 (n.) 5th ed.) that facts constituting a delivery sufficient to sustain an action for goods sold and delivered ought also to constitute an acceptance and actual receipt under the Statute of Frauds, and *converso*. It would perhaps have been convenient if this had been the established rule, but no such rule is to be deduced from the decided cases. There may be a delivery and receipt without "acceptance," though there can hardly be an "actual receipt" without a delivery, and the difficulty has rather been to determine what amounts to an acceptance, than what amounts to a delivery or receipt. The cases on the statute have been already digested at pp. 285 *et seqq.* A delivery to a carrier may be enough to support this action, though not to dispense with a written contract; for he has no authority, as carrier, to accept; *Meredith v. Meigh*, 2 *E. & B.* 364, 373. See also *Boulter v. Arnott*, 1 *C. & M.* 333, *per curiam*, and *Curtis v. Pugh*, 10 *Q. B.* 114. So an acceptance and receipt of part satisfies the statute as to the whole, but is not a delivery of the whole for the purpose of this action.

Where A. agreed to sell to B. certain goods, and earnest was paid, and the goods were packed in cloths furnished by B. and deposited in a building belonging to A., till B. should send for them, A. declaring at the same time that they should not be carried away till he was paid,—it was held that this was not such a delivery as to entitle A. to maintain an action for goods sold and delivered; for there must be a

transfer of possession as well as property; *Goodall v. Skelton*, 2 H. Bl. 316; see *Simmons v. Swift*, 5 B. & C. 857. So where goods sold for ready money, were packed up in boxes of the vendee for him and in his presence, but remained at his request on the premises of the vendor, it was held that a count for goods sold and delivered would not lie; *Boulter v. Arnott*, 1 C. & M. 333. Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of that time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retains the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods so delivered; *Oxendale v. Wetherell*, 9 B. & C. 386; *Shipton v. Casson*, 5 B. & C. 383. Where the defendant hired a musical snuff-box of the plaintiff on the understanding that if it was damaged he was to retain and pay for it; on its being so damaged, it was held that the plaintiff might sue as for goods sold, &c.; *Bianchi v. Nash*, 1 M. & W. 545; *Beverley v. Lincoln Gas Co.*, 6 Ad. & E. 829.

If the delivery deviates from the mode pointed out by the buyer, yet if notice is sent to him and he does not repudiate it, he is liable; *Richardson v. Dunn*, 2 Q. B. 218. Sale and delivery by an agent of an intestate between the time of the death and grant of administration will support an action by the administrator, as such, for goods sold; *Foster v. Bates*, 12 M. & W. 226.

A symbolical delivery of goods, if sufficient to enable the vendee to take possession and to divest the seller's lien for the price, is a sufficient delivery; as the delivery of the key of the warehouse, or of a delivery order on a wharfinger, or of other *indicia* of property, so as to put it under the control of the vendee; see *Chaplin v. Rogers*, 1 East, 192, 194; *Elmore v. Stone*, 1 Taunt. 460. And this species of constructive delivery is particularly applicable to ponderous goods not capable of ordinary delivery, as timber; or which the vendor has not engaged to deliver in any other way. Where a ship, or goods at sea, are sold, the delivery is by delivery of the documentary proofs of title, as the bill of sale or lading, &c.; 2 *Kent's Comm.* 500, 501. An order by seller for delivery to defendant of a rick of hay, made on a third person who has consented to let it remain on his land, is a sufficient delivery as between the seller and buyer, the latter having undertaken to carry it away himself; *Salter v. Woollams*, 2 M. & G. 650, 654. Other cases applicable to this head of constructive delivery will be found under the heads of *Action for not accepting*, p. 289.

To whom delivered.—Carrier, agent, or servant.] Proof of a delivery to a third person, at the defendant's request, will support a count for goods sold and delivered to the defendant; *Bull v. Sibbs*, 8 T. R. 328. And where a purchaser orders goods to be sent by a carrier, though he does not name any particular one, or where that is the usual course of business between the plaintiff and defendant, a delivery to a carrier operates as a delivery to the purchaser; *B. N. P.* 36; *Dutton v. Solomonson*, 3 B. & P. 584; or on board ship with the bill of lading indorsed so as to make the goods deliverable to the vendee or his assigns; *Groning v. Mendham*, 5 M. & S. 189; *Meredith v. Meigh*, 2 E. & B. 364, cited *supra*, p. 306. But delivery on board ship is not a delivery to the vendee,

if the bill of lading be for delivery to order of the consignor or his assigns, and the consignor does not indorse it to the vendee; *Wait v. Baker*, 2 *Ex.* 1. But, though the bill of lading be to the consignor's order, if it be indorsed at the time of shipment to the consignee's order, the property passes, and the consignee must pay for the goods though lost on the voyage; especially since the act 18 & 19 Vict. c. 111, *ante*, p. 246; *Brown v. Hare*, 3 *H. & N.* 484; 27 *L. J. (Ex.)* 372; *aff. in Ex. Ch.*, 29 *L. J. (Ex.)* 6; 4 *H. & N.* 822.

The master of a ship has a general authority to bind the shipowner for goods sold or money lent; but in an action by the creditor against the owner, the plaintiff must show that they were necessities; *M'Intosh v. Mitcheson*, 4 *Ex.* 175. See further, as to liability of shipowner on contracts of the master, *post*, p. 329.

The members of a club managed by a committee are not, merely as such, personally liable for goods supplied on the order of the committee for the use of the club; it appearing that the committee are supplied with funds by the members, who are subject only to annual subscriptions, and to other ready money payments, and that the committee has no express authority to bind the members by contracts; *Fleming v. Hector*, 2 *M. & W.* 172. And it seems that such committees are not generally authorised to deal on credit; therefore the person who supplies goods on credit can only sue those members of the committee who were privy to the contract, unless he can prove that such dealing was in furtherance of the purposes for which the committee was appointed; *Todd v. Emly*, 7 *M. & W.* 427. Nor are the members of the committee liable, as such, on the contract of their servant, the house steward, unless there be some proof of an authority from them; *Todd v. Emly*, 8 *M. & W.* 605. But where the secretary of a club for supply of coals to each member was authorised to deal on credit with the coal-merchant, each member was held liable, though there existed particular rules of the club for collecting and paying over the money from its members; *Cockereil v. Aucompte*, 2 *C. B.*, *N. S.* 440; 26 *L. J. (C. P.)* 194.

A master is not responsible for goods ordered by his servant in his name but without his authority, unless he accepts and adopts them, or has accredited the servant by paying for goods so ordered before; *Maunder v. Conyers*, 2 *Stark.* 281; *Pearce v. Rogers*, 3 *Esp.* 214. If even in one instance the master has employed the servant to buy on credit, he will be liable for any goods which the same servant subsequently orders, until the authority is distinctly withdrawn by notice; *Hazard v. Treadwell*, 1 *Str.* 506; *Rusby v. Scarlett*, 5 *Esp.* 76; and see *Gilman v. Robinson*, *Iry. & Mood.* 226; *Filmer v. Lynn*, 4 *Nev. & M.* 559, *post*, p. 318; though he has given the servant money to pay for the goods in some instances; *Wayland's case*, 3 *Salk.* 234; *Bolton v. Hillersden*, *ibid.*; 1 *Ld. Raym.* 225; *Rusby v. Scarlett*, 5 *Esp.* 76. But when the master has been always used to give his servant money to pay for commodities as he buys them, and the servant buys them without paying, and embosses the money, the master is not liable; *Stubbing v. Heintz*, *Peake*, *N. P.* 47.

Where the contract has been made with an agent, and delivery to him, the seller may in some cases resort to the principal. As to suing the principal on a sale to his agent, the following cases are important. Where the principal is unnamed or unknown at the time of sale, the following has been laid down as the rule:—"If a

person sells goods, supposing at the time of the contract that he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows that the person who is nominally dealing with him, is not principal, but agent, and also knows who the principal really is, and, notwithstanding that knowledge, chooses to make the agent his debtor, then, according to the cases of *Addison v. Gandasequi*, 4 Taunt. 574, and *Paterson v. Gandasequi*, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal; having once made his election, at the time when he had the power of choosing between the one and the other; *Thomson v. Davenport*, 9 B. & C. 86. The mere knowledge at the time of the contract that there is a principal, his name not being disclosed, will not prevent the seller, who has debited the agent, from afterwards resorting to the principal; *S. C. A.*, as agent of the defendant, a foreign merchant, bought goods of the plaintiff, and plaintiff made out invoices describing them as bought by A. "on account of" the defendant, and drew for the amount on A., who accepted. The defendant remitted the amount to A. to meet the acceptances, but A. became insolvent before they were due: held that defendant was not liable; *Smyth v. Anderson*, 7 C. B. 21. When the seller elects to sue an undisclosed principal, the defendant may show, under a denial of the contract, that he has paid his agent; *Smyth v. Anderson*, *supra*; and the books of the seller cannot be admitted as evidence for him that he always debited the principal; *S. C.* Where the contract is in writing signed by the agent in his own name, the result of the authorities seems to be, that parol evidence is admissible to charge the undisclosed principal, but not to discharge the agent; see notes to *Thomson v. Davenport*, 2 Sm. L. C. 330 *et seqq.*, and the cases there cited.

Delivery to partner.] Each partner is presumably an agent for the rest to bind them by simple contracts relating to the business of the firm. Therefore goods delivered in pursuance of an order by one are delivered to all, unless it appears that they were delivered on the exclusive credit of one only; but debiting one only, and taking the separate acceptance of that one, is not decisive of this; *Bottomley v. Nuttall*, 5 C. B., N. S. 122; 28 L. J. (C. P.) 110. A question sometimes arises in such actions, whether all the defendants are liable as partners. Although the defendant cannot compel the joinder of a dormant partner as co-defendant, yet the dormant partner may, at the option of the plaintiff, be so joined; *Lloyd v. Archbuckle*, 2 Taunt. 327; *Ruppell v. Roberts*, 4 Ner. & M. 31. And such a partner may be joined as defendant, though the contract, which was in writing (not under seal) and *inter partes*, did not name him; *Drake v. Beckham*, 11 M. & W. 315 (Ex. Ch.). Though a partnership is constituted by deed, it may be proved by parol evidence. An examined copy of an answer in Chancery by two of the defendants to a bill of a third defendant, charging them as partners and praying for an account, is good evidence to prove the partnership as against the persons so answering; *Studdy v. Sanders*,

2 D. & R. 347. Proof that the defendants suffered their names to be used as partners will be sufficient. See notes to *Waugh v. Carver*, 1 Sm. L. C. 833. If it can be proved that the defendant has held himself out to be a partner,—not “to the world,” for that is a loose expression,—but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he is liable to the plaintiff in all transactions in which the plaintiff gave credit upon the faith of his being such a partner; *per* Parke, J., *Dickinson v. Valpy*, 10 B. & C. 140. Though parties are not really partners in trade, yet if one so represents himself and thereby gets credit for goods for the other, both are liable; *per* Lord Kenyon, C. J., *De Berkom v. Smith*, 1 Esp. 29. Where the defendant had held himself out as a partner, and statements had been made by one of the firm that the defendant was a partner, though in fact he was not, this will not make the defendant liable, as an ostensible partner, to plaintiffs who had not heard of the statements, nor supplied the goods on the faith of the defendant being a partner; *Edmundson v. Thompson*, 31 L. J. (Ex.) 207. If the name of a clerk be used in a firm with his own consent, he is liable to third persons as a partner, though he receives no part of the profits; *Guidon v. Robson*, 2 Camp. 304. So, where the defendant had advanced money to a person who was getting up a mining company, and had received 200 shares as a security, with the option of taking them, but had not done so; but he had permitted the captain of the mine to represent, without absolutely naming the defendant, that the mine was being worked by a person of substance, and the plaintiff supplied goods on the faith of these representations, it was held that plaintiff could recover against the defendant as a partner in the mine; *Martyn v. Gray*, 14 C. B., N. S. 824. Persons may be partners in a particular concern or business, yet if they do not hold themselves out as general partners, it will not make them liable in other cases not connected with that business; *De Berkom v. Smith*, *supra*. But as to that particular concern, they are partners so as to bind one another by contracts for carrying it out; *Heyhoe v. Burge*, 9 C. B. 431; 19 L. J. (C. P.) 243. Where the publisher, editor, and printer agree to share the profits of a periodical work equally, and the printer is to furnish paper at cost price, the stationer who supplied the printer with paper cannot sue either publisher or editor, as partners; *Wilson v. Whitehead*, 10 M. & W. 503. If there is a stipulation between apparent partners, that one of them shall not participate in the profit and loss, and shall not be liable as a partner, he is not liable as such to those persons who have notice of the stipulation; *Alderson v. Pope*, 1 Camp. 404 (n.). The plaintiff must show that the name of the defendant was used in the firm with his own consent; *Newsome v. Coles*, 2 Camp. 617, 2 H. Bl. 235 (n.), 4th edit. Where a person allows his name to remain in a firm, either exposed publicly over a shop-door, or used in printed invoices or bills of parcels, or published in advertisements, this precludes him from disputing his liability as a partner; *per* Tindal, C. J., *Fox v. Clifton*, 6 Bing. 794. If a firm, consisting of several, carry on business in the name of one of the partners, the whole firm will be bound by acts done by him as representing the firm; *South Carolina Bank v. Case*, 8 B. & C. 427; *Vere v. Ashby*, 10 B. & C. 293.

The liability of a person, as partner, whether called one or not, may also be proved by showing that he participated in the profits of the

concern; and it is immaterial whether he receives the profits for his own use, or as a trustee for others. Thus the executors of a deceased partner, carrying on trade for the benefit of the estate, are liable personally as partners; *Wightman v. Townros*, 1 M. & S. 412. However small the stipulated portion of profits, the participation renders the party liable to all the engagements of the partnership; *R. v. Dodd*, 9 East, 527. And this, whether the plaintiff knew or not, at the time of his dealing with the concern, that the person whom he charges as a partner participated in the profits; *Ex parte Gellar*, 1 Rose, 297; *Vere v. Ashby*, *supra*.

The participation, to render the party liable, must be in the profits *as such*. Therefore a remuneration made to a traveller, or other agent, by a portion of the sums received by or for his principal in lieu of a fixed salary, is only a mode of payment adapted to secure exertion, and does not render the agent a partner; *Cheup v. Cramond*, 4 B. & A. 670. So, a person employed as superintendent-engineer of another's steam-ship at a yearly salary, and, in addition, a sum equivalent to ten per cent. on the net profits, is not a partner; *Harrington v. Churchward*, 29 L. J. (Ch.) 521. So, a person employed to sell goods, and who was to have for himself whatever he could procure for them above a stated sum, was held not to be a partner; *Benjamin v. Porteus*, 2 H. Bl. 590. So, in an agreement between the owner of a lighter and B., that B., in consideration of working the lighter, shall have half the gross earnings, is only a mode of paying wages, and not a partnership in the profits; *Dry v. Boswell*, 1 Camp. 329. So, an agreement that a sailor shall receive a certain share of the produce of the voyage in lieu of wages, does not make him a partner with the owners of the cargo; *Wilkinson v. Frasier*, 4 Esp. 182; *Mair v. Glennie*, 4 M. & S. 244. So, where a patentee grants an exclusive licence to work it to other persons, who engage to employ him as manager at a salary equal to forty per cent. on the net proceeds of the business; *Stocker v. Brocklebank*, 20 L. J. (Ch.) 401. So, the receipt of a per-centage on the gross amount of sales to persons recommended by A. does not make him a partner of the seller; *Pott v. Eyton*, 3 C. B. 32. But, where a retiring proprietor of a newspaper guaranteed the purchaser of it a certain profit, stipulating for the surplus profit for a certain number of years in a certain event, he was held to be a partner; *Barry v. Nesham*, 3 C. B. 641. An agreement between two persons, that one shall make purchases of goods for the other, and in lieu of brokerage shall have one-third of the profits of the sales, and bear a certain proportion of the losses, would make him liable as a partner as to third persons; *per Holroyd, J.*, *Smith v. Watson*, 2 B. & C. 409. A distinction is recognised between receiving a share of the profits, which renders the person liable as a partner, and relying on the profits as a fund for payment, which will not have that effect. See *Grace v. Smith*, 2 W. Bl. 998; *Ex parte Hamper*, 17 Ves. 404; and 2 H. Bl. 236, 4th edit. Two persons who carried on business, as iron-smelters, in partnership, compounded with their creditors by means of a composition deed, conveying the partnership property to trustees, to carry on the business under the name of a company, and to divide the net profits annually among the creditors of the partnership; and it was held that a creditor who had executed the deed was not liable as a partner for debts contracted by the trustees in carrying on the trade; *Cox v. Hickman*, 9 C. B., N. S. 47; 8 H. L. Cas. 268; 30 L. J. (C. P.) 126. The proper test of liability as a partner of a person not ostensibly a

partner, is not merely whether the person sought to be charged has stipulated for participation in the profits, as such; but whether the person by whom the trade was actually carried on, carried it on as agent for the other; *S. C.*; *In re English and Irish Church Insurance Society*, 1 *H. & M.* 85; *Kilshaw v. Jukes*, 32 *L. J. (Q. B.)* 217; 3 *B. & S.* 847. In that case, A., an ironmonger, having supplied ironmongery to the amount of 189*l.* to B. and C., who were builders, agreed to join them in the purchase of some land for building, on the conditions that B. and C. should build the houses, A. supplying the ironmongery required, and that on the completion of the houses A. should be paid his debt of 189*l.*, and the price of the ironmongery, and no more, and that if no profit was realised A. should be a loser; an agreement was accordingly entered into by all three with the landowner for the purchase of a piece of land, and the three bound themselves to complete buildings upon it according to certain plans, the vendor agreeing to make advances to the three to enable them to complete the building, and the three being jointly bound to pay the purchase-money, and the conveyance, when all was paid, to be to the three. B. and C., having ordered timber of the plaintiff, it was supplied on their credit (the plaintiff being ignorant of A. having an interest in the building), and it was used in the building; held (*Wightman, J.*, dissenting), that A. was not jointly interested with B. and C. in such a way as to make him a partner, and liable for the timber.

A partner is not liable on a contract made before he became such; as for goods delivered after he became partner on an order given before; *Beale v. Moulds*, 10 *Q. B.* 976; *Battley v. Lewis*, 1 *M. & G.* 155. And this is the rule, though the partnership may have been made retrospective by agreement between the new and old partners; *Vere v. Ashby*, 10 *B. & C.* 288.

Where a dormant partner quits the partnership without any public notice, he will not be liable to persons subsequently dealing with the partnership, and who were ignorant that he had been a partner; *Carter v. Whalley*, 1 *B. & Ad.* 11. If a creditor, knowing of a dissolution of partnership, transfers his account from the old to the new firm, and continues to deal with the new firm, this is evidence of accepting that firm as his debtors, and will release a retiring partner; *Hart v. Alexander*, 2 *M. & W.* 484; and see *Kirwan v. Kirwan*, 2 *C. & M.* 617. If a partner retires from a firm which has dealings with a banking company formed under 7 Geo. 4, c. 46, the fact that a shareholder in the bank, who is also a director of it (but not a manager), happens to be one of the firm, is not *constructive notice* of the dissolution of partnership so as to protect the retired partner from future liability to the bank; *Powles v. Page*, 3 *C. B.* 16.

The authority of a partner to bind the firm being that of a presumed agency, a question may arise how far this agency can be determined or excluded by timely notice to the vendor or other creditor from another member of the firm, disclaiming the act or order of his partner. The general question as to the effect of such notice has not, it is believed, been settled. It has, however, been said that mere notice to, or knowledge of, the creditor of any arrangement between the partners respecting the non-liability, or the restricted liability, of any of them, will not affect the creditor's right to hold all, or any, of the partners liable, though the notice was before the contract; *Ex parte Greenwood*, 23 *L. J. (Ch.)* 966; 3 *De G., M., & G.* 459. But it has been repeatedly ruled, so far as relates to the

power of binding a firm by negotiable securities, that a partner is not liable after notice to the person taking the security; *Galway v. Mathew*, 10 East, 264; *Rooth v. Quin*, 7 Price, 193; and see generally *Story on Partnership*, sect. 123; 3 *Kent's Com.* pp. 44, 45, and the cases cited *ante*, p. 178. In cases where the majority can bind the rest of the partnership, it is questionable whether such notice or disclaimer can have any operation at all; see *Story and Kent*, *ubi supra*.

Delivery to an unincorporated mining company.] Working mines is a species of trade, and has some of the qualities of an ordinary partnership. Mines being often worked by unincorporated partnerships, with transferable shares, the cases may be conveniently collected under this head.

The shareholders in an ordinary mining company, conducted by managers or other agents, are personally liable on the contracts made for the supply of the mines, where such contracts are necessary or usual, or where the defendants can be shown to have authorised the contracts; *Tredwen v. Bourne*, 6 M. & W. 461; *Steigenberger v. Carr*, 3 M. & G. 191. And such shareholders are for this purpose partners, and therefore liable on all usual contracts for goods supplied, &c., made by their agents, though there may be an agreement *inter se* not to deal on credit; unless the plaintiff knew of the restriction, and that the goods were ordered without the authority of the shareholder sued; *Hawken v. Bourne*, 8 M. & W. 703. The defendant may be charged as partner on proof of an admission of his interest either before or after the debt was incurred, without proving a deed of copartnership or any strict legal interest in the mine; *Ralph v. Harvey*, 1 Q. B. 845; or by proof that he acted as partner; *Owen v. Van Uster*, 10 C. B. 318; 20 L. J. (C. P.) 61; unless the admission be shown to have been made under an error; *Vice v. Anson*, 7 B. & C. 409, 411. The defendant's interest may be proved by his acceptance of the shares in a mine, written at the foot of a certificate of transfer by the seller, although it be not stamped as a transfer; but if the document does not itself convey any legal interest, the admission of the defendant is not conclusive proof; *Toll v. Lee*, 4 Ex. 230. See *ante*, pp. 135-7, as to stamp duty; and, as to evidence of transfer, see *Watson v. Spratley*, 10 Ex. 222, cited *ante*, p. 151, and p. 284. Attendance of the defendant at a meeting in the character of a shareholder, is evidence that he is one; *Harrison v. Heathorn*, 6 M. & G. 81. Where the facts showed that the defendant became a shareholder on the terms that the directors should not proceed without a certain capital, and they proceeded (without the defendant's assent) before that capital was raised, the defendant was held not liable on their contract; *Pitchford v. Davis*, 5 M. & W. 2. But the non-performance of this condition by the directors will not prevent the liability of a shareholder from attaching, where he sanctions the contract either directly or by acquiescing in the working; *Steigenberger v. Carr*, 3 M. & G. 191.

Delivery to members of an inchoate company.] A joint-stock company is in the nature of a partnership; but the constitution of such companies generally distinguishes them from ordinary partnerships. When incorporated, the direct liability of individual members ceases. When inchoate, or not incorporated, the liability of a member depends

on his being actually or constructively a party to the contract on which the plaintiff sues. In such cases the questions to be considered are:—Was the defendant directly a party to the contract? Was he a member of the body which contracted? Did he hold himself out as a partner by acting, or permitting others to act, in such a way as reasonably to induce the plaintiff to believe that he was a partner, and responsible as such? Had he legally withdrawn from the concern at the time of the contract? See *Wood v. Argyll*, 6 M. & G. 928; *Lake v. Argyll*, 6 Q. B. 477; *Fox v. Clifton*, 6 Bing. 792; *Bright v. Hutton*, 3 H. L. C. 341. The question, that most frequently presents itself, is the liability of persons who have become subscribers to a company projected, but not finally established.

When the defendants consented to be directors of a water company and attended meetings, and were privy to an order given to the plaintiff (an engineer), though not actually present when the order was given, they were held liable, notwithstanding the subsequent failure of the project; *Doubleday v. Muskett*, 7 Bing. 110. But the mere consent of the defendant to become a member of the provisional committee of an intended company, and the insertion, with his authority, of his name in a prospectus accordingly, will not *per se*, and without further privy, make him liable on orders given by other members of the committee, or by the secretary, or the solicitor of the company; *Reynell v. Lewis*, 15 M. & W. 517; *Barker v. Stead*, 3 C. B. 946; *Cooke v. Tonkin*, 9 Q. B. 936; *Bailey v. Macaulay*, 13 Q. B. 815. The facts of the case may, however, warrant a judge in leaving them to the jury as evidence that the defendant had authorised the contract to be made either by his co-provisional committeemen or by the managers of the concern, *i.e.*, by the managing committee, if any, or the majority of them, or by the solicitor or other officer of the company; and the terms of the printed prospectus, if circulated with the defendant's privy and consent, and known, or presumably known to the plaintiff, may be sufficient to justify such inference; *Semb. per Curiam*, in *Reynell v. Lewis*, 15 M. & W. 517, and see *Bailey v. Macaulay*, *supra*. But a managing committee, appointed by the provisional committee, are not *therefore* agents of the latter for the purpose of pledging *their* credit by contracts; *Williams v. Pigott*, 2 Ex. 201. Where the defendant, as one of an acting committee, assented to the contract with the plaintiff, it was held a proper question for the jury whether the contract was on the personal liability of the defendant either alone or as a committeeman, or on the sole credit of the funds. If on the credit of the funds, the contract becomes absolute on receipt of funds and may be enforced by action of *indebitatus assumpsit*; *Higgins v. Hopkins*, 3 Ex. 163. A minute in the books of an unincorporated railway company appointing the plaintiff their engineer, not authenticated by any signature, or by any proof *aliunde* that a board meeting was held on the day, or that the defendant, a provisional committeeman, had sanctioned the resolution, is not *per se* evidence to fix the defendant; nor is a letter of the secretary to the plaintiff, stating the minute, admissible against the defendant without some proof of his authority to write it; *Rennie v. Wynn*, 4 Ex. 691.

A person who applies for shares in a joint-stock company and pays a deposit on them, but has not otherwise interfered in the concern, is not therefore liable on contracts made by a board of directors, who have taken upon themselves to act before the necessary capital has been raised agreeably to the prospectus, and after the shares have

been declared forfeited by reason of non-payment of subsequent calls; *Fox v. Clifton*, 6 Bing. 776. See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151, cited *post*, under *Actions by Companies*, Part III.

Some of the cases belonging to this head have already been mentioned under the last head of delivery to partners (pp. 309 *et seqq.*), such companies having, until recently, been treated as partnerships, and so called. In *Reynell v. Lewis*, *suprà*, p. 314, it is denied that associations of this kind (at least so long as they are *in fieri*) are partnerships at all.

As to actions against incorporated or registered companies, see *ante*, p. 306, and *Actions by and against Joint-Stock Companies*, *post*, Part III.

Delivery to wife.] Where husband and wife live together, and goods are delivered to the wife by her order, a jury may presume the husband's assent; *Bac. Abr. Baron and Feme* (H.); 1 *Freem. Rep.* 249 (n.), 2nd ed. The question is one of authority for the jury; and not simply whether the articles supplied were necessities or not; *Reid v. Teakle*, 22 L. J. (C. P.) 161; 13 C. B. 627. Where a husband is living in the same house with his wife, he is liable for any goods which he permits her to receive there. If they are not cohabiting, then the husband is in general only liable for such necessities as, from his situation in life, it is his duty to supply to her; *Waithman v. Wakefield*, 1 Camp. 121; *Atkins v. Curwood*, 7 C. & P. 756. The liability of the husband for articles supplied to his wife was much discussed in the late case of *Johnson v. Sumner*, 3 H. & N. 261; 27 L. J. (Ex.) 341; where it was held that in all cases where she is living separate, it lies on the plaintiff to show that she does so under circumstances which imply an authority to pledge her husband's credit; and if she has an allowance agreed upon between them, the plaintiff must prove the insufficiency, otherwise he may be nonsuited. In delivering judgment the Court laid down the following propositions:—If the wife leaves her husband without his consent, there is no implied authority to bind him. If with his assent, there is no necessary implication of authority; but it *may* be implied either by her destitution of adequate support *aliunde*, or inability to support herself. Thus, in the case of labouring people both equally able to maintain themselves, an authority to bind the husband is not to be implied in the case of mere non-cohabitation. In the ordinary case of cohabitation the implied authority of the wife is not affected by any private agreement between her and her husband.—But the majority of the Court of Common Pleas (Erle, C.J., Williams, J., and Willes, J.), directly negated this last proposition in *Jolly v. Rees*, 33 L. J. (C. P.) 177; 15 C. B., N. S. 628. In that case the defendant's wife, while living with him, ordered goods of the plaintiff, which were necessities suitable to the estate and degree of her husband, for the use of herself and children. The defendant had forbidden his wife to buy goods on credit, and told her to apply to him if she wanted money, and there was no evidence that she had applied and been refused; but the plaintiff had received no notice of this prohibition. The wife had the command of 65*l.* per annum settled to her separate use, and the defendant had promised to allow her 50*l.* per annum in addition, but had not paid it regularly, and had not himself supplied her with such necessities as the goods supplied by the plaintiff, nor with money sufficient for the purchase thereof,—

the majority of the Court decided, that on these facts the defendant was entitled to a verdict; holding that the wife cannot make a contract binding on her husband unless he give her authority as his agent to do so; and that when it is sought to charge a husband on a contract made by the wife, the question is whether the wife has his authority, express or implied, to make the contract; and that although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption may always be rebutted. Byles, J., who dissented from the judgment of the Court, was of opinion, that the wife's power to bind the husband, like the case of any other principal and agent, depends not only on her actual authority, but on the apparent authority with which the husband invests her by cohabitation; and that he thereby represents her to tradesmen as his domestic manager within certain limits, and is therefore responsible for her contracts within the margin of that apparent authority. That no private revocation of authority or private agreement between husband and wife, not communicated to a tradesman, honestly supplying necessities to the wife for the family in the ordinary course of domestic affairs, can affect the tradesman's right to rely on the apparent authority of the wife.

As the liability of the husband in ordinary cases turns on the question of the wife's power as his agent, where the order is plainly an extravagant one, that fact may be considered by the jury as tending to rebut the presumed agency; *Lane v. Ironmonger*, 13 M. & W. 368. Where a wife carried on business on her own account during the imprisonment of her husband, and, after his return, articles were furnished in the same business with his knowledge, he was held liable for these articles, though the invoices and receipts were made out in the wife's name; *Petty v. Anderson*, 3 Bing. 170. The presumption of the husband's liability may be rebutted by proof that the credit was given to the wife; *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22: or by proof of any other circumstances negating the husband's assent, as that the goods supplied are beyond the rank and station the husband maintains; *Montague v. Benedict*, 3 H. & C. 631. Even where they are living together, if she is in fact supplied with sufficient articles of dress, the husband may show this to rebut the presumption of authority to order dresses arising from cohabitation; *Reneaux v. Teakle*, 8 Ex. 680.

If the husband and wife have parted by consent, the former remains liable for necessities supplied to the latter, unless he makes her an adequate allowance; *Hodgkinson v. Fletcher*, 4 Camp. 70; *Hindley v. Westmeath*, 6 B. & C. 211: *aliter*, if she leaves without his consent; *S. C.* But where the husband and wife had lived separate for many years, and the wife had adequate resources of her own, of which the plaintiff had notice, it was held that he could not sue the husband; *Liddlow v. Wilmot*, 2 Stark. 88; see *Thompson v. Hervey*, 4 Burr. 2 177. So even without a knowledge of her being provided for, the creditor, if he gives credit to her and she is in fact adequately provided for *aliunde*, cannot sue the husband; *Clifford v. Laton*, *Mood. & M.* 101. And, generally, it is now settled that if the wife is living apart from her husband, and he, in fact, allows her a sufficient maintenance, he is not bound by her contracts; and it is immaterial whether the tradespeople had notice of that allowance or not; *Mizen v. Pick*, 3 M. & W. 481; in which case Alderson, B., says,

"I do not see how notice to the tradesman can be material. The question in all these cases is one of authority. If a wife living separate from her husband is supplied by him with sufficient funds to support herself, with everything proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable." In *Biffin v. Bignell*, 7 H. & N. 877, 31 L. J. (Ex.) 189, it was held that a wife, living apart from her husband with his consent, on the terms that she shall accept a certain allowance, which is paid, has no authority to pledge his credit, though the allowance is inadequate.

A husband is liable for necessities provided for his wife pending a suit in the ecclesiastical court, and before alimony decreed, although a decree, afterwards made, directs the alimony to be paid from a date before the time when the necessities were provided; *Keegan v. Smith*, 5 D. & C. 375. And after a divorce for adultery in the husband, and a decree of alimony, the husband has been held liable for necessities supplied to the wife, if he omits to pay the alimony; *Hunt v. De Blaquiere*, 5 Bing. 550. But after a decree of nullity, the liability of the husband for the debts of his late wife does not continue; *Anstey v. Manners*, Gow, 10. And after sentence of judicial separation in the Court for Divorce and Matrimonial causes (20 & 21 Vict. c. 85, sect. 26), the wife is a *feme sole* for the purpose of wrongs, contracts, and suits, and her husband is not liable in respect of her contracts or wrongs, or of the costs of proceedings by or against her in a civil suit; but if he shall not have duly paid the alimony (if any) decreed, he shall be liable for necessities supplied for her use. And a wife, deserted by her husband, and obtaining protection under s. 21 of the act, is, during the protection, deemed to be in like position with regard to property and contracts and suits, as if she had obtained a decree of judicial separation. Such protection, if granted by Justices of the Peace, is, within ten days of the making, to be entered with the Registrar of the County Court of the district where she is resident. And see also 21 & 22 Vict. c. 108, s. 8. Before these acts it had been considered that an express promise made by the husband to pay a debt contracted by the wife after a separation and adequate allowance, was a ratification, and binding upon him; *Hornbuckle v. Hornbury*, 2 Stark. 177; accord. *Harrison v. Hall*, 1 Mood. & Rob. 185. But the principle of this ruling is open to question; see a note to the last-mentioned case.

Where the wife elopes from her husband and lives in adultery, the husband is not liable even for necessities supplied to her; *Morris v. Martin*, 1 Stra. 647. And, in such case, the wife is a competent witness to prove the adultery; *Cooper v. Lloyd*, 6 C. B., N. S. 519. And where the husband turns the wife out of doors on account of her having committed adultery under his roof, he is not liable for necessities furnished to her afterwards; *Ham v. Toovey*, Selw. N. P. 329. So if she elopes, though not with an adulterer; *Child v. Hurdymann*, 2 Stra. 875. But if, after an adulterous elopement, the husband takes her back, he is liable for necessities subsequently supplied; *Harris v. Morris*, 4 Esp. 41. In these cases there is no ground for implying an authority; but where her separation is compulsory, and is the act of her husband, he is liable, although an implied authority in the strict sense of the word, can hardly be the ground of obligation. Thus where a wife leaves her husband under a reasonable apprehension of personal violence, he continues liable for necessities furnished to her; *Houlston v. Smyth*, 3 Bing. 127. So if he cause-

lessly turns away his wife or shuts his door against her; *Lungworthy v. Hockmore*, cited 1 *Ld. Raym.* 444; see also *Rawlyns v. Vandyke*, 3 *Esp.* 251. In such cases even a notice by him, that he will not be answerable for her debts, will not relieve him from liability; *Boulton v. Prentice*, *Selw. N. P.* 334; *Harris v. Morris*, 4 *Esp.* 42. A husband ill-treated his wife, who indicted him for the assault; a person who advanced money, for the purposes of the prosecution, to the attorney, without which he could not have gone on, cannot recover it from the husband as money supplied to procure her necessities; *Grindell v. Godmond*, 5 *Ad. & E.* 755. But the husband is liable to the attorney employed by the wife for the expenses of articles of the peace exhibited by the wife against him, although she may have a separate maintenance; *Turner v. Rookes*, 10 *Ad. & E.* 74. It lies upon the plaintiff to show, that under the circumstances of the separation, or from the conduct of the husband, the wife had authority to bind him; and this even in an action for necessities; *Mainwaring v. Leslie*, *Mood. & M.* 18; 2 *C. & P.* 507; *Clifford v. Laton*, *Id.* 102. And where the plaintiff caused a letter to be sent to the defendant reminding him of his liability for necessities supplied to his wife, that she was getting into debt, and stating the wish of his wife to return to him, which the defendant received, but returned no answer, it was held some evidence, though slight, that the defendant had authorised his wife to pledge his credit for necessities; *Edwards v. Towels*, 5 *M. & G.* 624. If the husband is a lunatic and incapable of making contracts, then he is bound by the orders for necessities given by his wife; for this is analogous to the case of an omission of the husband to supply necessities, though the omission is involuntary; *Read v. Legard*, 6 *Ex.* 636.

The plaintiff must prove, either that the defendant and the woman to whom the goods were delivered are married, of which it is sufficient *prima facie* evidence that they are living together; *Cur v. King*, 12 *Mod.* 372; *Mainwaring v. Leslie*, *supra*; or that she and the defendant cohabited, and that she passed as his wife with his assent, assumed his name, and lived in his house as part of his family; *Watson v. Threlkeld*, 2 *Esp.* 637; *Robinson v. Nahon*, 1 *Camp.* 245; for the presumed authority arising from cohabitation in the character and position of a wife applies to such cases as well as to legal marriages. But when the defendant has separated from a woman with whom he has lived, not being his wife, he is not liable for necessities supplied afterwards; *Munro v. De Chemant*, 4 *Camp.* 215. But if the separation be unknown to the plaintiff, and the goods have been supplied under circumstances which justify him in supposing that the authority of the defendant continued,—as where the defendant had authorised like orders before, and the woman continued to live in the same house where the former orders had been given,—it is a mere question of agency for the jury, and it is immaterial that the plaintiff knew that the parties were unmarried; *Ryan v. Sams*, 12 *Q. B.* 460.

Where the wife ordered goods to be delivered to her mother, saying her husband would pay for them, which he did; and she subsequently ordered other goods in like manner, it was held that there was evidence for the jury of the wife's authority to order the latter goods; *Filmer v. Lynn*, 4 *Nev. & M.* 559. The case is, in this respect, like that of a household servant. See *ante*, p. 308.

The wife's authority is of course put in issue under the general issue. Thus where the goods were delivered after the husband's

liability had ceased by reason of the wife's adultery, the defence was admitted under *non-assumpsit*; *semb.*, *Symes v. Goodfellow*, 4 *Dowl.* 642. See further, as to the husband's liability for the contracts of the wife, *Manby v. Scott*, with other cases, and the notes; 2 *Sm. L. C.* pp. 380—431.

Delivery to infant child.] The father of an infant to whom goods are supplied is only liable where an actual authority from him to his son is proved, or circumstances appear from which such an authority can be implied; *Baker v. Keen*, 2 *Stark.* 501; *Rolfe v. Abbott*, 6 *C. & P.* 286. *Quære*, Whether a father, deserting his infant child of tender years, be liable to a person who supplies the child with necessaries, no further proof of contract being given? Such action, at all events, cannot be maintained if the father had reasonable ground to suppose that the child was provided for; *Urmston v. Newcomen*, 4 *Ad. & E.* 899. And the mere moral obligation arising from the relation of parent and child does not, *per se*, afford any legal inference of a promise on the part of the parent to pay a debt even for necessaries supplied to the child; *Shelton v. Springett*, 11 *C. B.* 452. The mother of a bastard child is bound by the 4 & 5 *Will.* 4, c. 76, s. 71, to maintain it till sixteen years old, but this is a mere personal liability; and on the death of the mother leaving assets, the administrator cannot be sued for necessaries supplied to the child after the death; *Ruttinger v. Temple*, 33 *L. J. (Q. B.)* 1; 4 *B. & S.* 491. It appeared that the plaintiff, a tailor, furnished clothes to the defendant's son, a boy at school; that the boy, when sent to the school, was in want of clothes; that when he went home for the holidays he took the clothes in question with him, but was not wearing them; and that he returned to school bringing them with him. Defendant lived near the place where the school was, but it did not appear that he had given any direction, or made any provision, for supplying his son with clothes. It was held that there was *some* evidence to go to a jury of an implied authority from the father; *Law v. Wilkin*, 6 *Ad. & E.* 718.

Delivery to overseer.] Where goods were supplied for the use of the poor of the parish on orders signed by some of the overseers separately, all of whom had, on different occasions, promised to pay, this was held evidence of a joint contract on which all the overseers were liable to be sued, including the assistant overseer who had signed; *Kirby v. Banister*, 5 *B. & Ad.* 1069; see *Eaden v. Titchmarsh*, 1 *Ad. & E.* 691. And an express promise will make them liable for medicines, &c., already supplied to a pauper on sudden illness without previous request; *Watson v. Turner*, *B. N. P.* 147. But overseers are not, generally, legally bound by the contract of one or more of them; it is a question for the jury whether the parties sued did in fact join in it; *Marsh v. Davies*, 1 *Ex.* 668.

Value.] When the goods have been sold without any agreement as to the price, their value must be proved. If the vendor of goods is only able to prove the delivery of a package, without any evidence of the contents, it will be presumed as against him that it was filled with the cheapest commodity in which he deals; *Clunnes v. Pezzey*, 1 *Camp.* 8. If a seller agrees to sell a machine at a certain price and puts in materials superior to those contracted for, the purchaser is neither bound to pay a higher price, nor to return the machine;

Wilmot v. Smith, 3 C. & P. 455. Where goods have been sold and delivered to be paid for by bill at a certain date, if the bill be not given, the plaintiff may recover in this action, as part of the stipulated price, interest from the time the bill would have become due; *Farr v. Ward*, 3 M. & W. 25.

Defence.

Evidence of the various defences that may be set up to an action of this kind, will be found under the general head of *Defences in Actions on Simple Contract*.

Nunquam indebitatus.] This plea operates as a denial of those matters of fact from which the liability arises; as of the sale and delivery in point of fact; *R. II. T.* 1853. Matters in confession and avoidance, or discharge, must be pleaded; as payment, fraud, illegality, &c.

Reduction of damages.] It was formerly a question in this action, whether the defendant could give the bad quality of the article in evidence in reduction of the value claimed by the plaintiff, or whether it was only ground of cross action. Such evidence is admissible where the plaintiff claims only on a *quantum meruit*, and no price has been agreed upon; *Basten v. Butter*, 7 East, 479; *Furnsworth v. Garrard*, 1 Camp. 38. And, though a different practice formerly prevailed, it is now held that, in all cases of goods sold at a fixed price with a warranty, or agreed to be supplied according to a special contract, it is competent for the defendant in this form of action to show, under the general issue, how much less the subject-matter of the action is worth by reason of the breach of warranty or contract; but any further damages sustained by the defendant beyond the difference of value must be recovered in a cross action; *Mondel v. Steel*, 8 M. & W. 858; *Parson v. Sexton*, 4 C. B. 899. And it seems that the acceptance and non-return of the goods by the defendant will not preclude this defence, though it may be evidence in favour of the plaintiff of a fresh contract to pay on the footing of a *quantum valebant*; *Mondel v. Steel*, *supra*; *Grounsell v. Lamb*, 1 M. & W. 352. The defendant might have availed himself of the defence of the inferior quality or worthlessness of the goods under the plea of non-assumpsit; *Cousins v. Paddon*, 2 C., M. & R. 547; *Dicken v. Neale*, 1 M. & W. 556; and though this plea is now disused, and a general plea of *nunquam indeb.* substituted, the like defence is still available under the new plea. Where plaintiff sold to the defendant a cask of cyder warranted good, and it turned out bad and unsaleable, whereupon defendant gave the plaintiff notice of the quality, and said he would continue to try it, but feared it would be unsaleable; to which plaintiff made no reply: Held that the defendant was not liable, though he used more than was necessary to try it, and that the silence of plaintiff in reply was evidence that he acquiesced in the further trial, and that defendant was not bound to send back the cask with the remaining cyder; *Lucy v. Mouflet*, 29 L. J. Ex. 110; 5 H. & N. 229. But he cannot show, under *nunquam indebitatus*, that the plaintiff had no title to the goods delivered, and that they have been claimed and taken possession of since the sale by another person under a prior title; *Walker v. Mellor*, 11 Q. B. 478. Such a plea, relying upon a warranty of title, must, it seems, be specially pleaded in cases where it

is a defence at all, as to which, see *ante*, p. 256, *Action on Warranty*. Where a patented machine for printing in two colours was bought by the defendant after seeing it, and it turned out to be incapable of so printing from a defect in the principle of it, he cannot resist an action for the price; for the plaintiff complied with the order of the defendant and sent him the very article which he bargained for, and (there being no fraud) the insufficiency of the alleged invention was no answer; *Ollivant v. Bayley*, 5 Q. B. 288. And in an action by the patentee of an alleged invention against an assignee or vendee of the patent, the defendant cannot set up its invalidity for want of novelty, if there be no fraud or eviction; for there is no warranty on such sale; *Lawes v. Purser*, 6 E. & B. 930; *Smith v. Neale*, 2 C. B., N. S. 67. Where plaintiff sold to defendant by sample an article (*e. g.* alkali) not manufactured by himself, which proved unfit for defendant's use, this is no defence under *nunq. indeb.*, if the sample was fairly taken, though much of the article did not correspond with it; *Sayer v. London and Birmingham Glass Co.*, 27 L. J. (Ex.) 294. Where the contract contains a clause releasing the plaintiff from all responsibility in respect of the goods supplied by him after a certain time of trial, the purchaser cannot, after the time is passed, prove a latent defect in them in reduction of the price; there being no fraud alleged; *Sharp v. Great Western Railway Co.*, 9 M. & W. 7.

As to the defence of fraud on sales, see *ante*, pp. 156-7, and *post*, *Defences*.

Action brought before credit expired.] On the Pleading Rules, 4 Will. 4, it was decided that, under *nunquam indebitatus*, it could be shown that the action had been brought before the time of credit expired; *Broomfield v. Smith*, 1 M. & W. 542; *Webb v. Fairman*, 3 M. & W. 473. In the last case it was held that, in calculating the time of the credit, the day of the sale must be excluded; and, therefore, where goods were sold on the 5th of October to be paid for in two calendar months, an action could not be commenced till after the expiration of the 5th of December, and a writ issued on that day was premature.

Where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered before the credit has expired, though he may maintain trover; *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C., M. & R. 312. If by the contract it is agreed that a bill at a certain date shall be given, it operates as a giving of credit; and, although no bill should be given, the seller cannot sue the purchaser for goods sold and delivered before the period when the bill, if given, would have become due. Therefore where a person purchased goods, and agreed to pay for them in three months by a bill at two months, which bill he afterwards refused to give; an action for goods sold was held not to lie before the expiration of five months; *Mussen v. Price*, 4 East, 147; *Lee v. Risdon*, 2 Marsh, 495. So when goods are sold at six months' credit, payment to be then made by a bill at two or three months at the purchaser's option; this is in effect a nine months' credit; *Helps v. Winterbottom*, 2 B. & Ad. 431; *Price v. Nixon*, 5 Taunt. 338. And where the goods are to be paid for partly in cash and partly by bills at three months, the payment of the money or delivery of bills does not constitute a condition to the credit, so as to enable the vendor to sue for goods sold before the expiration of the three months; *Paul v. Dod*, 2 C. B. 800.

But if part only of the goods are supplied, and the defendant then refuses to take more, the plaintiff may sue for the goods delivered immediately; *Bartholomew v. Markwick*, 33 L. J. (C. P.) 145; 5 C. B., N. S. 711. So where goods were sold at three months' credit, the vendor agreeing to take the vendee's bill at three months' date at the end of the first three months if he wished for further time; and the vendee at the end of the three months did not give such bill: Lord Ellenborough held that the giving the bill was a condition to the further credit, and that the vendor might bring an action for goods sold and delivered immediately; *Nickson v. Jepson*, 2 Stark. 227. Where bills, given for goods, are dishonoured, the vendor may sue for the price immediately; *Hickling v. Hardey*, 7 Taunt. 312; *Mussen v. Price*, 4 East, 151; provided the bills are in the hands of the seller; but if they are in the hands of third persons, that is a defence to the action; for the defendant may be called upon by those persons to pay the bills; *Kearlake v. Morgan*, 5 T. R. 513; *Burden v. Halton*, 4 Bing. 455. When the buyer gives a promissory note of another person without indorsing it, the vendor may, on its dishonour, sue for the price of the goods without proving presentment to the maker, the note being produced by himself; *Goodwin v. Coates*, 1 Mood. & Rob. 221. So where the vendor takes a bill, indorsed by the defendant, on a wrong stamp, in suing for the price of the goods he need not prove due notice of dishonour of the bill; *Cundy v. Marriott*, 1 B. & Ad. 696. But if he makes a bill his own by laches, it operates in satisfaction of the preceding debt; so if he makes it his own by altering it in a material part; *Alderson v. Langdale*, 3 B. & Ad. 660.

See further as to payment by bill or note, *post*, *Defences*;—*Payment*.

ACTION ON SALES OF STOCK, SHARES, AND SECURITIES.

Shares in the public funds, in commercial partnerships and companies, and like interests, are choses in action, and not assignable at common law so as to pass a legal interest in them except by statute, as in the case of stock, railway shares, &c.; or by custom, as in the case of promissory notes and bills of exchange. Such interests, however, are saleable whether they be legal or equitable interests, and are the subject of contracts which the law will recognise and enforce; *Humble v. Mitchell*, 11 Ad. & E. 205; *Tempest v. Kilner*, 2 C. B. 300. They are not "goods, wares, or merchandise" within the Statute of Frauds, *ante*, p. 284; though they are "goods and chattels" within the meaning of a declaration by the seller for the price of them, *ante*, p. 305.

Time bargains for the sale of stock of which the seller is not possessed at the time, but which is to be transferred at a future time, though of a gambling nature, are not illegal at common law: but the statute 7 Geo. 2, c. 8, against stock jobbing (now repealed by 23 Vict. c. 28), made such bargains illegal, where there was no actual transfer or where the transaction was not for securing a loan of money: Sections 1, 8, and 11. This act did not refer to any but stock in the British funds; *Williams v. Trye*, 23 L. J. (Ch.) 860;

Hewitt v. Price, 4 M. & G. 355. But even sales of other stock or of shares in companies, though not within the act, may become illegal, or rather void, by being mere pretences for wagering; as where the real bargain is that the differences only shall be paid at the time for completion; see *Grizewood v. Blane*, 11 C. B. 538; *Knight v. Fitch*, 24 L. J. (C. P.) 122; 15 C. B. 566. See also 8 & 9 Vict. c. 109, s. 18, *post*, p. 350.

The actions of ordinary occurrence are,—for not accepting stock or shares;—for not delivering or replacing them; and for not paying for them when transferred.

Action for not accepting.] • The plaintiff in order to prove his alleged tender of, or readiness to transfer stock, if denied, must show his attendance at the time or latest office hour of the day fixed for transfer, and the non-attendance of the defendant; or an actual tender and refusal to accept by the defendant; or that defendant in some way dispensed with such tender or attendance of the plaintiff; *Bordenave v. Gregory*, 5 East, 107; and on such sales the facts proved may warrant a finding of readiness to transfer, though no transfer be actually tendered; *Humble v. Langston*, 7 M. & W. 517; see *ante*, pp. 295, 302, and *Shaw v. Rowley*, 16 M. & W. 810. But such readiness is disproved by showing that the plaintiff had no stock or shares to transfer at the time for completion; as in *Hibblewhite v. McMorine*, 6 M. & W. 200, *ante*, p. 154.

The plaintiff must of course be prepared to prove his title, if in issue, but the title to shares in commercial companies, in which no documentary evidence of title is provided, does not stand on the same footing as the title to land, and requires no such strict proof. On the sale of a share in a cost-book mine, proof of the existence of the mine and of the authorised entry of the plaintiff's name in the cost-book of the mine as an adventurer, will be evidence of title. The contract of sale in such speculative adventures seems indeed to amount to nothing more than an agreement to substitute the defendant for the plaintiff in the possession of such interest as the plaintiff, in common with the other shareholders, can lawfully claim in the subject of the adventure. See *Curling v. Flight*, 6 Hare, 41; S. C., on appeal, *cor. Ld. Cottenham, C.*, 2 Phill. 613. Where the question was whether there was a proper conveyance by deed, a written transfer by a foreigner of a foreign mine is evidence of it, though not under seal; it not appearing by any evidence that a seal was necessary abroad; *Steigenberger v. Carr*, 3 M. & G. 191.

Where the assent of directors is necessary for the transfer, the vendor must procure and show such assent; *Wilkinson v. Lloyd*, 7 Q. B. 27. See *Stray v. Russell*, 29 L. J. (Q. B.) 115. But (in the absence of any agreement or usage to the contrary) it is the business of the purchaser to prepare and tender the written transfer, and to cause it to be afterwards registered, when registration is necessary; *Stephens v. De Medina*, 4 Q. B. 422; *Wynne v. Price*, 3 De G. & Sma. 310; *Sayles v. Blane*, 14 Q. B. 205, 206. And a special action lies for not registering, if by reason thereof the seller is obliged to pay subsequent calls, though in some cases of privity between the seller and his immediate vendee an action, as for money paid, may also be supported; *Sayles v. Blane*, *supra*; *Walker v. Barilett* (in *Exch. Ch.*), 18 C. B. 845, where it was a cost-book company. Where the company is not completely constituted, a contract for sale of shares will be satisfied by the tender of the letter of allotment made out to

the seller ; for that is all which could have been contemplated by the parties ; *Tempest v. Kilner*, 3 C. B. 249.

Where bought and sold notes for the sale of mining shares named the time for payment, but were silent as to the time of delivery, parol evidence was held admissible to show that by custom the shares were not deliverable till the time named for payment ; *Field v. Lelean*, 30 L. J. (Ex.) 168 ; 6 H. & N. 617.

Damages.] The measure of damages for not accepting stock sold, is the difference between the contract price and the market price on the day of the breach of contract ; *Boorman v. Nush*, 9 B. & C. 145. The measure of damage in the case of railway or other shares in companies is the difference between the contract price and the market value on the day of breach or earliest day afterwards on which they could be sold ; *Pott v. Flather*, 16 L. J. (Q. B.) 366.

Action for not delivering, or replacing.] The vendee (in the absence of usage or express agreement on the point) must show a tender to the defendant of a written transfer for execution by him in cases where such formal instrument is necessary, as in railway shares ; *Stephens v. De Medina*, *suprà*, p. 323 ; unless the defendant has by his conduct dispensed with such tender. See cases, *suprà*, p. 323. A tender of payment by the plaintiff is not necessary ; *Stephens v. De Medina*, *suprà*. It is only necessary that he should be ready and willing and able to pay. A contract to deliver shares in a company does not require the actual delivery of the scrip certificates, but it is sufficiently performed when the vendor has put the vendee in the position of legal owner of the shares ; *Hunt v. Gunn*, 13 C. B., N. S. 226.

Damages.] When the action is for non-delivery, and the plaintiff had not paid the price, the measure of damage is the difference between the contract price and the market value on or about the day of breach ; for the plaintiff might have bought other stock immediately ; and the same rule applies to shares in a company ; *Shaw v. Holland*, 15 M. & W. 136 ; *Tempest v. Kilner*, 3 C. B. 253.

In an action for not replacing stock or shares lent by the plaintiff to the defendant, a different measure is adopted. There the plaintiff may have been prevented from replacing them himself, for he may not have had, and is not bound to have, funds in his hands to do so. He is therefore entitled to damages sufficient to enable him to buy other stock or shares at the current price at the time of the trial, if that be larger than the price at the time fixed for replacing ; *Shepherd v. Johnson*, 2 East, 211 ; *McArthur v. Seaforth*, 2 Taunt. 257. *Owen v. Routh*, 14 C. B. 327 ; 23 L. J. (C. P.) 105. Any other special damage arising from the breach of contract, such as the loss of dividends, &c., must be alleged in the declaration if sought to be recovered.

Action for shares, &c., sold.] Where shares in a company are not legally saleable for want of registration of the company under an act of Parliament, this may be pleaded as a defence ; *semb. Lawton v. Hickman*, 9 Q. B. 563.

In the sale of shares or securities there is generally no implied warranty ; but it is implied that they are really what they purport to be, and what the buyer means to purchase. Where, for instance,

scrip is known in the market as "Kentish Railway scrip," though informally issued by a railway company, the buyer cannot treat the sale as a nullity on that ground, if the jury find that it was what he contracted to buy; *Lamert v. Heath*, 15 M. & W. 486.

ACTION FOR WORK AND MATERIALS.

In an action for work done, the plaintiff's proofs are, 1. The contract, express or implied; 2. The performance of the work and supply of materials, if any; and 3. The value, if the remuneration is not ascertained by the contract.

The contract.] Where there is a special agreement, the terms of which have been performed, it raises a duty for which an *indebitatus assumpsit* will lie; *B. N. P.* 139; cited by Holroyd, J., in *Studdy v. Sanders*, 5 B. & C. 638; *Robson v. Godfrey*, *Holt*, N. P. 236. And whenever the duty of the defendant, arising upon the execution of the consideration, is simply to pay money, the usual and safest mode of pleading is to declare in the *indebitatus* form; as in the case of goods sold, work and labour done, and other cases; *per* Park, J., in *Streeter v. Horlock*, 1 Bing. 37. The disadvantage of suing in this form is, that the defendant will sometimes be able to show, on the general issue, grounds of defence which would have required a special plea if the plaintiff had declared specially.

If the contract has not been executed, but the plaintiff has been prevented from executing it by the absolute refusal of the defendant to perform his part of it, or by an act done by the defendant which has incapacitated the plaintiff from performing it, the plaintiff may rescind the contract, and sue on a *quantum meruit* for past services; *Planché v. Colburn*, 8 Bing. 14, and notes to *Cutter v. Powell*, 2 Sm. L. C. 17. So where the plaintiff was to have certain goods for his services, and the defendant sold them, or caused them to be sold, by his own default, this action lies for the money value; *Keys v. Harwood*, 2 C. B. 905. Where the plaintiff agreed to print a work, but refused to print a libellous dedication to it, and the author thereupon refused to accept or pay for the rest, he was held liable to pay for printing the body of the work; *Clay v. Yates*, 25 L. J. (Ex.) 237; 1 H. & N. 73.

If there is a special agreement, and work has been done and been adopted by the defendant, though not strictly pursuant to such agreement, the plaintiff may recover upon a *quantum meruit*; for otherwise he would not be able to recover at all; *B. N. P.* 139; *Burn v. Miller*, 4 Taunt. 745. But the defendant may refuse to pay for the subject-matter of the plaintiff's work and labour, where it deviates from the special contract; and in such case the plaintiff cannot recover even on a *quantum meruit*; *Ellis v. Hamlen*, 3 Taunt. 52. Where indeed the plaintiff contracted to build cottages by the 10th of October, and they were not finished until the 15th, the defendant, having accepted the cottages, was held liable on a general declaration for work, labour and materials; *Lucas v. Godwin*, 3 N. C. 737. See *post*, p. 326.

An implied assumpsit to pay for work done *extra*, and not under, the contract, can only arise in cases where the defendant is competent to contract by parol, and not in the case of a corporation; *Lamprell v. Billericay Union*, 3 *Ex.* 283; except in cases where the corporation is so constituted as to have by express provision of statute, or by implication, the power of entering into parol contracts. See *Henderson v. Australian Steam Navigation Company*, 5 *E. & B.* 409; where it is admitted that the judgments of the Exchequer and Q. B. in some cases are not reconcilable on this point. See also cases cited *ante*, pp. 167, 306; *Diggle v. London and Blackwall Railway Co.*, 5 *Ex.* 442; *Ilomershaw v. Wolverhampton Waterworks Co.*, 6 *Ex.* 137; and *Reuter v. Electric Telegraph Co.*, 6 *E. & B.* 341; where the plaintiff recovered for his services done under a parol contract, recognised by the company, though not signed or sealed in the manner prescribed by the company's deed of settlement. In *Haigh v. Guardians of N. Bierley Union*, 28 *L. J. (Q. B.)* 62; *E., B. & E.* 873; the defendants were (with some doubt) held liable to plaintiff for work done as an accountant in investigating their accounts, though there was no contract except by a parol resolution of the Board of Guardians.

To fix a defendant with extras, the acceptance and adoption ought to be under circumstances which imply approval and waiver of the deviation, and make it practicable to repudiate; for a defendant cannot be expected to refuse a house built on his own land, or to repudiate materials and labour worked into the *corpus* of his own property. In such cases the decision in *Sinclair v. Bowles*, 9 *B. & C.* 92, *post*, p. 331, and *Ellis v. Hamlen*, *supra*, p. 325, seems to apply. In *Lucas v. Godwin*, *supra*, p. 325, the stipulation as to time was held not to be a condition precedent; and there was also extra work done. The rule with regard to additions or alterations in the case of a special contract must be taken with this limitation, that the workman cannot charge for them unless his employer is expressly informed, or must necessarily from the nature of the work be aware, that they will increase the expense; *Lovelock v. King*, 1 *M. & Rob.* 60. Where the special contract is so entirely abandoned by consent that it is impossible to trace it, the workman will be permitted to charge by measure and value, as if no contract had ever been made; but if not wholly abandoned, the contract will operate as far as it can be traced, and the excess only shall be paid for according to the usual rate of charging; *Pepper v. Burland*, *Peake, N. P.* 103. Where there is a written contract it must be produced, although the plaintiff seeks only to recover for extras not included in it; *Vincent v. Cole*, *Mood. & M.* 257; for the contract is the proper evidence to show what are extras; *Jones v. Howell*, 4 *Dowl. P. C.* 176; *Buxton v. Cornish*, 12 *M. & W.* 426; and, if unstamped, the judge cannot look at it to see whether it extends to the work claimed as extras; *S. C.*; and see *Edie v. Kingsford*, 14 *C. B.* 759; 23 *L. J. (C. P.)* 123. In *Vincent v. Cole*, *supra*, it was even held that a distinct promise by the defendant to pay for the work would not supersede the production of the contract; but it was not held (though so stated in the marginal note) that an admission by the defendant that it was *extra* the contract, was insufficient to fix him without producing it. Yet, *semble*, as a building contract usually contains general provisions as to extra works, even this admission may not dispense with the production, unless the defendant has also admitted that it contains no such provisions. Where a man is employed to do work under a written con-

tract, and a separate order for other work is afterwards given by parcel during the continuance of the first employment, the written contract need not be produced in an action for the second work; *Reid v. Batte, Mood. & M.* 413. A plaintiff may be prevented from recovering for extras by the form of pleading. Thus where the defendant pleaded that the work was done under a special contract which was satisfied by payment, and the plaintiff traversed the payment and satisfaction, it was held that he could not recover for extras without a new assignment; *Rogers v. Custance*, 1 Q. B. 77.

Conditions precedent.] In *Morgan v. Birnie*, 9 Bing. 672, the surveyor's certificate, required by the contract, was held a condition precedent to the plaintiff's right to sue in respect of work done under it; and a letter enclosing the bills, with an approval of the charges, is not equivalent to a certificate of approval of the work done; *S. C.* And it is no dispensation of the condition that it is withheld by fraud or collusion with the defendant; *Milner v. Field*, 5 Ex. 829; for this is only the subject of a cross-action at law. But *quere* if this may not now be pleaded as an equitable defence? The principle of *Morgan v. Birnie*, and *Milner v. Field*, is supported by *Grafton v. Eastern Counties Railway Company*, 8 Ex. 699; *Pashley v. Birmingham*, 18 C. B. 2; *Ranger v. Great Western Railway Company*, 5 H. L. C. 72; and see *Scott v. Liverpool Corporation*, 28 L. J. (Ch.) 230. The surveyor or architect need not certify in writing, unless expressly required by the contract; *Roberts v. Watkins*, 14 C. B., N. S. 592; 32 L. J. (C. P.) 291. Where the contract required the work to be done to the satisfaction of the *other party*, his approval was held not to be a condition precedent; *Dallman v. King*, 4 N. C. 106. But if the parties have clearly left it to the employer to decide as to the sufficiency of the compliance with the contract, his decision is conclusive as long as he acts *boni fide*; *Stadhard v. Lee*, 32 L. J., Q. B. 75; 3 B. & S. 364. In building contracts, payments on such certificates during the work are considered as payments on account of the sum eventually found due; and the time of completion is not generally of the essence of the contract; *Lamprell v. Billericay Union*, 3 Ex. 283.

Liability of defendant.] Where the defendant had contributed to the funds of a building society, and had been party to a resolution that certain houses should be built, it was held that this made him liable to an action for work done in building those houses without proof of his interest in them or in the land; *Braithwaite v. Skosfeld*, 9 B. & C. 401. So a subscriber who is one of a committee for managing the affairs of a hospital, is personally liable to the creditors of the hospital for goods supplied with the sanction of the committee; *Burls v. Smith*, 7 Bing. 705. For cases on the personal liability of partners, members of clubs, shareholders, &c., see *ante*, pp. 309 *et seqq.*

Where orders are given by a public officer acting on behalf of a public body, or of a known department of the State, and in discharge of his duty as such, it is to be presumed that personal credit is not given to him, and he is not liable; *Macbeath v. Haldimand*, 1 T. R. 172. This rule applies to such officers as a colonial governor; commissary; commanding officer of a regiment, or of a king's ship; justices contracting to build a county bridge, &c., *Allen v. Waldegrave*, 2 B. Moore, 621; *Myrtle v. Beater*, 1 East, 135; *Umwinn v. Wolseley*, 1 T. R. 674. But where navigation commissioners

employed the plaintiff to do certain of the works, all the acting commissioners were held personally liable; *Horsley v. Bell, Ambler*, 770. So where the defendant, the clerk of a county-court, ordered the plaintiff to fit up the court, and the bill was allowed by the county-court judge, it is for the jury to say whether the work was not done on the clerk's personal credit; for it was no part of his official duty to give such an order, nor did the facts exclude the presumption of personal credit; *Auty v. Hutchinson*, 6 C. B. 266.

The defendant requested the plaintiff to take care of and show his (the defendant's) house, and promised to make him a "handsome present;" it was held that this was evidence on which the plaintiff might recover a reasonable recompense for work and labour; *Jewry v. Busk*, 5 Taunt. 302. But where a person performed work for a committee under a resolution entered into by them, "that any service rendered by him should be taken into consideration, and such remuneration be made as should be deemed right," it was held that an action would not lie to recover a recompense; *Taylor v. Brewer*, 1 M. & S. 290; see *Roberts v. Smith*, 4 H. & N. 315. There is no implied assumpsit to pay an arbitrator for his trouble; *Virany v. Warne*, 4 Esp. 47. But see *Swinford v. Burn, Gw.*, 8, per Dallas, C.J., *contra*; and *In Re Coombs*, 4 Ex. 839; *Hoggins v. Gordon*, 3 Q. B. 466. A master may maintain assumpsit for the work and labour of his apprentice against a person who harbours him after his desertion; for he may waive the tort; *Foster v. Stewart*, 3 M. & S. 191. It has been said that a barrister may recover on an express contract to remunerate him for professional services; *Egan v. Kensington Union*, 3 Q. B. 935 (n.). But in *Kennedy v. Broun*, 32 L. J. (C. P.) 137, 13 C. B., N. S. 677, the Court decided that such a contract had no binding effect. See also *Broun v. Kennedy*, 33 L. J. (Ch.) 71. A physician might, at common law, recover his fees on an express contract to remunerate him; *Veitch v. Russell*, 3 Q. B. 928; and see, since the Medical Act, *ante*, p. 277. Where A., who was employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it, it was held that the plaintiff could not recover from the defendant a compensation for such services; for there was no privity between them; *Schmaling v. Thomlinson*, 6 Taunt. 147. Where the plaintiff having a contract jointly with A. to do certain work for a company, assigned the contract to A., with the company's consent, on a promise by A. to pay plaintiff a certain sum when the contract was completed, and the contract was afterwards abandoned as between A. and the company and replaced by another; held that the plaintiff could not sue A. for the money upon the completion of the substituted contract; *Humphreys v. Jones*, 5 Ex. 952.

A sheriff's officer must sue the attorney who employed him, and not his client, for fees on executing process; *Walbank v. Quarterman*, 3 C. B. 94; *Maile v. Mann*, 2 Ex. 608. But the attorney cannot be sued by the sheriff for the fees payable on executions; *Maybery v. Mansfield*, 9 Q. B. 754. See, however, the observations in *Maile v. Mann*, *supra*.

Under the general count for work and labour, the plaintiff may give evidence of a particular species of work and labour, e.g. as of a farrier; and the medicines administered by him may be considered as materials within the count; *Clarke v. Mumford*, 3 Camp. 37; and see *Mecke v. Orlade*, 1 N. R. 289. So he may recover under it

for scientific experiments made at the defendant's request, and for materials used in making them; *Grafton v. Armitage*, 2 C. B. 336. But where the claim "for materials found," was omitted in the count for work and labour, it was held that the plaintiff, who sought to recover for building a house and furnishing the timber, could not recover for the latter under the count for goods sold and delivered; *Cotterell v. Apsey*, 6 Taunt. 322; *Heath v. Freeland*, 1 M. & W. 543. The rule is thus laid down: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials he may maintain an action against you for work and labour. But if you employ another to work up his own materials, he may appropriate the produce of that labour and materials to any other person, and no right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for and the employer has accepted it, the party employed may then maintain an action for goods sold and delivered, or (if the employer refuses it) a special action on the case for such refusal; but he cannot maintain an action for work and labour;" *per* Bayley, J., in *Atkinson v. Bell*, 8 B. & C. 283.

A contract for work and materials supplied in and about the work is not within sect. 17 of Stat. of Frauds, *ante*, p. 284. It may be within sect. 4, *ante*, p. 283, if it must continue beyond a year; but not if it will not necessarily continue beyond the year; as where the plaintiff undertook to board a child at the defendant's request at so much a week or month, "as long as the defendant thought proper;" though the contract, in fact, continued for more than a year; *Souch v. Strawbridge*, 2 C. B. 808.

Liability of Defendant.—Repairs of Ships.] Registered ownership,—that is, proof of registration; see 17 & 18 Vict. c. 104, and 18 & 19 Vict. c. 91, and that it was made with the assent of the parties therein named,—is *prima facie* evidence of the liability of those parties for the repairs of the ship; *Cox v. Reid*, Ry. & Mood. 199, and it is questionable whether proof of such assent is now necessary. Such evidence may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship; *Jennings v. Griffiths*, R. & M. 42; *Young v. Brander*, 8 East, 10. The true question in cases of this description is, "Upon whose credit was the work done?" *per* Abbott, C. J., *Jennings v. Griffiths*, R. & M. 43. Where the owner A. agreed to sell to B., who appointed T. to be master, and he was registered as such, and plaintiff did repairs on the order of T., A. was held not liable, he not having done anything to sanction T. appearing as his captain; *Mitcheson v. Oliver*, 5 E. & B. 419. See *Preston v. Tamplin*, 2 H. & N. 684; 27 L. J. Ex. 192. A person who takes a share in a ship under a void conveyance is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as (that is, by acts or words assumes the character of) owner; *Harrington v. Fry*, 2 Bing. 179. An undertaking by the defendants' attorney "to appear for Messrs. T. and M., joint owners of the sloop A." is evidence against the defendants of the joint ownership; *Marshall v. Cliff*, 4 Camp. 133. A part owner of a ship is not necessarily a partner;

and if, as ship's husband, he has fitted her out, he may sue the other part owners separately for their shares of the expense; *Helme v. Smith*, 7 Bing. 709.

Whether a mortgagee of a ship, before possession, was liable to repairs, was formerly much doubted; *Briggs v. Wilkinson*, 7 B. & C. 30; but now when a transfer is made only by way of mortgage in the manner specified in the Act 17 & 18 Vict. c. 104, ss. 66 *et seqq.*, the mortgagor continues owner, except so far as may be necessary for making the ship available as a security for the mortgage debt. And when a mortgagor has been allowed by the mortgagee to continue in possession and to use and navigate the ship, and the mortgagor orders necessary repairs to be done, the shipwright has a lien as against the mortgagee for his work and labour; *Williams v. Allsop*, 30 L. J. (C. P.) 353; 10 C. B., N. S. 417.

Work as agents.] Generally a commission to sell may be revoked, and the death of the principal is a revocation; *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J. (C. P.) 13; and the agent is not necessarily entitled to any remuneration unless he can show that he has been put to expense or trouble before the revocation, from which a contract to pay on a *quantum meruit* may be implied; and a private sale by the principal without his agent's instrumentality will not entitle him to his commission on the price; *Simpson v. Lamb*, 25 L. J. (C. P.) 113; 17 C. B. 603. And where an estate agent is to receive a certain per centage for finding a purchaser, he is entitled to nothing if he fails to find one before his authority is revoked; but if he finds one, and the seller is unable or unwilling to complete the sale, the agent may recover on a *quantum meruit* at least for his labour, if not the whole stipulated per centage; 26 L. J. (C. P.) 33; *Prickett v. Badger*, 1 C. B., N. S. 296; and in such a case the title to remuneration is not a question for the jury, but of law; *S. C.* But where the defendant contracted with the plaintiff to sell tickets for the defendant at a certain per centage, and the defendant afterwards revoked the plaintiff's authority before any were sold, but after some trouble had been taken and expense incurred by him, and the plaintiff acquiesced in the revocation, it may be left to the jury whether there was a rescission by consent, and a new contract to pay for past labour on a *quantum meruit*; *De Bernardy v. Harding*, 8 Ex. 822.

Where a broker is employed to find a buyer, he is entitled to his commission if he introduced the parties, though the principals eventually settled the terms; and, *semble*, if several brokers are employed separately, the one who first introduces the parties is entitled. *Cunard v. Van Oppen*, 1 Fost. & Fin. 716. The above was a case of shipbrokers, and was perhaps governed by the proof of custom at the trial; but in the absence of express stipulation, or of fraud, the rule seems reasonable in other like cases. The plaintiff was employed by the defendant to sell an estate for him, upon the terms that the plaintiff should be paid two and a half per cent. commission if the estate were sold, and a fixed sum if not sold. The plaintiff advertised the property and put it up to auction, but without finding a purchaser. Shortly afterwards the estate was sold by the defendant himself to a person, who had attended the auction, and had first heard of the estate being in the market from the plaintiff's advertisement. During the negotiations with the purchaser the defendant withdrew from the plaintiff the authority to sell the estate. It was held that the plaintiff was entitled to the commission, the relation of

buyer and seller having been brought about by what the plaintiff had done; *Green v. Bartlett*, 32 L. J. (C. P.) 261; 14 C. B., N. S. 681.

Performance.] The plaintiff must prove a performance of the work and labour according to the terms of the contract; or if there is a deviation from those terms, an assent of the defendant to the deviation; *vide supra*, pp. 325, 326. Thus in an action to recover the value of a riding habit, for which the defendant's wife had been measured, but which was returned to the plaintiff on the day on which it was delivered, it was ruled to be incumbent on the plaintiff to prove that the habit was made agreeably to the order; *Hayden v. Hayward*, 1 Camp. 180. So a herald who sues for making out a pedigree is bound to give some general evidence of the truth of the pedigree; *Townsend v. Neale*, 2 Camp. 191.

Value.] In what manner the value of the work done is to be calculated where there is a special contract and deviations from it, has been already mentioned, pp. 325-6. Where a tradesman finishes work differing from the specification agreed on, he is not entitled to recover the actual value of the work done; but (if anything) only the stipulated price, minus the sum necessary to complete the work according to the specification; *Thornton v. Place*, 1 Mood. & Rob. 218; *Chapel v. Hickes*, 2 C. & M. 214. In an action for work and labour as a surveyor or architect, in the absence of express agreement, it is a question for the jury whether the commission charged is, under the circumstances, a reasonable or unreasonable charge; *Chapman v. De Tastet*, 2 Stark. 294; *Upsdell v. Stewart, Peake*, N. P. 193.

Defence.

Defendant may show, on *nunquam indebitatus*, that the work was done under a special contract not executed; *Jones v. Nanney*, 1 M. & W. 333. Or that the defendants, being a corporation, did not contract under seal, or with the formalities required by the act of incorporation; *Cope v. Thames Haven Railway Co.*, 3 Ex. 841. So that the defendants, guardians of a union, are charged for work done by a surveyor, which it was no part of their duty to order; *Paine v. Strand Union*, 8 Q. B. 326.

If the defendant has received no benefit from the work, it having been improperly executed by the plaintiff, the latter cannot recover anything; *Farnsworth v. Garrard*, 1 Camp. 38; *Montrieu v. Jeffereys, Ry. & Mood*. 317. Thus an auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services; *Denew v. Daverell*, 3 Camp. 451; see *ante*, pp. 271, 277. It has indeed been held that where the defendant has derived some benefit from the plaintiff's services, he must pay *pro tanto*; *Farnsworth v. Garrard*, 1 Camp. 38. But this rule requires qualification; and where the plaintiff had contracted to repair completely some chandeliers for 10*l.*, and returned them incompletely repaired, in an action for work and labour it was held that the plaintiff could not recover anything, at least in this form of action, though the jury found that the repairs were worth 5*l.*; *Sinclair v. Bowles*, 9 B. & C. 92, *ante*, p. 326. But where a shipwright undertook to

put a ship into thorough repair, and, before the work was finished, required payment for the portion done, without which he refused to proceed, and the ship thereby lost her voyage, it was held that he was nevertheless entitled to recover for the work done; *Roberts v. Havelock*, 3 B. & Ad. 404. Where A. engaged with defendant's landlord to build a house on defendant's land, and A. made a sub-contract with the plaintiff to do part of the work, and defendant separately agreed to pay over to the plaintiff directly all money due for such part of the work upon a discharge from A., it was held that the defendant's agreement did not make him liable to plaintiff for work and labour, but only on the special agreement; *Sweeting v. Asplin*, 7 M. & W. 165. Where the plaintiff agrees to do work for a certain sum on a false representation by defendant of the quantity of work to be done, he may repudiate the contract; but if he performs it, he can only recover the stipulated sum in this action; *Schway v. Fogg*, 5 M. & W. 83.

ACTION FOR MONEY PAID.

The plaintiff, in an action for money paid, to which the general issue is pleaded, must prove, 1. The payment of money by the plaintiff; 2. That it was paid at the request of the defendant, and to his use.

The payment of money.] The plaintiff must prove that money was paid; giving a security, as a bond or warrant of attorney, is not sufficient; *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & A. 51; unless, perhaps, where a bill or note is taken from the plaintiff by a creditor as payment of the defendant's debt; *Barclay v. Gouch*, 2 Esp. 571. So stock cannot be considered as money; *Nightingal v. Devisme*, 5 Bur. 2589; unless it be so treated by the parties, as where it was transferred to the defendant with a view to a sale for defendant's use; *Howard v. Danbury*, 2 C. B. 803.

The plaintiff must prove that the money paid was his money. Thus, an under-tenant, whose goods had been distrained and sold to strangers by the original landlord for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant; *Moore v. Pyrke*, 11 East, 52; but it is otherwise where the under-tenant or a stranger redeems his goods with his own money; *Exall v. Partridge*, 8 T. R. 308.

The defendant's request.] The plaintiff must prove a request by the defendant, express or implied; *Alexander v. Vane*, 1 M. & W. 511. Thus, where the lessee is to pay the lessor's expenses of granting a lease, and the lease has been granted, the lessor may recover his own solicitor's bill as money paid to the use of the lessee; *Grissell v. Robinson*, 3 N. C. 10. A subsequent assent to the payment will be evidence of a previous request; 1 Saund. 264 (n); and if there be a request to pay, the plaintiff may recover the money, though

the debt so paid be one that could not be enforced; as a wager; *Knight v. Cambers*, 24 *L. J. (C. P.)* 121, 15 *C. B.* 562; or a time bargain, which is void by 8 & 9 Vict. c. 109, s. 18; *Rosewarne v. Billing*, 15 *C. B.*, *N. S.* 316; 33 *L. J. (C. P.)* 55. If there be no request, plaintiff cannot recover, though he has paid a legal debt of the defendant; *Stokes v. Lewis*, 1 *T. R.* 20. Where a broker purchases stock to fulfil a contract entered into by him for his principal, but which his principal refuses to make good, he cannot sue his principal in this action; *Child v. Morley*, 8 *T. R.* 614. So where the party to whom the stock was contracted to be sold, on the defendant's refusal to transfer bought the stock himself, and brought assumpsit for money paid to recover the difference in the price of the stock, it was held that this action could not be sustained; *Lightfoot v. Creed*, 8 *Taunt.* 268. But where there is a usage of the Stock Exchange that brokers should be responsible to each other on time contracts, and the seller's broker is obliged to pay the difference in consequence of his principal's default, he may reimburse himself in this form of action; *Bayliffe v. Butterworth*, 1 *Ex.* 425; *Pollock v. Stables*, 12 *Q. B.* 765. In such case it is immaterial whether or not the principal knew of the usage; *S. CC.* So where the broker, who had been authorised to buy shares at a certain price, was called upon by the seller, according to the rules of the Stock Exchange, to repay him a call due after the sale and paid by the seller in order to enable him to transfer the shares, the principal was held liable over to the broker in this action; *Bayley v. Wilkins*, 7 *C. B.* 886.

A legal obligation to pay for another's benefit will be equivalent to a previous request; as where one person is surety for another, and is called on to pay, the money paid may be recovered, though not paid by the desire of the principal; *per* *Ld. Kenyon*, *Exall v. Partridge*, 8 *T. R.* 310. So if one co-bail pays the whole debt; *Belldon v. Tankard*, 1 *Marsh.* 6. So, if an accommodation acceptor is sued on default of the drawer to pay, the acceptor may recover in this action; and he may sue alone though the loan was in fact advanced on account of the plaintiff and his partner, and paid out of their joint funds; *Driver v. Burton*, 17 *Q. B.* 989. But if the drawer voluntarily pays the holder of a bill, which he had drawn and indorsed for the accommodation of the acceptor, without having received any notice of dishonour or any request from the acceptor to pay it, he cannot sue the latter for money paid; for there must be either legal obligation or request; *Sleigh v. Sleigh*, 5 *Ex.* 514. When an executor has paid legacies in full, and is afterwards obliged to pay the legacy duty, it was held, in *Foster v. Ley*, 2 *N. C.* 269, that he might recover the amount paid for duty in an action for money paid against the legatee; see *Bate v. Payne*, 13 *Q. B.* 900.

Where several are sureties, and one is compelled to pay the whole, he may recover in this action from each of his co-sureties a rateable proportion of the money so paid; *Cowell v. Edwards*, 2 *B. & P.* 268; *Deering v. Winchelsea*, *Id.* 270. A co-surety may pay the debt when due, without waiting for a demand or an action, and may then sue for contribution; *Pitt v. Purssord*, 8 *M. & W.* 538. The amount recoverable from each co-surety is ascertained by reference to the number of sureties, and not the number of principals; *Kemp v. Finden*, 12 *M. & W.* 421; and where A., B., and C. became sureties for D. by three separate bonds, and one of them was compelled to pay D.'s debt, each of the others must contribute in

proportion to the amount in their respective bonds; *Deering v. Winchelsea*, *supra*. "Recent decisions as to suretyship establish the principle, that the court may look to the transaction itself without regard to the form of the instrument by which the relation is created;" *per* Williams, J., in *Reynolds v. Wheeler*, 30 L. J. (C. P.) 350; 10 C. B., N. S. 561; in which case the plaintiff had drawn a bill, which C. accepted, and the defendant indorsed (both plaintiff and defendant putting their names for C.'s accommodation), and the plaintiff having been obliged to pay the bill, he was held entitled to recover contribution against the defendant as co-surety. Where two are jointly liable for the expenses incurred for their common benefit, and one dies, the survivor, who pays the whole, may sue the executor of the deceased for money paid to the use of the defendant as executor; *Prior v. Hembrow*, 8 M. & W. 873; *semb. acc. Batard v. Hawes*, 2 E. & B. 287. If premises are let to several persons for the use of a company or partnership of which the lessees are members, and one of them is called upon to pay rent, he may sue the co-lessees for contribution; *Boulter v. Peplow*, 9 C. B. 493. So, if one of a managing committee is obliged to repay a loan borrowed for a club by authority of the committee, he may recover contributions from each of the others; *Mountcashel v. Barber*, 14 C. B. 53. If one partner advances to another the capital which the latter is to contribute to the joint capital, he may sue for the amount at law; *French v. Styring*, 2 C. B., N. S. 357; 26 L. J. (C. P.) 181. A partner who pays a note, in which he has joined some of the other partners, may sue them for contribution in this action, though the money raised on it was for partnership purposes; *Sedgwick v. Daniel*, 2 H. & N. 319.

As a general rule, this action does not lie for contribution or indemnity against a person jointly engaged with the plaintiff in doing a wrongful act, by which the plaintiff is put to expense; *Merryweather v. Nixan*, 8 T. R. 186; or where money is paid in furtherance of an illegal transaction; *Michell v. Cockburne*, 2 H. Bl. 379; *Aubert v. Maze*, 2 B. & P. 371. But where the plaintiff was not aware that the transaction was illegal, or where its nature is doubtful, he may sue on the implied contract to indemnify; *Betts v. Gibbins*, 2 Ad. & E. 57; *Pearson v. Skelton*, 1 M. & W. 504; and see *Dixon v. Fawcett*, 30 L. J. (Q. B.) 137, and notes to *Lampleigh v. Braithwait*, 1 Sm. L. C. 148-150.

A notice to the party by whom an indemnity is given is not necessary before defending an action; but if such notice is given, and he refuses to defend the action, he is estopped from saying that the person indemnified was not bound to pay the money; *Duffield v. Scott*, 3 T. R. 374. The only effect of want of such notice is to let in proof that the course pursued was not justified under the circumstances, but the onus lies on the person indemnifying; *Smith v. Compton*, 3 B. & Ad. 408. And if knowledge of an action be brought home to the party indemnifying, and he leaves the defence to the party indemnified, the latter is not bound to defend, but may compromise the action to the best of his judgment, and sue for money paid, though the action might perhaps have been defended with success; *Pettman v. Keble*, 9 C. B. 701. And where an action is brought against a surety who lets judgment go by default, there being no good defence, he cannot recover the costs, unless the writ was the first notice of default; in which case the costs of the writ can be recovered; *Pierce v. Williams*, 23 L. J. (Ex.) 322.

To support this action it must appear either that the defendant was primarily liable to the third party to pay the money, or that it was paid, or the liability incurred, by the plaintiff at his express or implied request, or on his guarantee. See *Brittain v. Lloyd*, 14 M. & W. 762; *Lewis v. Campbell*, 8 C. B. 541. Therefore where the tenant is compelled to pay landlord's tax by distress, the action lies; *Dawson v. Linton*, 5 B. & A. 521. So, too, when the tenant of land liable by prescription to repair a public bridge is fined for non-repair on indictment, he may reimburse himself by this action against his landlord; *per curiam*, *Baker v. Greenhill*, 3 Q. B. 163. So in case of rates levied on the lessee in respect of such liability, if he has not covenanted to pay them; *Ib.* Where A. paid the funeral expenses of his deceased daughter during her husband's absence, the husband was held liable to A.; *Jenkins v. Tucker*, 1 H. Bl. 90; acc. *Ambrose v. Kerrison*, 10 C. B. 776. So where the wife was living apart from her husband when she died, but the plaintiff, in whose house she died, knew where to find him and did not apply to him before burying the wife, the husband was held liable to repay the plaintiff the reasonable funeral expenses; *Bradshaw v. Beard*, 31 L. J. (C. P.) 273; 12 C. B., N. S. 344. But it is not sufficient that the defendant has agreed with the plaintiff to pay the money to the third party. Thus where the landlord is called upon to pay the taxes to which a landlord is primarily liable, but which his tenant is, by special agreement, bound to pay, he cannot sue the tenant for money paid; *Spencer v. Parry*, 3 Ad. & E. 331; and see *Lubbock v. Tribe*, 3 M. & W. 607. So where the transferee of shares in a railway company omits to register the transfer, and the transferor is consequently obliged to pay calls subsequent to the sale, he cannot recover the amount from the transferee as money paid; but a special action for not registering is the proper remedy; *Sayles v. Blane*, 14 Q. B. 205; *aliter*, if the defendant has requested the plaintiff to pay. See *ante*, p. 323. An accommodation acceptor, who has defended an action on the bill at the request of the drawer, may recover the costs of such action as money paid; *Houes v. Martin*, 1 Esp. 162; acc. *Garrard v. Cottrell*, 10 Q. B. 679. So the indorser of a bill, who has been sued by the holder, and paid him part of the amount of the bill, may recover that amount in an action for money paid against the acceptor; *Pownall v. Ferrand*, 6 B. & C. 439. But he cannot recover the costs of the former action; for the custom of merchants does not make an acceptor liable for the costs of all actions against subsequent holders; *Dawson v. Morgan*, 9 B. & C. 618. A person who pays a bill for the honour of one of the parties to it, may sue him for money paid. But he must prove noting or protest before the payment; *Vandewall v. Tyrrell*, Mood. & M. 87, as explained in *Geralopulo v. Wieler*, 10 C. B. 707. Bail may recover, as money paid, the expenses incurred by them in taking their principal; but not the costs of an action against them to recover these expenses unadvisedly defended; *Fisher v. Fallows*, 5 Esp. 171. If one of two parties to an award takes it up and pays the whole expense of it, the award directing each party to pay only one half, he cannot recover half from the other as money paid; *Bates v. Townley*, 2 Ex. 152.

Money paid lies against a ship-owner for money supplied to the captain, either in a foreign or English port, for the necessary repairs or use of the ship; *Robinson v. Lyall*, 7 Price, 592. But only where the necessity is so pressing that the owner himself cannot be

consulted without prejudice and delay: *Johns v. Simons*, 2 Q. B. 425.

Where a carrier, by mistake, delivered to B. goods consigned to C., and B. appropriated them, and the carrier, on demand without action, paid C. the value, it was held that the carrier might recover from B. the sum so paid, as money paid to his use; *Brown v. Hodgson*, 4 Taunt. 189. See *Sills v. Laing*, 4 Camp. 81; *Spencer v. Parry*, 3 Ad. & E. 331, 338; and *Coles v. Bulman*, 6 C. B. 184.

Generally, if a party is compelled to pay money in consequence of his own neglect (*Capp v. Topham*, 6 East, 392), or breach of duty (*Pitcher v. Bailey*, 8 East, 171), though for the benefit of another the law implies no promise on the part of the other to repay him.

ACTION FOR MONEY LENT.

Evidence of loan.] In an action for money lent, the plaintiff will have to prove the loan of his money. Of this a promissory note given by the defendant to the plaintiff is not alone evidence; *Cury v. Gerrish*, *infra*. It is not sufficient merely to prove the payment of money to the defendant; for in such case the presumption is, that the money is paid in liquidation of an antecedent debt; *Welch v. Seaborn*, 1 Stark. 474. But if the plaintiff can show any money transactions between the defendant and himself from which a loan may be inferred, or any application by the defendant to borrow money at the time, this, coupled with the payment, will be evidence of a loan; *Cury v. Gerrish*, 4 Esp. 9. When a parent advances money to a child, it is presumed to be by way of gift; *per* Bayley, J., *Hick v. Keates*, 4 B. & C. 71. A transfer of stock may be evidence of a loan of money; *Howard v. Danbury*, 2 C. B. 803. Where the defendant was heard to ask for a loan, and the plaintiff then handed him a bank-note, of which the amount was not shown, the plaintiff cannot recover more than 5*l.* as principal, for that is now the smallest note in circulation; *Lawton v. Sweeney*, (*Ex.*) 8 Jurist, 964. In *Fesenmayer v. Adcock*, 16 M. & W. 449, the Court of Exchequer expressed a strong opinion that an I. O. U. was not evidence of money lent. *Contra*, *Douglas v. Holme*, 12 Ad. & E. 641, but *quære*, see 10 L. J. (Q. B.) 43. If A. lends money to B., who contracts "to repay on demand or to execute a mortgage," A. may recover for money lent on B.'s refusal to execute; *Bristowe v. Needham*, 9 M. & W. 729. Where the plaintiff advances money to the defendant, for which the defendant deposits a security which is to be returned "upon repayment," a return, or offer to return, is not a condition precedent to the right of recovery on a count for money lent; *Scott v. Parker*, 1 Q. B. 809; *Lawton v. Newland*, 2 Stark. 73. On a declaration containing special counts on debentures, and counts for money lent, and interest, the debentures were rejected as evidence on the special counts, for want of proper stamps; but were held admissible to show that they were void as debentures; and the plaintiff was, therefore, entitled to recover, on the common counts, the loan,

with interest, for which the debentures had been given as collateral securities; *Enthoven v. Hoyle*, 21 L. J. (C. P.) 100; 13 C. B. 373. See as to interest, *post*, Action for Interest.

In ordinary trading partnerships, one partner is presumed to have authority to bind the rest by borrowing money for partnership purposes, and the other partners will be liable to pay; *Fisher v. Taylor*, 2 Hare, 218; *Rothwell v. Humphreys*, 1 Esp. 406; *Story on Partnership*, s. 102. But a mining concern carried on by a company is not, in this respect, a trading one, and no such authority to borrow is to be presumed. The power must be given by the original settlement, or by the consent of every shareholder; *Ricketts v. Bennett*, 4 C. B. 686; *Brown v. Byers*, 16 M. & W. 252; *Burmester v. Norris*, 6 Exch. 796. If, however, mining be carried on as a trade by an ordinary private partnership, under a deed of partnership, the ordinary authority to bind each other exists; *Brown v. Kulger*, 3 H. & N. 853; 28 L. J. (Ex.) 66.

Where a simple loan or advance of money is merged in a higher security, as in a covenant, express or implied, to repay the money, this is held to be a defence under the general issue; *Yates v. Aston*, 4 Q. B. 182; *Baber v. Harris*, 9 Ad. & E. 532; *Edwards v. Bates*, 7 M. & G. 590. The defendant authorised S., his attorney, to borrow 100*l.* on mortgage, giving him the title-deeds for the purpose. S. borrowed 400*l.* of the plaintiff, forging the defendant's signature to a mortgage deed for that amount, and appropriated the money to his own use, but afterwards advanced 190*l.* to the defendant, taking from him a mortgage to a third person; and it was held that the plaintiff had no cause of action against the defendant even to the extent of 100*l.*; *Painter v. Abil*, 33 L. J. (Ex.) 60; 2 H. & C. 113. Money of a customer at a banker's is money lent, and if left for six years without acknowledgment, the right to recover it may be barred; *Pott v. Clegg*, 16 M. & W. 321. If notes are left by the customer, and the banker gives a receipt for the amount as cash, and the notes turn out to be worthless, the customer cannot claim credit for the amount as money lent, or had and received, unless the banker has bought the notes, or committed laches; *Timmins v. Gibbins*, 18 Q. B. 722.

ACTION FOR MONEY HAD AND RECEIVED.

In an action for money had and received, and issue joined on a general plea, the plaintiff must prove the receipt of the money by the defendant and his own title to recover it as received for him. The proper plea to put the plaintiff on such proof, is the plea *nunquam indebitatus*, and not, as formerly, *non-assumpsit*. By the Pleading Rules, Hil. 1853, this plea operates as a denial both of the receipt, and of the existence of those facts which make it a receipt to the plaintiff's use.

The general rule that this action is an equitable action, and lies when the defendant "is obliged by the ties of natural justice and equity to refund the money," as laid down by Lord Mansfield in *Moses v. Macferlan*, 2 Bur. 1012, and repeated in later cases, has been found too vague, and cannot safely be applied as a guide to the

use of this count. The following cases will show the conditions necessary to sustain it:—

Receipt of money.] The plaintiff must prove that money has been received; and therefore an action for money had and received will not lie to recover *stock*; *Nightingal v. Devisme*, 5 Burr. 2589. See *ante*, p. 332. And it has been held that it will not lie against a *finder* of bank-notes, to recover their value; *Noyes v. Price*, MS. *Select Ca.* 242; *Chitty on Bills*, 524, 9th ed.; unless it can be shown that they have been cashed, or circumstances justify the presumption; *Chitty, ubi sup.*, citing *Longchamp v. Kenny*, 1 Doug. 138. And the value even of provincial notes, if received as money, may be recovered in this action; *Pickard v. Bankes*, 13 East, 20; *Fox v. Cutworth*, cited 4 Bing. 179. The principle of the cases is, that, if a thing be received as money, it may be treated and recovered as such; *per Best, C. J.*, *Spratt v. Hobhouse*, 4 Bing. 179. Where a sheriff seized goods in execution at the suit and by order of A., who took them by bill of sale for 256*l.*, and the debtor's assignees afterwards recovered their value from the sheriff, it was held that, though no money passed as between the sheriff and A., the sheriff might recover from A. 256*l.* as money had and received, and that the return of *feri feci* was no estoppel against setting up the right of the assignees; *Standish v. Ross*, 3 Ex. 527. And money allowed in account, under circumstances which would have entitled the party allowing it to recover it back if he had actually paid it, may be treated as paid, and may be recovered in this form of action; *Gingell v. Purkins*, 4 Ex. 720. The last two cases, however, seem to be at variance with *Lee v. Merrett*, 8 Q. B. 820. The purchaser of an estate agreed with the vendor, after conveyance, to give up his claim to a moiety of the expenses in consideration of the vendor paying some other charges. Held that the vendee's attorney, who had agreed to charge the vendee nothing if the vendor refused to pay his share, might recover the amount set off, as money had and received by the vendee to his use; *Noy v. Reynolds*, 1 Ad. & E. 159. If an agent refuses to account for goods delivered to him for sale, it shall be presumed, after a reasonable time, that he has sold them and received the proceeds in money; *Hunter v. Welsh*, 1 Stark. 224. Where goods are given to an agent for a particular purpose, as to sell them, there is an implied promise to account for the proceeds, in respect of which this action lies, though an action of account may sometimes be a concurrent remedy; *Wilkin v. Wilkin*, 1 Salk. 9.

The plaintiff must give evidence of some particular sum; otherwise he will be nonsuited: *Harvey v. Archbold*, 3 B. & C. 626; *Bernasconi v. Anderson*, Mood. & M. 183.

Receipt by the defendant for the plaintiff.] The plaintiff must prove that it was his money which the defendant received; *Scarfe v. Hallifax*, 7 M. & W. 288. Or that the money has been received to his (the plaintiff's) use by the defendant; *Kelly v. Curzon*, 4 Ad. & E. 622. The mere bearer of money from one person to another cannot be sued; *Coles v. Wright*, 4 Taunt. 198. And a mere agent who has paid money over pursuant to the directions of the party depositing it with him, and without notice of the plaintiff's title, cannot be sued; *Horsfall v. Handley*, 8 Taunt. 136; but merely passing it in account, without new credit given, is not such a payment; *Buller v. Harrison*, Cowp. 565; and until there has been a

change of circumstances by his having paid over the money to his principal, or done something equivalent to it, he remains liable to the true owner; *Cox v. Prentice*, 3 M. & S. 344. So if he pays it over after notice that the right to it is disputed; *Edwards v. Hodding*, 5 Taunt. 815. An auctioneer is the agent of both parties, and a deposit on a sale that goes off may be recovered from him personally: But if the deposit money is paid to the vendor's solicitor, who receives it as such, the action by vendee should be brought against the vendor and not the solicitor; *Bamford v. Shuttleworth*, 11 Ad. & E. 926. Where money in litigation between two parties has by consent been paid over to a stakeholder in trust for the party entitled, it can only be recovered from the stakeholder, and not from the original debtor; *Ker v. Osborne*, 9 East, 378.

In general an agent must account to his principal, and cannot set up the *jus tertii* to an action brought by the principal; *Nicholson v. Knowles*, 5 Mad. 47; *Crosskey v. Mills*, 1 C., M., & R. 298; *White v. Bartlett*, 9 Bing. 378. Thus if the master of a ship employs B. to sell a ship on an occasion that justifies the sale (as in case of irreparable damage on a voyage), the owner of the ship cannot sue B. for the proceeds after he has paid them over to the master; nor even, *ut semble*, before such payment over; *Ireland v. Thomson*, 4 C. B. 149, 171. Where an agent receives money to pay over to a third person, although he assent to hold it for that purpose, he continues to be accountable to his principal alone until he has entered into some binding engagement with that third person to hold the money to his use; and not until then will he be liable to the third person in an action for money had and received; *Baron v. Husband*, 4 B. & Ad. 611; *Williams v. Everett*, 14 East, 582; *Wedlake v. Hurley*, 1 C. & J. 83; *Scott v. Porcher*, 3 Mer. 652; *Brind v. Hampshire*, 1 M. & W. 365. The holder of a bill cannot sue the acceptor's banker for money had and received, though the acceptor has put funds into his hands for payment of the bill; *Moore v. Bushell*, 27 L. J. (Ex.) 3. But if A. sends money to B. to discharge a debt owing from A. to C., and B. assents to hold the money for that purpose, and *allows C. to be told this*, C. can maintain an action against B. for money had and received; *Lilly v. Hays*, 5 Ad. & E. 548. See *Noble v. The National Discount Co.*, 5 H. & N. 225.

A receipt signed by an agent for his principal, is not *per se* evidence to support an action for money had and received against the agent; *Edden v. Read*, 3 Camp. 339. So where an attorney's clerk, B., in the absence of his master, J., received money due to the plaintiff, one of his master's clients, and gave a receipt, "B. for J." and, his master never returning, the clerk refused to pay over the money to the plaintiff; it was held that no action lay against the clerk, there being no privity between him and the plaintiff, and the money being rightfully received on behalf of J., who was accountable to the plaintiff for it; *Stephens v. Badcock*, 3 B. & Ad. 354. But where the defendant is a wrongdoer, as where he took money of the plaintiff found in the house of a deceased person by direction of the executor to whom he paid it over, he is liable, and such payment is no defence; *Tugman v. Hopkins*, 4 M. & G. 389. So where the defendants *bond fide* received money from the plaintiff's wife, but without his assent, to keep for her infant child, the plaintiff can recover it; *Calland v. Lloyd*, 6 M. & W. 26. In *Stead v. Thornton*, 3 B. & Ad. 357 n.: the defendant received money on behalf of the assignee of a bankrupt, who was, however, insane at the time, and on his being

afterwards removed, and the plaintiff appointed assignee in his stead, it was held that the plaintiff could maintain money had and received against the defendant, for he was a mere stranger, as he could not be the agent of an insane person.

Where a wife, living separately, had saved part of her allowance, and invested it in her maiden name in stock which she sold out and gave as a present to her brother just before her death, after her death the husband was allowed to recover it; *Messenger v. Clark*, 5 Ex. 388. So where a married woman received from the trustee of her marriage settlement the rents of her separate estate, and deposited part with the defendant, it was held that the husband might recover it in this action in his own name and right after her death; *Bird v. Peagram*, 13 C. B. 639. In such a case the monies received ceased to be trust monies and became the monies of the husband, recoverable without administering to his wife's estate.

There is no such privity between the client of a country attorney and his London agent as will support an action by the client for money had and received against the agent for the proceeds of a judgment recovered in the ordinary course of business; *Robbins v. Fennell*, 11 Q. B. 248; *Cobb v. Becke*, 6 Q. B. 930. Where one of two tenants in common receives the whole rents of the property, the co-tenant must sue for his moiety in account, and cannot maintain money had and received; *Thomas v. Thomas*, 5 Ex. 28.

A strict trustee, who receives rents, &c., which he is bound by the trust deed to pay over to his *cestui que trust*, cannot be sued in this form of action by the latter for non-payment over. Therefore, where the defendant was a trustee for the plaintiff under a deed assigning all debts, &c., in trust for payment of certain creditors, and to repay the surplus to the plaintiff, it was held that this action would not lie against the defendant so long as the trusts were open; and that the defence was available on the general issue; *Edwards v. Bates*, 7 M. & G. 590. See also *Bartlett v. Dimond*, 14 M. & W. 49; *Pardoe v. Price*, 16 M. & W. 451. But if he has personally accounted for the money by admitting that he has a certain sum due to the *cestui que trust*, which he is ready to pay to his use, and which he has accordingly directed his bankers to pay, he becomes liable as for money had and received and on an account stated; *Roper v. Holland*, 8 Ad. & E. 99; *Howard v. Brownhill*, 23 L. J. (Q. B.) 23, per Crompton, J.; and see *Edwards v. Lowndes*, 1 E. & B. 81, and the cases there cited.

Failure, or want, of consideration.] Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who has paid it. Thus, if an annuity be defective, and the deeds are set aside, the consideration money may be thus recovered; *Shore v. Webb*, 1 T. R. 732. So if one of several securities for the annuity fails; *Scurfield v. Gowland*, 6 East. 241. So if an annuity is purchased at a time when the annuitant is in fact dead, but neither buyer nor seller know of this at the time, the buyer may recover back his money; *Strickland v. Turner*, 7 Ex. 208. But where an annuity for A.'s life was regularly paid up to the time of A.'s death, but no memorial of the grant of the annuity was enrolled, it was held that, although the contract was void, A.'s executor could not, on that ground, recover back the consideration money as money had and received; *Davis v. Bryan*, 6 B. & C. 651. Where the annuity is set aside, and the grantee brings an action to

recover the consideration money, the defendant may, on a plea of set-off, deduct the payments made by him within six years in respect of the annuity; *Hicks v. Hicks*, 3 East, 16. A broker at A.'s request bought railway scrip for him; before the day of account the company converted the scrip into shares and made a call; held that A. was bound to, accept the shares and pay the call, and could not repudiate the contract and recover back the price; *M'Ewen v. Woods*, 11 Q. B. 13.

If A. sells to B. a bill as a foreign bill of exchange, which turns out to be an English bill and unavailable for want of a stamp, B. may recover the price in this action, both being ignorant of the defect; but if it had really been a foreign bill with some latent defect which made it worthless, B. could not have recovered, unless there was a warranty or fraud; *Gompertz v. Bartlett*, 2 E. & B. 849. So if A. sells to B. a bar of brass as gold, B. may recover the price though A. was ignorant of the fact; per Lord Campbell, C. J., *Id.* 851. So where the plaintiff bought of defendant a bill, purporting to be an acceptance of A. B., but which was in fact forged, he was held entitled to recover back the money paid, although there was one genuine though worthless indorsement; *Gurney v. Womersley*, 4 E. & B. 133. Where plaintiff, a stock-broker, sold for defendant foreign bonds, which proved to be defective for want of a foreign stamp, and the bonds were afterwards returned on that account by the purchaser, whereupon plaintiff took them back and reimbursed the purchaser, it was held that money had and received was maintainable against the defendant for the amount of purchase-money paid over to him by the plaintiff; *Young v. Cole*, 3 N. C. 724.

Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at interest the directors resolved to abandon the project, it was held that each subscriber might, in this action, recover the whole of the money advanced by him without any deduction for expenses; *Nockels v. Crosby*, 3 B. & C. 814. So the money paid for the purchase of shares in a joint-stock company, may, under similar circumstances, be recovered from the person of whom the shares were bought; *Kempson v. Saunders*, 4 Bing. 5. So a deposit on shares in a projected company, subsequently abandoned, may be recovered from one of the acting committee; *Walstab v. Spottiswoode*, 15 M. & W. 501. But the action must be against a party, or one of the parties, who received the money or sanctioned the application of it. Payment to the bankers named in a letter of allotment "to the credit of the company," of which the defendant is an active managing director, is a payment to him; *Moore v. Garwood*, 4 Ex. 681. It is not enough to show that the defendant was a provisional committeeman and chairman of the managing committee, if he never in fact concurred in their acts, though he may have been present at a meeting of them, from whose proceedings, however, he dissented; *Burnside v. Dayrell*, 3 Ex. 224. But on a failure of the project, a deposit applied to expenses actually incurred, with the plaintiff's authority, cannot be recovered; *Willey v. Parratt*, *Id.* 211. It is otherwise if paid without his authority; *Moore v. Garwood*, 4 Ex. 681, 690. Where payment of the deposit by the plaintiff was made "subject to the provisions of the subscriber's agreement," and no such agreement was then in existence;

but one was subsequently made which improperly authorised payment of expenses out of the deposits, and which was not signed by the plaintiff, the plaintiff may recover back the deposit in full on proof of failure of the projected company; for he neither assented, nor could be required to assent, to such an agreement; *Ashpitel v. Sercombe*, 5 *Ex.* 147. Inability to establish the company after a reasonable lapse of time is evidence of an abandonment of the scheme; *Chaplin v. Clarke*, 4 *Ex.* 403. It is no answer to the action that the plaintiff signed the parliamentary and subscription contracts, if his signature was obtained by suppressing the fact that the scheme had been abandoned; *Jarrett v. Kennedy*, 6 *C. B.* 319; *post*, p. 346. Where the deposit was paid to the credit of certain persons in trust for the company, it cannot be recovered from other, though active, members of the company; *Watson v. Charlemont*, 12 *Q. B.* 856. Where all, or substantially all, of the shares in a cost-book mine are not subscribed for, and the directors are obliged to relinquish the mine for want of funds, they are liable to refund to allottees who have not authorised the working or other expenditure; and the deposits are recoverable from the directors, though they were, in fact, paid to their bankers, who were authorised to receive them, and though entered to the credit of some of the directors only; *Johnson v. Goslett* (aff. in error), 27 *L. J. (C. P.)* 122; 3 *C. B., N. S.*, 569. The defendant entrusted his broker to sell his shares in a banking company; and the broker agreed to sell them to another broker who had been instructed by the plaintiff to buy some shares for him. Both brokers were members of the Stock Exchange, according to the custom of which the names of the principals are not mentioned at the time of such contract, but are communicated on the day preceding the day for which the sale is made, the parties executing the contract on the last-mentioned day. By the rules of the company transfers could not be made without the consent of the directors, and seven days' notice of transfer must be given, but in practice these rules are not strictly enforced. No notice had been given; and on the day for which the sale was made the defendant's broker obtained a blank form of transfer from the company, which the defendant executed three days afterwards. On the following day the defendant's broker delivered the transfer to the plaintiff's broker. On the day following the company had stopped payment, and the plaintiff's broker refused to accept the transfer or pay the purchase money. The company never consented to the transfer, or renewed business, and ultimately became bankrupt. The plaintiff directed his broker not to pay for the shares, but in obedience to the decision of the Stock Exchange the broker paid the money to the defendant's broker, who handed it over to the defendant. The plaintiff afterwards paid the money to his broker, under a threat of legal proceedings, and then sued the defendant for money had and received on the ground of failure of consideration; and it was held (by the *Exch. Ch.* affirming *Q. B.*) that the action did not lie; *Remfry v. Butler*, *E. B. & E.* 887. And in a similar case where no previous leave of the company had to be obtained, it was held that the plaintiff could not recover, as there was no proof of a total failure of consideration; *Stray v. Russell*, 29 *L. J. (Q. B.)* 115; 1 *E. & E.* 888.

Where a fixed sum has been paid to the parish by the putative father of a bastard in discharge of further liability, and the child dies, the unexpended residue may be recovered in this action; *Watkins v. Hewlett*, 1 *B. & B.* 1. And in *Chappell v. Poles*, 2 *M. & W.*

867, the balance was held recoverable, though the defendants (the overseers who had received the money) had handed over the money to their successors, *the child having died during the defendants' year of office; and *semble*, the whole sum paid was money had and received to the plaintiff's use from the time it was so paid; such contract being illegal and void; *Ibid*. If A. pays B., a gratuitous bailee, money to be applied to a particular purpose, which B. neglects to do, A. may recover it back in this form of action; but *semble*, it will be otherwise, if B. has lost it by gross negligence; for this is the subject of a special action for such negligence; *Parry v. Roberts*, 3 *Ad. & E.* 118. So where the plaintiff abandons the purpose for which money was deposited with the defendant, he may sue for money had and received; *Baird v. Robertson*, 1 *M. & G.* 981. If A. gives a letter of credit to B. to apply the proceeds to a specific purpose, and B. is persuaded by C., who is cognisant of the facts, to lend the money to him, and he fails to repay it, A. may sue C. in this form of action; *Litt v. Martindale*, 18 *C. B.* 314.

In cases of forgery.] Where a party, paying money upon a forged instrument, has not been guilty of any want of that caution which, in consequence of the character which he fills, he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover back the money as money paid under a mistake. Thus a person, who discounts a forged navy bill, may recover back the money as money had and received to his use; *Jones v. Ryde*, 5 *Taunt.* 488; 1 *Marsh.* 157. So in the case of forged bank-notes; *per Gibbs, C. J., & C.* So where a banker by mistake paid a bill for the honour of a customer whose name was forged, but, discovering the mistake, gave notice thereof to the holder in time to enable him to give notice of non-payment to the indorsers, it was held that the money was recoverable from the holder; *Wilkinson v. Johnson*, 3 *B. & C.* 428; and see *Gompertz v. Bartlett*, and cases cited, *supra*, p. 341. So where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged, it was ruled that the defendants were liable to refund the money; *Fuller v. Smith, Ry. & Mood.* 49.

But where the party paying the money ought to have ascertained, or is bound to know, that the handwriting is forged; or where, by his delay in discovering his mistake, he has deprived the holder of the means of resorting to other parties on the bill, he will not be allowed to recover. Thus where two bills were drawn upon the plaintiff, one of which he accepted and both of which he paid, and it appeared that the handwriting of the drawer was forged, it was held that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was in the drawer's hand before he accepted or paid it, and that he could not recover the amount from the payee; *Price v. Neale*, 3 *Burr.* 1354; 1 *W. Bl.* 390. So where a banker paid a bill to a *bonâ fide* holder, which purported to be accepted payable at his house by one of his customers, and the forgery of the acceptor's name was not discovered until the end of a week, it was held that the money could not be recovered from the holder; *Smith v. Mercer*, 6 *Taunt.* 76; and the banker in such a case cannot recover, though he gives notice of the forgery on the day after he has paid it; for the holder is entitled to know whether it is to be dishonoured on the very day it becomes

due; *Cocks v. Masterman*, 9 B. & C. 902. Where a cheque, drawn by a customer upon his banker for a sum of money described in the body of the cheque in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the cheque in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum, it was held that the banker could not charge his customer for anything beyond the original sum; *Hall v. Fuller*, 5 B. & C. 750. But where the customer drew a cheque for 50*l.* and left a space on the line before the fifty, and also a space between the £ and the 50, so that the person to whom it was delivered was enabled to insert *three hundred and* before the fifty, and the figure 3 between the £ and the 50, it was held that the forgery and payment was from the customer's negligence, and he must bear the loss; *Young v. Grote*, 4 Bing. 253. The executor of A. recovered from the maker of a note purporting to be payable to A. and B., of whom A. survived B. It afterwards appeared that A.'s name had been added by forgery, and B.'s executor thereupon sued A.'s executor for money received to plaintiff's use; held that he could not recover, for it was not money paid on a note to which, if genuine, the plaintiff would have been entitled; *Vaughan v. Matthews*, 13 Q. B. 187.

Money paid under ignorance or mistake of facts or of law.] Money paid with a knowledge of all the facts, but under a mistake of the law, cannot in general be recovered back, there being nothing against conscience in the other retaining it; *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143; *Barber v. Pott*, 4 H. & N. 759. Thus where the plaintiff has suffered the defendant to sell some of his property under an impression that it had passed to the defendant by a deed of assignment, which was, in fact, inoperative, he cannot recover the price as money received to his use; *Platt v. Bromage*, 24 L. J. (Ex.) 63. But money paid under a mistake of facts, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration; *Bize v. Dickason*, 1 T. R. 285; *Milnes v. Duncan*, 6 B. & C. 671. And money so paid in ignorance may be recovered back although the defendant cannot be put in *statu quo*; *Standish v. Ross*, 3 Ex. 527. Where money was paid on account, and a dispute afterwards occurred between the parties and a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover the sum paid on account, as money paid under a mistake in the hurry of business; *Lucas v. Worswick*, 1 Mood. & Rob. 293. And a payment, made in *bond fide* forgetfulness of a fact formerly known to the plaintiff, may be recovered back; *Kelly v. Solari*, 9 M. & W. 54. And it is not enough to disentitle the plaintiff that he *might* have learnt the real fact upon inquiry, unless he has voluntarily waived all inquiry into the truth; *S. C.* Thus on the dissolution of partnership the plaintiff agreed to give the defendant 450*l.* for his share in the business, at a certain date; but if the moiety of the profits of the three preceding years should not amount to 1,800*l.*, then the plaintiff was to deduct the deficiency from 450*l.*, and the balance only was to be payable. At the given time the plaintiff investigated the partnership accounts, and came to the conclusion that the moiety of profits exceeded 1,800*l.*, and he accordingly paid the defendant the whole 450*l.* Afterwards the plaintiff made a fresh investigation of the accounts, and found that he had made a mistake in his former calculation, and

that he would have been entitled to deduct a considerable sum from the 450*l.*; held that he could recover from the defendant the sum paid in excess; *Townsend v. Crowdy*, 29 *L. J. (C. P.)* 300; 8 *C. B., N. S.* 477. But money paid with full knowledge of facts by a person who might have resisted payment cannot be recovered back. Thus where a discharged insolvent, being arrested by one of his scheduled creditors, pays the debt, he cannot get it back in this action; and *semble*, if he had given a security for it (which would itself be void as against the statute), and paid the amount when due, he could not have recovered it back; *Viner v. Hawkins*, 23 *L. J. (Ex.)* 38; 9 *Ex.* 266. Where a mortgagee gave notice of the mortgage to a tenant and demanded the rent, and the tenant chose to pay it to his landlord, the mortgagor, on an indemnity which proved to be bad, it was held that he could not recover the rent back from his lessor after he had been obliged by distress to pay it over again to the mortgagee; *Higgs v. Scott*, 7 *C. B.* 63. Nor will every mistake of fact enable the party to recover money paid in ignorance. Thus where A. conveyed to his bankers, by way of security, all his interest in a supposed devise to him, subject to a charge on it of a debt due from A to B., and the bankers afterwards voluntarily paid to B. the debt at A.'s request, it was held that they could not recover back the money from B. upon discovering that the will had been revoked and the security was worthless. In this case the debt paid was really due to B., and the only mistake of the bankers was in supposing that they held a good security against A. for the advance; *Aiken v. Short*, 25 *L. J. (Ex.)* 321. So where bankers cash a customer's cheque, and afterwards discover that they have no assets of his, they cannot recover the money back from the person to whom they paid it; *Chambers v. Miller*, 32 *L. J. (C. P.)* 30; 13 *C. B., N. S.*, 125. See further the notes to *Marriott v. Hampton*, 2 *Sm. L. C.* 367. Where money had been paid to the defendant by the plaintiffs on an insurance on a ship effected by the defendant as the agent of a foreign principal, and the defendant, when effecting the insurance, had suppressed a material fact, which, if known to the plaintiffs, would have enabled them to resist the payment, and on discovering the fact the plaintiffs brought an action against the defendant to recover the money; it was held that the defendant, having suppressed the fact with no intention to defraud, and having paid the money over to his principals, or settled it in account with them, before demand by the plaintiffs, was not liable to refund it; *Holland v. Russell*, 30 *L. J., Q. B.* 308; 1 *B. & S.* 424; affirmed in *Ex. Ch.* 32 *L. J. (Q. B.)* 297; 4 *B. & S.* 14; *Shand v. Grant*, 15 *C. B., N. S.* 324 accord.

Where an article is sold, which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back; *per Le Blanc, J., Cox v. Prentice*, 3 *M. & S.* 340. But if parties agree to abide by the weighing of any article at any particular scales, and, in the weighing, an error, not perceived at the time, takes place from an accidental mis-reckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, money had and received is sustainable; *per Le Blanc, J., and Lord Ellenborough, C. J., Ibid.* In that case a bar of silver, having been assayed by a third person, was bought of the defendant by the plaintiff, and paid for according to the assay, but it turned out that the assay was wrong, and the bar contained less silver; it was held that the plaintiff could recover what he had overpaid.

Though this action will not lie for the purpose of determining a right to an interest in land, *Lindon v. Hooper*, *Cowp.* 414, yet where the title is not in issue, it will often lie to recover back payments made under misapprehension of title. Thus a tenant who has paid rent to his landlord, and has afterwards been ejected by a third person who afterwards recovers mesne profits from him for the period during which the tenant has paid his rent, may recover the rent so paid from his landlord in an action for money had and received, the landlord not having set up any title at the trial of the ejectment; *Newsome v. Graham*, 10 *B. & C.* 234; see 1 *Freeman*, 479 note (d), 2nd ed. So, where a tenant continues to pay rent to the defendant in ignorance of the failure of a life on which his lease depends, he may recover back the payments, there being no dispute about title; *Barber v. Brown*, 1 *C. B.*, *N. S.* 121; 26 *L. J. (C. P.)* 21.

As to money had and received on rescinding a contract, or on breach of warranty, see *ante*, pp. 158—160, 257.

Money obtained by fraud, duress, &c.] Where money has been obtained by fraud, this action lies to recover it back; and money, fraudulently obtained, may be recovered at law, although the defendant may be entitled to it as legatee in the ecclesiastical law; *Crockford v. Winter*, 1 *Camp.* 124. After the death of a bankrupt, tenant for life, his assignees were allowed to recover, as money had and received, the bygone rents from a person who had received them under the colour of a fraudulent assignment; *Pearce v. Day*, cited 2 *Russ. & Myl.* 124. If A., by means of a false pretence or a promise or condition which he does not fulfil, induces B. to give him a cheque, and hands it over to C., in fraud of B., but C. takes it *bona fide* for value, and obtains cash for it at B.'s banker's, B. cannot recover the money from C.; *Watson v. Russell*, 31 *L. J. (Q. B.)* 304; 3 *B. & S.* 34. Where the defendant, being secretly married already, married the plaintiff, and received the rents of her land, they were held recoverable in this form of action; *Husser v. Wallis*, 1 *Salk.* 28. Where A. is agent of B. to pay certain securities of B., and the defendant obtains payment from A. by falsely representing himself to be the holder of one of the securities, the action for money had and received will lie at the suit of A., or *semble* of B. also; *Holt v. Ely*, 1 *E. & B.* 795. In *Gorett v. Hopgood*, *Exeter Sp. Assizes*, 1852, cor. Erie, J., the plaintiff, a lady, imbecile from age and infirmity, recovered in this form of action a large sum which was alleged to have been a gift by her to the defendant's wife. The plaintiff, being herself called as a witness, showed her incapacity on her examination, and the judge left it to the jury to say whether she knew what she was about when she gave the money. Where the defendant fraudulently colluded with J. S., who was insolvent, to obtain wines from the plaintiff, the proceeds on the resale of which eventually came into the defendant's hands in satisfaction of a debt due to him from J. S.; the plaintiff was held entitled to recover in this action; *Abbotts v. Barry*, 2 *B. & B.* 369; 5 *B. Moore*, 98. The promoters of a company advertised a large capital in 120,000 shares: The plaintiff took an allotment of sixty shares; notice was then published by the promoters that all the shares were allotted; whereupon the plaintiff paid a deposit on the shares and signed the subscription contract. He afterwards discovered that less than half the shares had been, in fact, allotted, and that the company had no funds. Held, that on this evidence of fraud he might recover back

his deposit from one of the active promoters; *Wontner v. Shairp*, 4 C. B. 404. See also *Jarrett v. Kennedy*, 6 C. B. 319, cited *ante*, p. 342. If a fraudulent statement, likely to influence the plaintiff, is shown, it need not be shown positively that it did, in fact, influence; and if the statement in a public advertisement can be traced to the secretary of a company, and purports to be by order of the directors, *semb.* an express authority to publish it may be presumed; *Wontner v. Shairp*, *supra*; and see *Watson v. Charlemont*, 12 Q. B. 856. But a party who seeks to repudiate shares on the ground of fraud must do so while he is in a condition to put both parties in *statu quo*. He cannot do so if he has received dividends and has permitted the company to become incorporated under 19 & 20 Vict. c. 47; *Clarke v. Dickson*, 27 L. J., Q. B. 223, E. B. & E. 148; *Cole v. Bishop*, E. B. & E., 150, n. But he may sue for the fraud, and so get damages; *S. C.*; *Clarke v. Dickson*, 28 L. J. (C. P.) 225; 6 C. B., N. S. 453; see post, *Action for deceit*.

So where a man has been obliged involuntarily, and by wrongful duress, to pay money, it may be recovered in this action; as where he has paid an exorbitant sum to redeem his goods from pawn; *Astley v. Reynolds*, 2 Str. 915; or wrongful detention; *Ashmole v. Wainwright*, 2 Q. B. 837. Plaintiff being indebted to the defendant and others, offered a composition of five shillings in the pound, which some of the creditors accepted, but the defendant refused until the plaintiff had privately given him 50*l.*, when he executed the deed. Some of the other creditors had refused to sign unless the defendant signed, and this he knew; held that the plaintiff could recover the 50*l.*; *Atkinson v. Denby*, 31 L. J. (Ex.) 362; 7 H. & N. 934. So where a party to a reference has been obliged to pay an unreasonable charge of the arbitrator in order to take up the award; *per curiam* in *Re Coombs*, 4 Ex. 839. See *Roberts v. Eberhardt*, 3 C. B., N. S. 482. So where goods, not liable to seizure, are seized by a revenue officer, who extorts money to release them; *Irving v. Wilson*, 4 T. R. 485; or a public officer demands and exacts an excessive fee; *Steele v. Williams*, 8 Ex. 625; as a parish clerk for a search in a register; or a corporation officer extorts a fee for granting a licence; *Morgan v. Palmer*, 2 B. & C. 729; or a sheriff claims and receives a larger fee than he is entitled to; *Dew v. Parsons*, 2 B. & A. 562; or a toll-keeper exacts an illegal toll; *Parsons v. Blandy*, Wightw. 22; or a railway company, bound by their special Act to charge rates equally to all, detains the parcels of a particular person until he pays an unreasonable charge, in which last case the action lies for the excess; *Parker v. Great Western Railway Co.*, 7 M. & G. 253; *Edwards v. the same Company*, 11 C. B. 688; *Bazendale v. the same Company*, 33 L. J. (C. P.) 197, (in *Exch. Ch.*); 16 C. B., N. S. 137; and this, although part of the money was received by the defendants as agents of another company and for their use; *Parker v. The Bristol and Exeter Railway Co.*, 6 Ex. 702. So if a mortgagee with power of sale refuses to stop a sale, unless the mortgagor pays expenses not duly chargeable upon him; *Close v. Phipps*, 7 M. & G. 586. A mortgagee having agreed to assign his security on payment of principal, interest, and costs, made a claim for costs to which he was not entitled, and on his refusal to execute the assignment on any other terms, the assignee, by direction of the mortgagor, paid the sum demanded, under protest; held, that the mortgagor could recover the excess, as paid not under duress in the strict legal sense, but as paid

involuntarily under undue pressure; *Fraser v. Pendlebury*, 31 L. J. (C. P.) 1. So, if a sheriff obtains payment by a wrongful seizure under a *fi. fa.* by a threat of selling the goods, though not liable to the execution; *Valpy v. Manley*, 1 C. B. 594; or an attorney illegally detains deeds till an undue claim is satisfied; *Wakefield v. Newbon*, 6 Q. B. 276; *Turner v. Deane*, 3 Ex. 836; even though he detains them as attorney of the third person, who had no right to payment, and though he has paid over the money to his client; *Oates v. Hudson*, 6 Ex. 346;—in all such cases, this action is maintainable. See also *Gibbon v. Gibbon*, 13 C. B. 205. And in these cases it makes no difference that the defendant, who has obtained the money as an agent, has handed it over to his principal. See *Steele v. Williams*, 8 Ex. 625, and cases cited, *id.* 629: *Oates v. Hudson*, *supra*. *Aliter*—if the agent has received, without fraud, money paid under a mistake of facts, and has paid it over to his principal, or settled it in account with them; *Holland v. Russell*, 32 L. J. (Q. B.) 297, *ante*, p. 345; *Shand v. Grant*, 15 C. B., N. S. 324.

Personal duress will of course avoid a payment made under its influence; and the wrongful detention of the plaintiff's goods or property for the purpose of obtaining money, will, we have seen above, be ground for reclaiming the money paid under such circumstances; but this is not on the ground of *duress*, but because the payment is involuntary. Where there is a fair and *bonâ fide* agreement to pay for redelivery of the detained goods, and no undue advantage taken, the action will not lie; for generally mere duress of goods will not avoid a contract or agreement so as to enable a party to recover back money paid under it. See *Atlee v. Backhouse*, 3 M. & W. 650; *Skeate v. Beale*, 11 Ad. & E. 983.

A party cannot try a title to land in an action for money paid to release goods taken as a distress by a claimant of the land; *Lindon v. Hooper*, Cowp. 414. And see the observations of the Court in *Gingell v. Parkins*, 4 Ex. 725, and cases cited *ante*, p. 346. Nor can the owner of cattle, *rightfully* distrained damage feasant, recover in this action an excessive demand for damage, though paid under protest; *Gulliver v. Cosens*, 1 C. B. 788. So it does not lie by a tenant against his landlord for the overplus after sale under a distress; for the proper remedy is an action for not leaving it in the hands of the sheriff or constable; *Yates v. Eustwood*, 6 Ex. 805; *Evans v. Wright*, 2 H. & N. 527. Where an action is brought, and the defendant pays the demand "without prejudice," he nevertheless cannot afterwards recover the money so paid; *Brown v. M'Kinally*, 1 Esp. 279. So money recovered by regular legal process, though in fact not due, cannot be recovered back in this action; *Marriott v. Hampton*, 7 T. R. 269; *Hamlet v. Richardson*, 9 Bing. 644; even though recovered after judgment by a writ fraudulently issued to levy a sum already paid by the judgment debtor; *De Medina v. Grove*, 10 Q. B. 152. But where a certificated bankrupt, upon being arrested upon a *ca. sa.* for a debt proveable under the commission, paid the money under a protest stating his bankruptcy and certificate, and warning the sheriff that he should apply to the Court to have the money returned, it was held that this was not such a payment under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money; *Payne v. Chapman*, 4 Ad. & E. 364. And where defendant, knowing he had no real claim, arrested the plaintiff, a foreigner, on his arrival from abroad, for 10,000*l.*, and, under the compulsion of a colourable legal process, ex-

torted from him 500*l.*, "as a payment in part of the writ," the Court held that this action was maintainable; *De Cudaval, v. Collins*, 4 *Ad. & E.* 858.

Against officer de facto.] Though a title to land cannot, as we have seen, be tried in this form of action, a title to an office or appointment is often tried in it. Thus the person entitled may sue a usurper of an office for the fees wrongfully received, as in the case of the disputed title to a stewardship of an honour or a court baron; *Howard v. Wood*, 2 *Lev.* 245; 1 *Freem.* 478, and cases collected *ib.* in ed. 1826; or office of clerk of the papers in the King's Bench office; *Woodward v. Aston*, 1 *Vent.* 296; or a rightful against a tortious guardian and socage; *obiter, per Holt*, C. J., in *Lamine v. Dorrell*, 2 *Ld. Raym.* 1217; or the office of crier of a court; *Green v. Hewett*, 1 *Peake, N.P.* 182; or prothonotary; *Campbell v. Hewlitt*, 16 *Q. B.* 258. And in such actions it will be sufficient to show the fees received *communibus annis*; *Montague v. Preston*, 2 *Vent.* 170, 171, *B. N. P.* 76 (e); *semb. Campbell v. Hewlitt, supra.* But if there are no accustomed fees attached to the office, and the profits are only casual, as in the case of a sexton who receives only gratuities for showing a cathedral, no such action lies; *Boyter v. Dodsworth*, 6 *T. R.* 681. The action lies against a corporation which has taken and wrongfully detained fees belonging to an officer of it; *Hall v. Mayor, &c. of Swansea*, 5 *Q. B.* 526; and thus the title to the office itself may be tried.

On waiver of tort.] We have seen that a taking or detention of goods from the plaintiff may be sometimes treated as a sale to the wrongdoer; *ante*, pp. 304-5. So a wrongful receipt by the defendant of the proceeds of goods wrongfully sold may be treated as a receipt to the plaintiff's use by waiving the preceding tortious detention of them; *Lamine v. Dorrell*, 2 *Ld. Raym.* 1216; *Kitchen v. Campbell*, 3 *Wils.* 304. So where the defendants wrongfully seized money of the plaintiff, and paid it to their joint account at a banker's, it was held that this action lay against both; *Neate v. Harding*, 6 *Ex.* 349. The right to maintain this action seems in such cases to be founded, not on the right to treat a mere tort as a contract, but on the right to refrain from suing for the tort, and to estop the wrongdoer from setting up his own wrong to defeat the plaintiff's remedy for the proceeds. But if, after a wrongful sale of goods, on a claim by the owner the wrongdoer pays over part of the proceeds to him, and he accepts it as money paid to his use, the tort is waived, and the owner's only remedy for the residue of the proceeds is by action for money had and received; *Lythgoe v. Vernon*, 5 *H. & N.* 180; 29 *L. J. (Ex.)* 164.

Where A. has sued B. for a tortious conversion of A.'s property, and recovered the value by a judgment, he cannot afterwards sue in this form for the proceeds of a sale of them by B., which sale was the tortious conversion complained of, although they were sold for more than the damages assessed and recovered, and although the judgment may be unsatisfied; and it makes no difference that the conversion was by B. & C. jointly, and that the former recovery was against C. only, and the proceeds of the sale were received by B. only; *Buckland v. Johnson*, 15 *C. B.* 145; 23 *L. J. (C. P.)* 204. Such a defence will, however, require a special plea.

This action lies to recover money in the hands of an overseer, levied on a conviction which has been quashed; *Feltham v. Terry*, cited 1 T. R. 387.

In cases of illegal contracts.] Where money has been paid in pursuance of an illegal contract, it is generally irrecoverable; see cases cited 2 Sm. L. C. 457, and *Lowry v. Bourdieu*, 2 Doug. 468. And there is no distinction in this respect between *mala prohibita* and *mala in se*; *Aubert v. Maze*, 2 B. & P. 371; *Cannan v. Bryce*, 3 B. & A. 179. But in some cases it is recoverable as money had and received to the use of the party paying it, as in the following cases: (See 1 H. Bl. 65 (n.), 4th ed.)—

1. When the contract remains *executory*, though the plaintiff and defendant be *in pari delicto*; *Tuppenden v. Randall*, 2 B. & P. 467; as a deposit upon an illegal wager; *Aubert v. Walsh*, 3 Taunt. 277; *Busk v. Walsh*, 4 Taunt. 290; *Varney v. Hickman*, 5 C. B. 271. The plaintiff, in order to effect the sale of his ship to a foreign government, authorised the defendant to bribe the officials of the government. The defendant accordingly effected a sale for £6,500, —£6,000 to be paid to the plaintiff, and £500 to the officials, as he informed the plaintiff, who assented to the bargain. The defendant received the whole £6,500 from the government; he paid over the £6,000 to the plaintiff, and £300 to the officials, but did not pay over the other £200,—held that the plaintiff could maintain an action for it; *Bone v. Ekless*, 5 H. & N. 925; 29 L. J. (Ex.) 438.

2. The money is recoverable, though the contract be executed, if the plaintiff be not *in pari delicto* with the defendant; *per* Id. Mansfield, C. J.; *Lowry v. Bourdieu*, 2 Doug. 472. As where money is extorted from the plaintiff by the threat of prosecuting a penal action against him; *Unwin v. Leaper*, 1 M. & G. 747; *Williams v. Hedley*, 8 East, 378. But money is not recoverable where the contract is *executed* and the plaintiff is *in pari delicto* with the defendant; *Andree v. Fletcher*, 3 T. R. 266; *Thistlewood v. Cracroft*, 1 M. & S. 500; *Stokes v. Twitchen*, 8 Taunt. 492. Where the plaintiff has given the defendant a bill to secure to him an undue preference over other creditors of the plaintiff and induce him to sign a composition deed, which bill is afterwards voluntarily paid by the plaintiff, he cannot recover back the amount as money had and received: *Wilson v. Ray*, 10 Ad. & E. 82. So where the plaintiff has paid money to compromise a prosecution for disobeying an order of sessions, which he afterwards finds to be irregular and void, he cannot recover back his money; *Goodall v. Lowndes*, 6 Q. B. 464.

3. Money is recoverable from a stakeholder in whose hands it has been deposited upon an illegal consideration, though *executed* by the happening of the event upon which a wager is made; provided the money has not been paid over by the stakeholder to the other party, or was paid over after notice to the contrary; *Cotton v. Thurland*, 5 T. R. 405; *Bate v. Cartwright*, 7 Price, 540; *Hastelow v. Jackson*, 8 B. & C. 221; *Hodson v. Terrill*, 1 C. & M. 797. By the 8 & 9 Vict. c. 109, s. 18, all wagering contracts are made null and void; and no suit can be maintained at law or equity for recovering any sum alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event of any wager. But if before the event, the party depositing the sum staked claims it back from the

stakeholder, he can maintain money had and received against him; *Varney v. Hickman*, 17 L. J. (C. P.) 102; 5 C. B. 271. Where, however, money is deposited, though by only two persons, as a wager upon a lawful game or race in which they themselves are engaged, this comes within the proviso in sect. 18, as "a sum of money to be awarded to the winner of a lawful game," and cannot be recovered from the stakeholder as money deposited on a void contract; *Batty v. Marriott*, 17 L. J. (C. P.) 215; 5 C. B. 818.

On transfer of debt by and between three parties.] Where A. was indebted to B., and B. to C., and B. gave an order to A. to pay C. the sum due from A. to B., and the order was assented to by A., on the security of which C. lent B. a further sum; it was held that, on A.'s refusal to pay, C. might maintain an action for money had and received against him; *Israel v. Douglas*, 1 H. Bl. 239; *Wilson v. Coupland*, 5 B. & A. 228; *Walker v. Rostron*, 9 M. & W. 411. It seems, however, that the agreement must be such that the debt due from B. to C. is thereby extinguished; *Cuxon v. Chadley*, 3 B. & C. 591; *Liversidge v. Broadbent*; *Wharton v. Walker*, *infra*. And the debt transferred must also be itself a demand for money had and received; *S. CC.* Where A., being indebted to B., gave him an order upon C., his (A.'s) tenant, to pay the amount out of the next rent that would become due, and B. sent the order to C., but had not any direct communication with him upon the subject, and at the next rent-day C. produced the order to A., and promised him to pay the amount to B., and, upon receiving the difference between that and the whole rent, A. gave a receipt for the whole,—it was held that B. could not recover the amount of the order from C., either in an action for money had and received, or upon an account stated; *Wharton v. Walker*, 4 B. & C. 163; see the principle of the cases discussed in *Liversidge v. Broadbent*, 4 H. & N. 603; 28 L. J. (Ex.) 332. So where an overseer stopped part of a pauper's allowance, and engaged to pay it to the pauper's landlord for his rent, in pursuance of an understanding between the three, it was held that the landlord could not maintain money had and received against the overseer; *Bluckledge v. Harman*, 1 Mood. & Rob. 344. Where, by the consent of all parties, the defendant is to pay to the plaintiff a debt due from defendant to A., who is the plaintiff's debtor, it lies on the plaintiff to show that there was, at the time of the agreement, an ascertained debt due from defendant to A.; *Fairlie v. Denton*, 8 B. & C. 395.

In case of partnership.] One partner cannot sue his co-partner for his share of the profits as long as the partnership is undissolved and accounts unsettled; therefore where two persons agree to divide the profits of an agency between them, and one of them receives, on account of such agency, a certain sum of money, the other cannot maintain this action for a moiety, it being a partnership transaction, and there being no account settled; *Bovill v. Hammond*, 6 B. & C. 149. A transaction between partners may, however, by agreement, or a separate security, be so separated from the partnership affairs, though arising out of them, as to form the subject of an action by one against another. Such an action involves no general account. See *Jackson v. Stopherd*, 2 C. & M. 361; *Coffee v. Brian*, 3 Bing, 54; *Pearson v. Skelton*, 1 M. & W. 504; also cases *ante*, p. 334, *Action for money paid*, and *post*, p. 357, *Action on account stated*.

Defence.] The agent of a party to an illegal contract, who receives money paid under it to the use of his principal, cannot set up the illegality of the transaction to an action brought against him by his principal; *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, *id.* 296. But it is otherwise where the receipt itself is illegal, and the agent is therefore also *particeps criminis*; *McGregor v. Lowe*, Ry. & Mood. 57; *per Crompton, J.*, in *Nicholson v. Gooch*, 5 E. & B. 1016.

The defence of illegality cannot be set up under non-assumpsit, or other general denial; *Martin v. Smith*, 4 N. C. 436; see *post*, *Defence in actions on simple contracts*.

ACTION FOR INTEREST.

Where interest is recoverable by law, it is either claimed in a special count on an agreement,—or given by way of damages by the jury, though not demanded in the declaration,—or it is the subject of a separate *indebitatus* count for interest, which last form has been commonly adopted where the principal sum only is recoverable under another count. Thus, as interest is not generally recoverable, at common law, on counts for goods sold, money lent or paid; *Walker v. Constable*, 1 B. & P. 306; *Fruhling v. Schroeder*, 2 N. C. 77; it is usual, if interest be due to all, to demand it in a separate count. Gibbs, C. J., in *Maberley v. Robins*, 5 Taunt. 625, thought that a separate count was not necessary to enable the jury to give interest by way of damage even on a count to recover a deposit paid on a sale; and in cases within the statute 3 & 4 W. 4, c. 42, the count seems to be superfluous, for the jury may give interest on any issue in such cases. See also *Edwards v. Great Western Railway Co.*, 11 C. B. 588; 21 L. J. (C. P.) 72. A count for interest is not supported by proof that the defendant, a widow, promised the plaintiff to pay interest on a debt of her husband, if the plaintiff forbore to “proceed against her” for payment of the debt; for the debt was not *her* debt; *Petch v. Lyon*, 9 Q. B. 147.

Under this head, the subject of interest will be noticed generally, and without reference to an *indebitatus* count.

Interest, when recoverable, is to be calculated down to the time of final judgment; *Robinson v. Bland*, 2 Burr. 1085-8.

When due at common law.] The principle upon which interest is claimed at common law is, that it is matter of contract, express or implied, between the parties. “It is now established as a general principle, that interest is allowed by law only upon mercantile securities; or in those cases where there has been an express promise to pay interest; or where such promise is to be implied from the usage of trade, or other circumstances;” *per Abbott, C.J.*, *Higgins v. Sargent*, 2 B. & C. 349; *Page v. Newman*, 9 B. & C. 381; *Rhodes v. Rhodes*, Johns. 653; 29 L. J. (Ch.) 418; notwithstanding many older cases at variance with the rule as above stated. See *Foster v. Weston*, 6 Bing. 714; *Arnott v. Redfern*, 3 Bing. 359; *Pinkhorn v. Tuckington*, 3 Camp. 463; *Swinford v. Burn, Gow*, 8. That there

may be a usage to pay a certain interest on the settled balance of a merchant's account, see *Orme v. Galloway*, 23 L. J. (Ex.), 118; 9 Ex. 544. In an action on an undertaking to let judgment go by default in a suit for a mortgage debt, and to pay principal and interest, in consideration of staying execution for a certain time, it was held that the jury might give interest by way of damages down to the date of the verdict for breach of the agreement by non-payment; and this without the aid of stat. 3 & 4 W. 4, c. 42; *Harper v. Williams*, 4 Q. B. 219.

The following cases in which interest was not allowed, must now be taken as subject to the statute hereafter mentioned.

It has been held that interest cannot, at common law, be recovered on money received to the use of another; *De Havilland v. Bowerbank*, 1 Camp. 50; though the money was obtained by fraud; *Crockford v. Winter*, 1 Camp. 129; nor for money lent, to be repaid either upon demand or at a given time; *Calton v. Bragg*, 15 East, 223; *Higgins v. Sargent*, 2 B. & C. 351; nor where the borrower by a written instrument promised to repay it at a certain time; *Page v. Newman*, 9 B. & C. 378; nor on money paid; *Carr v. Edwards*, 3 Stark, 132; nor on money due for work and labour; *Trelawney v. Thomas*, 1 H. Bl. 303; nor on money due for goods sold and delivered to be paid for on a certain day; *Gordon v. Swan*, 12 East, 419; 2 Camp. 429 (n.); nor upon a policy of insurance; *Kingston v. McIntosh*, 1 Camp. 518; nor upon a policy of insurance on a life, where the money was payable six months after proof of the death; *Higgins v. Sargent*, 2 B. & C. 348; nor on a single bond; *Hogan v. Page*, 1 B. & P. 337; nor on rent; per Tindal, C. J., *Foster v. Weston*, 6 Bing. 714; nor on an instrument "to pay 1500*l.* to be delivered in goods by three payments of 500*l.* each, at three, five, and seven months;" *Foster v. Weston*, 6 Bing. 709. An auctioneer employed to sell an estate, who receives a deposit from the purchaser, is a stakeholder liable to be called upon to pay the money at any time; and, therefore, although he may make interest by it, he is not liable to pay interest to the vendor on the completion of the contract; *Harrington v. Hoggart*, 1 B. & Ad. 577. So of an agent or banker who holds money payable at a moment's notice; see cases cited by Parke, J., S. C.

Interest in the case of mercantile instruments.] The mercantile instruments which have always been held to carry interest, whether mentioned or not, are bills of exchange and promissory notes. Where the bill or note is expressly made payable with interest, it is payable from the date; *Richards v. Richards*, 2 B. & Ad. 447; *Roffey v. Greenwell*, 10 Ad. & E. 222; and where interest is made payable at a certain rate, the jury may give interest at the same rate against the drawer from the time of being due; *Keene v. Keene*, 27 L. J. (C. P.) 88; 3 C. B., N. S. 144. If the instrument is silent about interest, it is payable only from the time when the instrument becomes due. Upon a bill or note payable on demand generally, not specifying interest, interest is given from the time of the demand proved; *Blaney v. Hendricks*, 2 W. Bl. 761. And when no demand is proved, from the issuing of the writ; *Pierce v. Fothergill*, 2 N. C. 167. Against the drawer of a bill not mentioning interest, interest is only recoverable from the time of his receiving notice of dishonour; *Walker v. Burnes*, 5 Taunt. 240; 1 Marsh. 36. It has, however, been said that, in an action on a bill

not bearing interest on its face, interest is in the nature of damages, and the jury may allow it, or may disallow it in case the delay of payment has been occasioned by the default of the holder; *per* Bayley, J.; *Cameron v. Smith*, 2 B. & A. 308. But though the jury are to decide whether interest is to be allowed, and what is the interest current at any particular place, it is a question of law what rate of interest is to be allowed on such a bill; therefore where the jury gave the indorsee of a bill interest at 6 per cent. in an action against the drawer on non-acceptance, and the interest at the place where it was drawn was found to be 25 per cent., it was held that the plaintiff was entitled by law to the higher rate; *Gibbs v. Fremont*, 9 Ex. 25; 22 L. J. (Ex.) 302. The indorsee of a bill may sue the acceptor for interest, although he has taken another bill from the defendant for the amount of the first, which has been duly paid; *Lumley v. Musgrave*, 4 N. C. 9.

When goods are sold to be paid for by bill, interest from the time when the bill would, if given, have become due may be recovered as part of the price in *indebitatus assumpsit* for goods sold and delivered; *Farr v. Ward*, 3 M. & W. 25; *Davis v. Smyth*, 8 M. & W. 399.

Where interest was payable on money had and received in consequence of a specific agreement, it was held (before the statute 3 & 4 W. 4, c. 42) that the plaintiff might recover the interest on an *indebitatus* count for interest without declaring on the special agreement; *Hicks v. Mareco*, 5 C. & P. 498.

Interest implied.] A promise to pay interest may be implied from the acts of the parties. Thus where a former balance has been settled upon an allowance of interest in a banker's book, it is an admission by the party of a contract to pay interest on the sums advanced to him by the banker; *Culton v. Bragg*, 15 East, 223. But where the defendant undertook to transfer to plaintiff's account a sum due from defendant to A., plaintiff cannot recover interest on it merely because interest was allowed in the usual course of dealing between defendant and A.; *Fruhling v. Schroeder*, 2 N. C. 77.

Compound interest is not generally allowed unless the parties have expressly or impliedly contracted to pay it, or there be a custom; *Fergusson v. Fyffe*, 8 Cl. & Fin. 121. Even where the defendant contracted to pay money by certain instalments, and also interest on each instalment from the day appointed for payment, and to secure payment of such interest by his bond, it was held that, on default of payment, a jury was not bound, either at common law or under stat. 3 & 4 W. 4, c. 42, s. 28, to award interest upon such interest; *Attwood v. Taylor*, 1 M. & G. 279. Where the plaintiffs had acted as agents for the defendant, and advanced moneys, and at the close of each account (which was delivered annually) had charged interest, and at each rest had added the interest of the preceding year to the principal, Lord Ellenborough held that the accounts, which had not been objected to for a number of years, afforded evidence of a promise to pay interest in this manner; *Bruce v. Hunter*, 3 Camp. 467. But where compound interest is so charged, it must appear that the debtor knew that the practice was to make such rests; *Moore v. Voughton*, 1 Stark. 487; and see *Daves v. Pinner*, 2 Camp. 486 (n.).

Interest by statute.] By sect. 28 of 3 & 4 W. 4, c. 42, upon all debts or sums certain payable at a certain time or otherwise, the jury

on the trial of any issue, or any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

And by section 29, it is enacted that the jury on the trial of *any issue*, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of *trover* or *trespass de bonis asportatis*, and over and above the money recoverable in all actions on *policies of assurance* made after the passing of the act.

Money claimed on a special agreement in writing to let judgment go by default in an action against a mortgagor for principal and interest, and to pay the amount of debt and costs on a named day, if certain securities were then ready, is not a debt certain payable at a time certain within the above act; *semb. Harper v. Williams*, 4 Q. B. 219. The deposit paid on a consideration that has failed may be recovered back with interest on a previous demand of interest made under it; *Mowatt v. Londesborough*, 4 E. & B. 1; claiming interest from an earlier date than the date of the demand will not vitiate it, *S. C.* So interest may be recovered on an over-payment made by a person to obtain his goods from a carrier, on which an illegal charge has been made, if due demand be made under the statute; *Edwards v. Great Western Railway Co.*, 11 C. B. 588; 21 L. J. (C. P.) 72.

By 17 & 18 Vict. c. 90, all acts or parts of acts of parliament mentioned in the schedule, and "all existing laws against usury," are repealed, except as to rights, remedies, and liabilities for acts previously done. By sect. 3, where interest is now (August 10, 1854) payable on any contract, express, or implied, for payment of the legal or current rate of interest, or where interest is "now" payable by any rule of law, the same rate shall be recoverable as if the act had not passed. By sect. 4, nothing is to affect the law relating to pawn-brokers. Among the repealed acts are those relating to the enrolment of annuities, and the temporary exemptions of bills and notes from the usury laws.

ACTION ON AN ACCOUNT STATED.

To recover upon a count on an account stated the plaintiff must prove an absolute acknowledgment by the defendant of the plaintiff's claim. A qualified acknowledgment is not sufficient, as, "I would have paid you, if you had not done so and so;" *Evans v. Verity, Ry. & Mood*. 239. And an offer of a sum certain on demand of a larger is not evidence on the account stated; *Wayman v. Hilliard*, 4 Moore & P. 729; 7 Bing. 101. An entry in a bankrupt's examination of a certain sum being due to A., is evidence of an

account stated between them; *Eicke v. Nokes*, 1 M. & Rob. 359. An oral admission of a debt due for goods sold is evidence of an account stated, though the agreement for the sale was in writing; *Newhall v. Holt*, 6 M. & W. 662. An agreement by a member of a company, on behalf of the company, to pay the plaintiff's bill in consideration of withdrawing an attachment against the company's funds, is evidence of an account stated in an action against the member as one of the company, though the defendant became a member after the debt was incurred; *Barker v. Birt*, 10 M. & W. 61. The company in this case seems to have been an unincorporated company or trading partnership. Where a party, examined before commissioners of bankrupt, admitted that he had received a sum on account of the bankrupt after an act of bankruptcy, but not that it was a subsisting debt; held that this would not support a count on an account stated with the assignees; *Tucker v. Barrow*, 7 B. & C. 623.

A promissory note given in 1844 by the defendant for a sum described as interest on a note for 117*l.* dated 1838, is evidence on an account stated of a subsisting debt of 117*l.* due in 1844; *Perry v. Slade*, 8 Q. B. 115. An I. O. U. is evidence of an account stated with the person who produces it, though not named in it, and if another person was meant, the defendant must prove this; *Fesenmayer v. Adcock*, 16 M. & W. 449. But it may be shown, under the general issue, that it was given on a consideration that has failed; as for part of a deposit on a sale which has gone off for want of title; *Wilson v. Wilson*, 14 C. B. 616; and see *Berry v. Storey*, in C. P. 2 Com. Law R. 815. Where an I. O. U. was given for a stipulated premium extra the consideration specified in an apprentice deed, which was therefore void by 8 Ann. c. 9, yet the master may recover the money under an account stated, the boy having, in fact, served out his full term; *Westlake v. Adams*, 5 C. B., N. S. 248; 27 L. J. 271. An account stated may be maintained on a parol agreement of what the balance between the parties is, though one of the items be the price of land sold under a parol agreement, whether the statement be after the land has changed hands; *Cocking v. Ward*, 1 C. B. 858; or before, if it be shewn to have subsequently come into the defendant's possession; *Laycock v. Pickles*, 33 L. J. (Q. B.) 43; 4 B. & S., 497; which cases see *ante*, p. 155. But there must be an admission of a debt due in order to support an account stated, therefore when the defendant verbally agreed to purchase a lease of the plaintiff, and gave as deposit an I. O. U. for 25*l.*, and afterwards refused to complete the purchase; it was held that the I. O. U., taken with the circumstances under which it was given, was no evidence of an account stated; *Lemere v. Elliott*, 6 H. & N. 656; 30 L. J. (Ex.) 350.

In an action by the plaintiff as executrix, where the defendant, on being applied to by her for the payment of interest, stated that he would bring her some, it was held that, though this was an admission that something was due, still, as the nature of the debt did not appear, nor whether it was due to the plaintiff as executrix, or in her own right, nor that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages; *Green v. Davies*, 4 B. & C. 235; and see *Teal v. Auty*, 2 B. & B. 101. And generally an account is not stated unless some specific sum is agreed upon; therefore a letter asking the plaintiff "to hold the defendant's cheque till Monday, when I will send the amount," the amount of the cheque being unknown, will not support this count; *Lane v. Hill*,

18 Q. B. 252. If it appears that the account is stated of a debt due from a third person to the plaintiff, which defendant promised to pay without any consideration, this is a defence on the general issue; *French v. French*, 2 M. & G. 644. So where the defendant gave a written promise to pay a debt due from her deceased husband to the plaintiff's deceased husband with interest, this was held no evidence on a common count for interest, or on an account stated; for the debt was not due from the defendant; *Petch v. Lyon*, 9 Q. B. 147. A promissory note was found among the testator's papers, upon which the executors promised to pay it, but it afterwards appeared that it was intended as a legacy, and was not in payment of a debt: held not evidence of an account stated with the payee; *Gough v. Findon*, 7 Ex. 48. A written guarantee by one of several partners without the authority of the others, and a letter written by their clerk explaining it, also without the authority of all, are not evidence of an account stated by the firm; *Brettell v. Williams*, 4 Ex. 623. It is sufficient to prove the account stated without giving evidence of the several items constituting the account; *Bartlett v. Emery*, 1 T. R. 42 (n.); and proof of the admission of a single item is sufficient; *Higmore v. Primrose*, 5 M. & S. 65.

Where a partnership has been dissolved and a balance struck, it may be recovered under this count even as between partners: *Foster v. Allanson*, 2 T. R. 479; *Brierly v. Cripps*, 7 C. & P. 709; *Wilson v. Cutting*, 10 Bing. 436; and the action is then maintainable without any express promise to pay; *Wray v. Milestone*, 5 M. & W. 21. But it will only lie on a final balance of the partnership accounts, and not during the continuance of the partnership; *Fromont v. Coupland*, 2 Bing. 170; *Goddard v. Hodges*, 1 C. & M. 37; *Curr v. Smith*, 5 Q. B. 128; ante, p. 351. If an account is stated of the balance due on a deed or bond, this action will not lie, for it continues to be a specialty debt; *Middleditch v. Ellis*, 2 Ex. 623.

The plaintiff may recover, though the account was, in fact, stated by the defendant with the plaintiff's wife; but not on an account stated by the wife of the defendant; *Styart v. Rowland*, B. N. P. 129; unless she is proved to be the defendant's agent in the transaction. An acknowledgment in a casual conversation with a stranger, not shown to be the agent of the plaintiff, is not sufficient; *Breckon v. Smith*, 1 Ad. & E. 488. Where there were accounts between A. and B., and C. became a partner with B., and dealings continued between the partners and A., who afterwards settled an account with B. and C., wherein was included the money due from A. to B. alone, Lord Kenyon held that the whole might be given in evidence in an action by B. and C. as on an account stated; *Moore v. Hill*, *Peake Ev.* 253, 5th ed.; see *Gough v. Davies*, 4 Price, 214; *David v. Ellice*, 5 B. & C. 196. The debt on which the account is founded may be an equitable one; thus, where a trustee holds money in trust for the plaintiff, and states an account with him and acknowledges himself a debtor for the amount, he is liable on this count; per Crompton, J., *Howard v. Brownhill*, 23 L. J. (Q. B.) 23, citing *Roper v. Holland*, 3 Ad. & E. 99. An account stated was formerly considered conclusive; but errors in it may now be corrected; per Ld. Mansfield, C. J., *Trueman v. Hurst*, 1 T. R. 42; *Dails v. Lloyd*, 12 Q. B. 531; and this, under the general issue; *Thomas v. Hawkes*, 8 M. & W. 140; accord. *Wilson v. Wilson*, 14 C. B. 616. If the defendant accounts with the plaintiff in a particular character, he will

be taken to have admitted that character; *Peacock v. Harris*, 10 *East*, 104.

A promissory note, if not properly stamped, cannot be given in evidence as an admission of an account stated; *Green v. Davies*, 4 *B. & C.* 235. A note, payable on a contingency, is not evidence of an account stated; *Morgan v. Jones*, 1 *C. & J.* 162. See further on the admissibility of bills or notes to prove an account stated, *ante*, pp. 182, 187, 199, 201, 215, 216.

The account must be stated before the commencement of the action; and where a defendant, after action brought, had offered a *cognovit*, it was held insufficient evidence to support the count. *Spencer v. Parry*, 3 *Ad. & E.* 331; *Allen v. Cook*, 2 *Dowl. P. C.* 546.

The plaintiff cannot, under this count, give evidence of more than one accounting. It is not like a count for goods sold, which may have been at several different times; *per Littledale, J., Kennedy v. Withers*, 3 *B. & Ad.* 769. Where the plaintiff relies on an account stated on one day, the defendant cannot prove, under the general issue, a subsequent accounting including fresh items, by which the balance was turned against the plaintiff; for this amounts to payment or set-off, and should be so pleaded; *Fidgett v. Penny*, 1 *C., M. & R.* 108. But if the second accounting was a mere correction of the first, it would be admissible; see *Thomas v. Hawkes*, 8 *M. & W.* 140.

Where accounts are submitted to an arbitrator, his award cannot be given in evidence under the count on an account stated; *Bates v. Townley*, 2 *Ex.* 152, overruling *Keen v. Butshore*, 1 *Esp.* 194. But where an incoming tenant agrees to take fixtures at a valuation to be made by brokers, and after it has been made the tenant enters, the value so ascertained may be recovered on such a count; *Salmon v. Watson*, 4 *B. Moore*, 73.

An infant cannot state a valid account; *Trueman v. Hurst*, 1 *T. R.* 40; but it will be good if ratified after full age and before action; *Williams v. Moor*, 11 *M. & W.* 256. No account can be stated with the agent of a lunatic, so as to bind the lunatic; nor can a lunatic state one, *Turbuck v. Bispham*, 2 *M. & W.* 2.

ACTIONS AGAINST COMMON CARRIERS.

This head treats only of the evidence in those actions against common carriers which accrue on contracts, express or implied, between them and their employers. Such actions have been framed, indifferently, either as on a breach of contract or neglect of duty; but in substance such actions are *ex contractu*, being for non-performance of the contract of bailment, and not for a tort independent of contract. See 2 *Black. Comm.* 451; *Legge v. Tucker*, 1 *H. & N.* 500; 26 *L. J. (Ex.)* 71. The same observation applies to the common law obligation of inn-keepers, livery-stable-keepers, and similar bailees, as such, although in some cases there is a public duty super-added to the personal contract. The action for refusing to carry, though perhaps

founded on tort rather than contract, will be also incidentally noticed. It seems, however, that the declaration against a carrier framed as for a breach of the common law duty of a common carrier to convey safely, will be treated as an action of tort, so as to entitle the plaintiff to costs under the act 19 & 20 Vict. c. 108, s. 30, on a judgment by default, though he recovers less than 20*l.*; *Tuttan v. Great Western Railway Company*, 29 L. J. (Q. B.) 184.

Carriers may be of goods or of persons, or of both; and they may be carriers by land or by sea; or of dead or of live stock. The obligations are not exactly the same in all these cases.

The obligation or liability of owners and masters of British sea-going ships has been already noticed under a previous head, p. 245, *et seq.*, especially with reference to the Merchant Shipping Act, 1854, in which the word "ship" includes all vessels not propelled by oars.

The obligations of carriers by land are regulated in some respects by the act 11 G. 4 & 1 Will. 4, c. 68, which relates to their liability for loss of goods. Canal and railway companies are subject to the regulations of 17 & 18 Vict. c. 31 (Railway and Canal Traffic Act, 1854) both in respect of goods and passenger traffic, as well as to the acts relating to carriers in general, so far as they are applicable.

Passenger-ships on voyages beyond Europe are regulated by act 15 & 16 Vict. c. 44, which particularly applies to the transport of emigrants beyond seas. See also 18 & 19 Vict. c. 119.

The Railway and Canal Traffic Act, 1854, professes only to regulate the obligations of companies as carriers on their respective rails or canals, and does not apply to private carriers using such rails or canals. Hence the obligation of these latter carriers must depend on the general law of carriers. It is presumed that carriers by inland waters are within the Land Carriers' Act 11 G. 4 & 1 Will. 4, c. 68; at least there appears to be no other statute specially applicable to inland navigation, except the several local or private acts under which such canals, &c. are established, and except the act 8 & 9 Vict. c. 42, by which canal companies (theretofore empowered only to take tolls) were allowed to become carriers of goods themselves, with power to make reasonable charges to be fixed by the several companies, and subject to the general laws of the realm as to the liability and protection of common carriers.

Action for loss of, or injury to, goods.] In an action for loss of, or injury to, goods, the plaintiff will have to prove (if denied): 1. That the defendant is a common carrier: 2. The delivery of the goods for conveyance, and the contract, if special: 3. The loss or injury: 4. The damage.

Action for refusing to carry.] In this action the plaintiff will have to prove, besides the defendant's character as a common carrier, the tender of the goods to the defendant for conveyance, and the refusal of the defendant to accept the goods for that purpose, although the plaintiff was then ready and willing to pay a reasonable reward in that behalf.

Who are common carriers.] Coach owners are common carriers, as well as owners of carts and waggons carrying for hire. So the owners or masters of vessels, whether engaged in coasting trade or voyages beyond seas; *Morse v. Shue*, 2 Lev. 69; *Benett v. Penin-*

sular Steam-Boat Co., 6 C. B. 775; lightermen, *Maving v. Todd*, 1 Stark, 72; bargemen, *Rich v. Kneeland*, Cro. Jac. 330; and all persons who openly profess to carry passengers and goods between different places by road or water for hire. Railway companies are carriers as to all things which they publicly profess to carry, or are obliged by their several acts to carry; *Johnson v. Midland Railway Co.*, 4 Ex. 367; and common carriers from a place within to a place without the realm are subject to the same liabilities at common law as a common carrier who carries only within the realm; *Crouch v. London and North-Western Railway Co.*, 14 C. B. 255. But *quære*, as to carriers of live stock, as distinguished from goods; *Carr v. Lancashire and Yorkshire Railway Co.*, 7 Ex. 707, *per Parke, B.*, cited by Erle, J., in *M'Manus v. same Co.*, 28 L. J. (Ex.) 358; 4 H. & N. 347. So canal and navigation companies are carriers (8 & 9 Vict. c. 42).

A carter undertaking jobs for special bargains, and not professing to carry generally, is not a common carrier; *Brind v. Dale*, 2 Mood. & Rob. 80. Nor is a wharfinger merely as such, though he has been treated as a carrier in some reported cases. See *Sideways v. Todd*, 2 Stark. 400, and cases cited 2 Kent Comm. 599 (n.). Nor is a London cab-driver or a hackney-coachman, plying for passengers, a common carrier; *Ross v. Hill*, 2 C. B. 877; 15 L. J. (C. P.) 182. In cases like the last, the liability is that of an ordinary hired bailee, which falls far short of that of a common carrier; *S. C.*; *Coggs v. Barnard*, 2 Ld. Raym. 909. See post, p. 364. A ferryman, though bound to carry all comers, is not therefore a common carrier; see *Willoughby v. Horridge*, 12 C. B. 751; 22 L. J. (C. P.) 90; *Walker v. Jackson*, 10 M. & W. 161; *contra*, 2 Kent Comm. 599.

The common law liability and implied contract of a common carrier.]

A common carrier is bound, at common law, to receive and carry all goods reasonably offered to him, and for which the person bringing the goods is ready and willing and offers to pay reasonable hire and reward; *Pickford v. Grand Junction Railway Co.*, 8 M. & W. 372; *Garton v. Bristol and Exeter Railway Co.*, 30 L. J. (Q. B.) 273; 1 B. & S. 112. He is bound to deliver within a reasonable time; *Raphael v. Pickford*, 5 M. & G. 551. And he is bound to carry by the route which he professes to be his route, and must use reasonable diligence in delivering the goods, having reference to the means at his disposal for forwarding them; and he is not justified in delaying the delivery by adopting a particular mode of forwarding the goods, merely because that is the mode usually adopted; *Hales v. London and North Western Ry. Co.*, 32 L. J. (Q. B.) 292; 4 B. & S. 66. If the road is obstructed by snow he must use all reasonable exertions to forward the passengers, although extra expense must be incurred in so doing, but he is not bound to use extraordinary means, involving additional expense, for accelerating the conveyance of cattle or goods, though the delay may be prejudicial to the goods or their owner; *Briddon v. Great Northern Railway Co.*, 28 L. J. (Ex.) 51. He is also an insurer of the goods against all accidents, except the act of God or the king's enemies; *Forward v. Pittard*, 1 T. R. 27; and whether the loss occurs by accident, robbery, violence, or the negligence of third persons; *Trent Navigation v. Wood*, 4 Doug. 287; 3 Esp. 127; *Oakley v. Portsmouth Steam Packet Co.*, 11 Ex. 618; 25 L. J. (Ex.) 99. But if the consignor has fraudulently concealed the value and risk from the carrier he can

maintain no action for a loss thus occasioned by his own fault; *Gibbon v. Paynton*, 4 Burr. 2298; *Bradley v. Waterhouse*, 3 C. & P. 318.

A carrier may limit, generally, his business to certain goods, and is then not obliged to carry other kinds of goods; his obligation in this respect depends upon what he publicly professes to do; *Johnson v. Midland Railway Co.*, 4 Ex. 367; *Oxlade v. North Eastern Railway Co.*, 15 C. B., N. S., 680.

Evidence of the contract.] The contract implied from the delivery and acceptance of the goods to and by the defendant in his capacity of carrier, is to charge a reasonable reward for the conveyance, and the jury are the judges of this; *semb. Ashmole v. Wannerwright*, 2 Q. B. 837; *Harrison v. London, Brighton, and South Coast Railway Co.*, 31 L. J. (Q. B.) 113; 2 B. & S. 122; and if the carrier refuses to carry or to deliver except upon payment of an exorbitant charge, the excess, if paid, may be recovered back; *S. C.* See *ante*, p. 347, *Action for money had and received*. But it is competent at common law to make a previous special bargain in each case for the rate of charge; and under stat. 11 G. 4 & 1 W. 4, c. 68, s. 6, *post*, p. 365; *Carr v. Lancashire Railway Co.*, 7 Ex. 707; 21 L. J. (Ex.) 261.

Where the carrier delivers a ticket or other notice to the person from whom he receives the article, specifying the terms on which he agrees to carry, and the customer assents (or does not dissent), the terms of the notice will establish a special agreement, and will exclude the common law contract so far as it is varied by those terms; *Wyld v. Pickford*, 8 M. & W. 443; *Great Northern Railway Co. v. Morville*, 21 L. J. (Q. B.) 319; *Phillips v. Edwards*, 3 H. & N. 813; 28 L. J. (Ex.) 52; and such a specific notice is not "a public notice or declaration" within sect. 4 of the Carriers' Act set out *post*, p. 365; *Walker v. York and North Midland Railway Co.*, 2 E. & B. 750; 23 L. J. (Q. B.) 73. If the customer in such a case declines the terms, and wishes to fix the carrier with the common law liability, he must tender or offer a reasonable compensation, and sue for the refusal to receive the goods; *per Parke, B.*, in *Carr v. Lancashire Railway Co.*, *supra*; *Garton v. Bristol and Exeter Railway Co.*, 30 L. J. (Q. B.) 273; 1 B. & S. 112. A passenger by steamer on paying his fare received a ticket on which was printed a condition that the ship would not be responsible for luggage goods, and unless bills of lading had been signed therefor, each passenger to be allowed to carry twenty cubic feet of luggage free. He took his luggage on board, but did not take a bill of lading for it, nor was he required by any person to do so. The ship was wrecked through the negligence of the captain, and the luggage lost. Held, the condition not having been complied with, the plaintiff could not recover; *Wilton v. Royal Atlantic Mail Steam Navigation Co.*, 30 L. J. (C. P.) 369; 10 C. B., N. S., 453. The general notice affixed in the offices of carriers, or advertised in newspapers, by which carriers were accustomed to limit, or attempt to limit, their common law liability, are deprived of that effect, so far as regards all common carriers *by land*, by sect. 2 of act 11 G. 4 & 1 Will. 4, c. 68. And it would seem that even if a knowledge of such a public notice could be brought home to the customer, it would not now protect the carrier. There ought to be proof of a specific agreement between the carrier, or his agent, and the individual tendering the goods. The case of

special contracts with railway and canal companies is now provided for by act 17 & 18 Vict. c. 31, cited hereafter, p. 368.

In the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, and in most of the special acts constituting railway companies, there are clauses enabling the company to determine upon "reasonable charges" in respect of the carriage of passengers and goods; and it is generally provided that these charges shall also be "equal," i.e., that all persons and classes of goods shall, under like circumstances, be treated alike as to charges. When the question of reasonableness comes in issue at Nisi Prius, as in an action for refusing to carry, &c., it is one for the jury, and is not a question of law. And where the question of "equality" involves an inquiry into the greater or less risk incurred by the company in the conveyance of certain parcels as compared with others, it is for the jury; *Crouch v. Great Northern Railway Co.*, 11 *Ex.* 742. Under these acts it has been held that a railway company cannot treat other carriers on their rail on a different footing from other customers, and therefore that they cannot charge such carriers on a higher scale for "packed parcels," that is, parcels enclosing smaller parcels collected by the consigning carrier from different persons and consigned to a single agent for distribution among other persons; *Parker v. Great Western Railway Co.*, 7 *M. & G.* 253; *Crouch v. Great Northern Railway Co.*, 9 *Ex.* 556; 23 *L. J. (Ex.)* 148; *Same v. Same*, 11 *Ex.* 742; 25 *L. J. (Ex.)* 137; *Piddington v. South-Eastern Railway Co.*, 5 *C. B., N. S.*, 111. Where a railway company, who were empowered by their private act to charge for the carriage of small parcels not exceeding 500lbs. in weight each, any sum which they thought fit, charged a through rate which included collection and delivery as well as conveyance, and which rate was charged whether the goods were collected and delivered by the company or not. The company once made a deduction in those cases where the customer collected and delivered; but afterwards refused to make any deduction. A customer who collected and delivered the goods was charged by the company the full amount as if they had done so; it was held that he could recover such over-charge from the company in an action for money had and received; *Baxendale v. Great Western Railway Co.*, 32 *L. J. (C. P.)* 225; 14 *C. B., N. S.*, 1; affirmed in *Ex. Ch.*, 33 *L. J. (C. P.)* 197; see *Pickford v. Grand Junction Railway Co.*, 10 *M. & W.* 399; *Parker v. Great Western Railway Co.*, 7 *M. & G.* 253; *Garton v. Bristol and Exeter Railway Co.*, 30 *L. J. (Q. B.)* 273; 1 *B. & S.* 112; *Baxendale v. Great Western Railway Co.*, 28 *L. J. (C. P.)* 81; *Branley v. South-Eastern Railway Co.*, 31 *L. J. (C. P.)* 286; 12 *C. B., N. S.*, 63. But if the packed parcels are separately directed so as to give more trouble on delivery, the higher charge is justifiable; *Baxendale v. Eastern Counties Railway Co.*, 4 *C. B., N. S.*, 63. The special acts of railway companies generally authorise higher charges for small parcels sent in separate packages, and sometimes provide that large aggregate quantities of goods, sent in several small parcels at the same time, shall be subject to a tonnage charge on the aggregate, and not to the higher rate as upon small separate packages; see *Parker v. Great Western Railway Co.*, 6 *E. & B.* 77. But the decisions on all these acts would be out of place in a work of this kind, and are therefore omitted.

When railway companies undertake to carry goods from a station on their railway to a place on another distinct railway, with which it

communicates, this is evidence of a contract with them for the whole distance, and the other railway company will be regarded as their agents, and not as contracting with their original bailor; *Muschamp v. Lancaster, &c. Railway Co.*, 8 M. & W. 421. And the same position obtains in the case of passengers; if a railway company chooses to contract to carry passengers not only over their own line, but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them if they had contracted solely to carry over their own line; per Cockburn, C. J., in *Great Western Railway Co. v. Blake*, 7 H. & N. 991; 31 L. J. (Ex.) 346. But the first railway company might, by a special contract evidenced by the terms of the receipt note or otherwise, restrain their own liability as carriers to the limits of their own rail, where they expressly act as agents for the other company; *Fowles v. Great Western Railway Co.*, 7 Ex. 699; 22 L. J. (Ex.) 76; and such a condition embodied in a notice, signed by the consignor, has been held just and reasonable within the meaning of the Railway and Canal Traffic Act, and therefore to protect the company (assuming they would be otherwise liable) beyond their own line; *Aldridge v. Great Western Railway Co.*, 33 L. J. (C. P.) 161; 15 C. B., N. S., 582. Where X. railway co. undertook to carry goods over X. and Y. railways, which were damaged on Y. railway, and the contract with X. excluded liability for damage done on Y., it was held, that company Y. could not be sued for it, for there was no contract with Y.; *Corou v. Great Western Railway Co.*, 29 L. J. (Ex.) 165; 5 H. & N. 274. Plaintiff, a passenger, took a ticket from a place on railway X. to a place on railway Y: In the Railway Act for X., the company was made not liable for ordinary passengers' luggage; on railway Y. there was no such provision: Plaintiff's luggage was lost on railway Y. Held, that the Y. company was not liable, the contract being with X.; and, *semble*, X. company was not liable by reason of their statutable exemption; *Mytton v. Midland Railway Co.*, 4 H. & N. 615; 28 L. J. (Ex.) 385; see *Bristol and Exeter Railway Co. v. Collins*, 7 H. L. C. 194; 29 L. J. (Ex.) 41. But the effect of such special acceptances and of the conditions contained in them, when the contract involves an undertaking to cause goods to be conveyed over successive portions of distinct railways forming a continuous line, has been the subject of much difference of opinion among the judges. The latest decision in the House of Lords (*Bristol and Exeter Railway Co. v. Collins*, *supra*) establishes the proposition that a receipt note by railway A. for goods "to be sent" to a place on another railway and there "delivered" for one entire sum, is one entire contract with railway A. for the whole distance, and that a subsequent company cannot be sued for loss on their railway; but it cannot be taken as yet settled how far conditions or limitations inserted in the receipt note, and therein confined to the carriage of the goods while on the railway of the first company, can be considered as accompanying the goods throughout the whole distance;—or whether the company is to be considered as carrying with the ordinary common law liability of carriers when beyond its own limits;—or on the conditions and limitations which may be legally in force on each successive railway. Where there has been a general acceptance by company A. to convey goods over another railway B. to C., the bailor may countermand the bailment while in the hands of company B., and, if the goods are lost in consequence of inattention to the countermand and delivery

at C., he may sue A. for the loss; *Scothorn v. South Staffordshire Railway Co.*, 8 Ex. 341.

A railway company is liable on its contract, whether the transit be over other railways, or partly by sea, or partly by coach, and whether payment for the whole be before or after delivery to the consignee; and where a railway company receives a parcel directed to a place beyond its line, without objection, or special contract, there is an implied contract of carriage over the entire distance, although the consignor may have pointed out a route different from the one usually adopted by the company; *Wilby v. West Cornwall Railway Co.*, 2 H. & N. 703; 27 L. J. (Ex.) 181. In a suit for non-delivery of a parcel, it appeared that, on refusal of the plaintiff, the consignee, to pay the carriage, the company had sent it back forthwith to a distant terminus where it had been first delivered to them, and took no further step. Held, that they ought to have kept it for the consignee a reasonable time, and that, on tender of the charges the next day, plaintiff might sue defendants; *Crouch v. Great Western Railway Co.*, 2 H. & N. 491; affirmed in *Ex. Ch.*, 3 H. & N. 183; 27 L. J. (Ex.) 345.

Where there has been a delivery by the carrier actual or constructive, though the goods remain on his premises, he is no longer liable as carrier, but only as warehouseman, or on any special terms of bailment which he may choose to impose on the customer, and the contract is not affected by any of the statutes applicable to carriers. The plaintiff on arriving by a railway at the terminus deposited her bag of the value of 20*l.* in the cloak-room, and received a ticket for it, for which she was charged 2*d.* by the company. On the back of the ticket was printed, "The company will not be responsible for articles left by passengers at the station unless the same be duly registered, for which a charge of 2*d.* per article will be made and a ticket given in exchange, and no article will be given up without the production of the ticket. The company will not be responsible for any package exceeding the value of 10*l.*" When the plaintiff brought the ticket and inquired for the bag it was gone. In an action against the company it was held that the Railway Traffic Act did not apply, as the company did not receive the bag as carriers, and they were not liable for the loss, though caused by their neglect, as the plaintiff must be taken to be bound by the conditions; *Van Toll v. South-Eastern Railway Co.*; 31 L. J. (C. P.) 241; 12 C. B., N. S., 75.

When the carrier's receipt for the goods is offered in evidence in order to prove the contract, the necessity of a stamp depends on the amount payable for the carriage, and not on the value of the goods; *Latham v. Rutley, Ry. & Mood.* 13; *Chadwick v. Sills*, *id.* 15.

Though a cab driver is not a common carrier, yet if charged on an implied contract to carry a passenger's luggage, "safely and securely," it is no variance, for this shall be taken to mean such obligation to use ordinary care as arises out of the relation between a bailee for him and his bailor, and not the more extended liability of a common carrier; *Ross v. Hill*, 2 C. B. 877; 15 L. J. (C. P.) 182. The owner of a hack cab hired by the driver in the ordinary way is liable for a loss occasioned by the driver; *Powles v. Hilder*, 25 L. J. (Q. B.) 331; 6 E. & B. 207. And a carrier, even without reward, is liable for gross neglect; *Beauchamp v. Powley*, 1 Mood. & Rob. 38.

Where the action is for refusing to carry, the plaintiff need not aver or prove a strict tender of the fare; it is enough that he was

ready to pay; *Pickford v. Grand Junction Railway Co.*, 8 M. & W. 372. But where the carrier has limited his liability unless a certain charge be paid, payment or tender of that charge must be proved; *Wyld v. Pickford*, *id.* 443.

Land Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68 (1830).] This act and the act next following (p. 368) govern almost all the cases which now come before the courts, so far as regards the liability of carriers by land or by canal navigation, and it has therefore been thought superfluous to insert the numerous cases decided before the passing of them upon the efficacy of general notices issued by such carriers in order to restrain liability. For the same reason many of the cases before the last act, in which the special contracts of railway companies have been held sufficient to exempt them from the consequences of their own negligence, are omitted; see *Carr v. Lancashire, &c. Railway Co.*, 7 Ex. 707; *Austin v. Manchester, &c. Railway Co.*, 10 C. B. 454; and other cases.

By sect. 1 of the above act, 11 G. 4 & 1 Will. 4, no common carrier *by land* for hire shall be liable for the *loss of or injury to* any articles of the descriptions following; (that is to say,)—gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English, or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, —contained in any parcel which shall have been delivered either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, *when the value of such articles contained in such parcel or package shall exceed 10l.* —*unless at the time of the delivery thereof* at the office, warehouse, or receiving-house, of such common carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger, the *value and nature* of such articles shall have been declared by the person sending or delivering the same, and the increased charge hereinafter mentioned or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Sect. 2, authorises the demand of an increased rate of charge for such articles, notified by a notice publicly affixed in the carrier's office, which all persons sending parcels are to be bound by without further proof or knowledge.

By sect. 3, the person receiving such goods, and increased rate of charge, is obliged, if required, to sign a receipt for them acknowledging that they are insured, which receipt need not be stamped.

By sect. 4, no *public notice or declaration* heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such public common carriers in respect of any articles or goods to be carried by them; but all such common carriers shall be liable, as at the common law, to answer for the loss of or injury to any articles and goods in respect whereof they may not be entitled to the benefit of the act, any public

notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

By sect. 5, for the purposes of the act, every office, warehouse, or receiving house, used or appointed by such common carrier for receiving parcels, shall be taken to be the receiving house or office of such carrier; and any one or more coach proprietors or carriers may be sued without joining their co-proprietors.

By sect. 6, nothing in the act shall be construed to annul or affect any *special contract* between such common carrier and any other parties for the conveyance of goods and merchandises.

By sect. 7, a person who has insured, as above, may recover back the extra charge as well as the value of the goods lost or damaged.

By sect. 8, nothing in the act shall be deemed to protect any common carrier for hire from liability to answer for loss or injury to any goods whatsoever arising from the *felonious acts* of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, guard, book-keeper, or other servant, from liability for any loss or injury occasioned by his own personal neglect or misconduct. •

By sect 9, common carriers shall be liable to pay only the actual value, as proved, not exceeding the declared value, together with the increased charges paid by the owner.

Under the 1st sect. articles more for ornament than use have been considered "trinkets," as bracelets, shirt pins, rings, brooches, ornamental purses, and scent bottles; but not a metal plain fusee box. So silk made into articles, as watch-guards, is within it; silk hose, gold chains for eye-glasses, &c; *Bernstein v. Bazendale*, 6 C. B., N. S., 251; 28 L. J. (C. P.) 265; and cases cited, *Ibid.* Whether an article is of the description mentioned in this section is a question of fact for the jury; *Brunt v. Midland Railway Co.*, 33 L. J. (Ex.) 187; 2 H. & C. 889.

A blank acceptance for 11*l.* lost by the carrier before delivery and before the drawer's name has been inserted, is not a bill nor a writing of the value of 10*l.* within sect. 1; *Stoessiger v. South-Eastern Railway Co.*, 3 E. & B. 549; 23 L. J. (Q. B.) 293.

It has been held that the above act extends to all the articles enumerated in the 1st section, although not (within the words of the preamble) "an article of great value in small compass." To entitle a party to recover for loss or injury to any article of such a description, he must give *express* notice to the carrier of the value and nature of the article. A looking-glass, exceeding the value of 10*l.*, was packed up in a case and sent to the carrier's office to be conveyed from London to a house near Lymington: A notice was fixed up in the office, pursuant to the second section of the statute: The words "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid: The parcel was conveyed from Lymington to its destination in the usual way: When the glass was unpacked it was found to be broken. Held, that the carrier was not liable for the damage; *Owen v. Burnett*, 2 C. & M. 353; 4 Tyr. 133. The expressed opinion of the carrier as to its real value will not supersede the necessity of a formal declaration of it; *Boys v. Pink*, 8 C. & P. 361.

The declaration required by sect. 1 must be given at the time of delivery, whether that be at the carrier's office, or to a carter sent to the customer's house to collect parcels, or on the road, or elsewhere;

Hart v. Bazendale, infra. The carrier may then demand the increased charge as publicly notified in his office under sect. 2, and on payment thereof he is to give the receipt, if required, under sect. 3. If no such declaration is made by the bailor on delivery, the carrier is protected by sect. 1 in respect of the specified articles, except in cases of felony referred to in sect. 8; *Hart v. Bazendale*, 6 *Ex.* 769; 21 *L. J. (Ex.)* 123 (*Ex. Ch.*). If no declaration is made, the carrier is protected, though no notice has been affixed under sect. 2; *S. C.* Where the plaintiff sent a valuable picture by a railway and declared its nature and value at the time of its delivery to the carrier, and the carrier did not demand any increased rate to which he was entitled under sect. 2, and only the ordinary charge was paid, the carrier is not protected by the statute from his common law liability for an injury which happened to the picture on its journey; *Behrens v. Great Northern Railway Co.*, 31 *L. J. (Ex.)* 299; 7 *H. & N.* 950 (*Ex. Ch.*) "There is nothing in the statute which protects a carrier from liability, if, after the value is declared to be such as would entitle him to demand an increased rate of charge, he chooses to accept the goods to be carried, without making any demand of such increased rate or requiring it to be either paid or promised;" *per curiam, S. C.* The "loss" provided for by the act is explained by the recital and context to mean loss by the carrier or his servant, so that the parcel cannot be delivered; where, therefore, the complaint against the carrier is for long delay in the delivery, as where copies of title deeds were missing for several months, and the plaintiff had been obliged to replace them, the statute will not protect the carrier; *Hearn v. London and South-Western Railway Co.*, 24 *L. J. (Ex.)* 180; 10 *Ex.* 793.

Where an innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by the defendants' mail or any other coach; though he kept no regular booking-office, it was held, that, for the purpose of taking in a parcel, the inn was a receiving-house of the defendants within section 5; *Syms v. Chaplin*, 5 *Ad. & E.* 634.

Since this act, if articles mentioned in sect. 1 are sent without declaration of value and payment of the increased charge, carriers are not liable, though the loss be occasioned by the gross negligence of their servants; *Hinton v. Dibdin*, 2 *Q. B.* 646. And it seems that there is no distinction between the negligence of themselves or their servants; but *wilful misfeasance* would come under a different consideration. See the argument in that case, and the observations of the court upon the statute. The servants of a common carrier employed by a railway company to forward goods to their destination, are servants of the company within sect. 8 of the above act; *Machu v. London and South-Western Railway Co.*, 2 *Ex.* 415. And by the same sect., where the loss is by the felony of the carrier's servants, the act does not protect; *Metcalfe v. London and Brighton Railway Co.*, 4 *C. B., N. S.*, 307; 27 *L. J. (C. P.)* 205. Where to a plea founded on sect. 1 of the act, that the value of the goods had not been declared, the plaintiff replied under the 8th sect., alleging a felony by the defendant's servants, the plaintiff must prove facts which fix some servant of the defendant with the felony, and not merely show that *somebody* must have stolen them while they were *in transitu*; *Metcalfe v. London and Brighton Railway Co.*, 4 *C. B., N. S.*, 311; 27 *L. J. (C. P.)* 333; *Gt. W. Ry. Co. v. Rimmell, infra.* Where the carrier carries on a special contract exempting

him from liability for loss unless the goods are declared and extra charge paid, felony by his servant will not deprive him of this protection, unless there be also gross negligence; *semb.*; *Butt v. Great Western Railway Co.*, 11 C. B. 140; 20 L. J. (C. P.) 241. This case is explained in *Great Western Railway Co. v. Rimmell*, 27 L. J. (C. P.) 201; 18 C. B. 575; and in *Metcalf v. London and Brighton Railway Co.*, 27 L. J. (C. P.) 205; 4 C. B., N. S., 307. Negligence is the material point when there is a special contract; felony, when the statute is set up as a defence; *Butt v. Great Western Railway Co.* was not, in fact, a case under the Carriers' Act at all; see the last two cases.

It has been already stated (*ante*, p. 361) that a specific notice repudiating liability in certain cases, and served on the customer, may, if he assent to it, or does not dissent, amount to a *special contract*, or be evidence of one for the jury, within sect. 6 of the act. In such cases the contract will not be "annulled" or "affected" by the act; but *non constat* that the act will be wholly inapplicable to such cases, so far as its provisions are consistent with the contract.

Railway and Canal Traffic Act, 17 & 18 Vict. c. 31.] By this act (passed 10 July, 1851), very important provisions are made respecting the traffic on railways and canals. They include as well lessees and contractors working railways or canals, as the companies or owners, and all navigations whereon tolls are levied by act of parliament. The act provides certain special remedies by application to the Court of Common Pleas in case of alleged neglect of any company to afford facilities for traffic, or alleged undue preference shown by such company in favour of certain persons or traffic; but nothing therein is to take away any right, remedy; or privilege of any person against such company.

By sect. 7, every company, &c., shall be liable for loss of or injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration, made and given by such company contrary thereto, or in anywise limiting such liability; and every such notice, condition, or declaration is declared to be null and void. Provided that nothing therein shall be construed to prevent such companies from making *such conditions* with respect to receiving, forwarding, and delivering such animals, articles, &c., as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable. The section further provides certain limits to damages recoverable for loss or injury to any of such animals (namely, a horse, 50*l.*; neat cattle, 15*l.* each; sheep and pigs, 2*l.* each), unless the person sending or delivering the same to the company shall, at the time of delivering have declared them to be of higher value, in which case the company may charge a reasonable per-centage on the excess of value above the limited sum, to be paid in addition to the ordinary charge, such per-centage to be notified in the manner prescribed by the Land Carriers' Act, sect. 2 (*supra*, p. 365), and to be binding on the company as therein mentioned. Proof of the value and amount of injury is to lie on the claimant. No *special contract* between the company and the other party respecting the receiving, forwarding, or delivering of any goods, &c., shall be binding on or affect such party, unless it be signed by him or the person delivering the goods for carriage.

Nothing in the act is to alter or affect the rights or liabilities of the company under the Land Carriers' Act, 11 G. 4 & 1 Will. 4, c. 68, with respect to the articles mentioned in that act (*ante*, p. 365).

The language of sect. 7 differs much from that of the Land Carriers' Act. The word "public" is not inserted before the word "notice," as in sect. 4 of that act; and it has been thought that *general* notices, conditions, &c., only are meant; see *per* Bramwell, B., in *Pardington v. South Wales Railway Co.*, 26 L. J. (Ex.) 105; 1 H. & N. 392. But this may be considered as finally negatived; and no notice given by a railway company is valid in law for the purpose of limiting the common law liability as carrier; but the second part of sect. 7 permits special contracts in writing and signed, on conditions which the judge may consider reasonable; *Peek v. North Staffordshire Railway Co.*, 32 L. J. (Q. B.) 241; 10 H. L. C. 473. The operation of the section is thus stated by Jervis, C. J., in *Simons v. Great Western Railway Co.*, 26 L. J. (C. P.) 25, 32; 18 C. B. 805. "General notices to limit the liability shall be null and void; but the parties may make special contracts with the companies, provided those contracts are adjudged by the court to be just and reasonable, and provided they be signed by the parties; and whereas on the one hand the monopoly of the company compels the public to carry by that conveyance, we [the legislature] will give them the security of the court, to take care that the contracts made under that species of compulsion are just and reasonable." This was approved by the Ex. Ch. in *McManus v. Lancashire, &c., Railway Co.*, *post*, p. 370, and by the H. L. in *Peek v. North Staffordshire Ry. Co.*, *supra*, and *post*, p. 370.

In *Simons v. The Gt. W. Ry. Co.*, *supra*, the court held that a condition exempting a company from liability for loss, detention, or damage, if goods were improperly packed, was unreasonable. In *Carton v. Bristol and Exeter Railway Co.*, 30 L. J. (Q. B.) 273, 1 B. & S. 112, this decision was adopted, and an action held to lie for refusing to carry unless the plaintiff signed that condition. In *Simons v. Great Western Ry. Co.*, *supra*, it was also held, that a company might stipulate not to be liable for loss or damage "however caused," in a contract to carry at a special or mileage rate. The act makes the question of reasonableness one of law, and not of fact; *per cur.*, S. C. If the particular condition relied on by the company to protect them in the particular case is a reasonable one, the unreasonableness of other conditions in the contract, not relied on, is not material; *per cur.*, S. C. Such special conditions will not protect the carrier where the loss or injury is caused by his own gross negligence; *semb.* S. C.; *Peek v. North Staffordshire Railway Co.*, *supra*. The plaintiff sent a dog by the defendants' railway, having received and signed a ticket containing a condition that the company would not be liable in any case for loss or damage to any dog above the value of 5*l.* unless the value was declared, and an additional price paid at the rate of two and a half per cent. upon the declared value above 5*l.* The value of the dog was 21*l.*, but the plaintiff made no declaration of its value, and paid only the regular fare. The dog was lost on the journey without any neglect or default on the part of the defendants. It was held (by *Erle, C. J., & Keating, J.*) that sect. 7 was confined in its application to cases where the loss was occasioned by the neglect or default of the company, and did not apply where the loss arose from pure accident, and that the company were therefore exempt from liability by the terms of their contract; and by

the whole court, except Wilde, B., that, even if the statute did apply, the conditions were just and reasonable, and that they were not to be construed as meaning to exempt the company from loss or injury occasioned by wilful misconduct on their part; *Harrison v. London, Brighton, and South Coast Railway Co.*, 31 L. J. (Q. B.) 113; 2 B. & S. 122 (Ex. Ch.).

A special contract professing to protect a company from damage to horses, "however occasioned," is not reasonable; *McManus v. Lancashire and Yorkshire Railway Co.*, 4 H. & N. 327; 28 L. J. (Ex.) 353, (Ex. Ch. overruling the decision of the court below, 2 H. & N. 693). Conditions, annexed by a railway company to their "cattle tickets" that the company should not be liable for damage to cattle from any cause whatever, "it being agreed that the animals are to be carried at the owner's risk, and that the owner of the cattle is to see to the efficiency of the waggon before his stock is placed therein: complaint to be made in writing to the company's officer before the waggon leaves the station," are not reasonable; *Gregory v. West Midland Railway Co.*, 33 L. J. (Ex.) 155; 2 H. & C. 944. See *McCance v. London and North-Western Railway Co.*, 31 L. J. (Ex.) 65; 7 H. & N. 477. A railway company gave the plaintiff a printed notice that they would only carry marble subject to the conditions therein stated, one of which was that they would not be responsible for any loss or injury unless the marbles were declared and insured according to their value. With full knowledge of these conditions the plaintiff instructed the company, by letter, to forward them "not insured," which they did, and the marbles were injured,—it was held, though there was no wilful default or neglect found, that the company were liable, and that the condition was neither just nor reasonable, for the effect of such a condition would be to exempt the company from responsibility for injury, however caused, whether by their own negligence, or even by fraud or dishonesty on the part of their servants; *Peck v. North Staffordshire Railway Co.*, 32 L. J. (Q. B.) 241; 10 H. L. C. 473; in H. L., reversing decision of Ex. Ch., 5 E. & B. 989, 29 L. J. (Q. B.) 97, and affirming decision of Q. B., 5 E. & B. 958, 27 L. J. (Q. B.) 465. The conditions must be embodied in a special contract signed by the party, otherwise they will not bind him. Thus the above letter was held not to constitute a special contract in writing, the words "not insured" being insufficient, either expressly or by reference, to embody the above condition; S.C. in H. L. Where a special contract provided that the company should not be liable for damage to horses conveyed, and a horse was injured in consequence of its being left without food all night in a box at the station, there being no one to receive it on its arrival; Held, that the company was not liable; and *semb.* the damage being the fault of the sender or the consignee in not providing for the reception of the horse, the defendants would not be responsible, independently of the special contract; *Wise v. Great Western Railway Co.*, 25 L. J. (Ex.) 258; 1 H. & N. 63. Where cattle were accidentally smothered by the fall of the lid of a van in which they were carried on a railway, and the van was not objected to by the drover, who was allowed a free pass to accompany the cattle, it was held, that a special contract exempting the company from liability for loss or damage from suffocation, or any other cause, was reasonable, and would protect them; and *semb.* even without such contract, the company would not be liable under the above circumstances; *Pardington v. South Wales Railway Co.*,

1 *H. & N.* 392; 26 *L. J. (Ex.)* 105. On sending fish the plaintiff signed a condition, that, as to fish, the company should not be responsible under any circumstances for loss of market, or other loss or injury arising from delay, or detention of trains, or from any other cause whatever, other than *gross neglect* or fraud; the fish arrived too late for the market they were intended for, but the cause of the delay was not shown; it was held that the condition was reasonable, and protected the defendants; *Beal v. South Devon Railway Co.*, 29 *L. J. (Ex.)* 441; 5 *H. & N.* 875. The decision was affirmed in *Ex. Ch.*, 3 *H. & C.* 337; the court holding the condition reasonable, as it left the company liable in all cases where carriers are liable for gross negligence, that is, for want of reasonable care, skill, and expedition. But a condition that the company should not be answerable for any consequences arising from over carriage, detention, or delay in the conveying or delivering of cattle, *however caused*, was held unreasonable; *Allday v. Great Western Railway Co.*, 34 *L. J. (Q. B.)* 5. In determining whether a condition is reasonable, the courts have considered whether any reasonable alternative is offered to the customer, as of sending at a reasonably higher rate, not subject to the condition; see *S. C.*; *Simons v. Great Western Railway Co.*; *Harrison v. London, Brighton, and South Coast Railway Co.*; *Peck v. North Staffordshire Railway Co.*, *ante*, pp. 369, 370; and see in the last case in the *H. L.* all the cases collected and discussed, especially in the opinion of Blackburn, J.

A condition as to risk of luggage on a passenger's ticket is not within sect. 7 of the act; *Stewart v. London and North Western Railway Co.*, 33 *L. J. (Ex.)* 199; 3 *H. & C.* 135. At least that appears to be the decision of the Court; see *post*, p. 376. This section does not apply if the railway company do not receive the goods in the capacity of carriers, as where luggage was left at the defendants' cloak-room by a person who had been a passenger by the railway; *Van Toll v. South-Eastern Railway Co.*, 31 *L. J. (C. P.)* 241; 12 *C. B., N. S.*, 75; *ante*, p. 364.

Most of the above cases are cases relating to injury which has happened after the contract for carriage has been completely made; but the statute goes further. The 7th sect., *ante*, p. 368, in terms applies to injuries in the receiving, forwarding, or delivering, and protects railway companies beyond a certain amount, unless the value of the animal is declared. Where injury was done to a horse at a railway station, before the declaration of value had been made, or ticket taken, or fare demanded, it was held that this was an injury in the *receiving*, and the owner could not recover more than £50; the horse was being led to a horse box by direction of one of the company's servants, and there was negligence on the part of the company in leaving iron girders on the ground, which caused the accident, and it was the usual practice to put horses in their box before declaring their value or paying the fare; *Hodgman v. West Midland Railway Co.*, 33 *L. J. (Q. B.)* 233, Cockburn, C. J., dissenting.

Who should be plaintiff.] The proper person to sue as plaintiff is the person in whom the property was vested when lost or damaged. Hence the consignee is usually the proper plaintiff, because delivering of goods to the carrier commonly vests the property in the consignee; *Dunlop v. Lambert*, 6 *Cl. & Fin.* 600; *Fragano v. Long*, 4 *B. & C.* 219; *Dowes v. Peck*, 8 *T. R.* 330. But where there is a special contract between the consignor and carrier, the

consignor may be plaintiff, and the ownership is immaterial; *Dunlop v. Lambert*, *supra*. If the consignment does not change the property, as where goods are sent on approval, the consignor should sue; *Swain v. Shepherd*, 1 *Mood. & Rob.* 223; or where the sale is insufficient to bind the vendee under Stat. Frauds; *Coats v. Chaplin*, 3 *Q. B.* 483; *Coombs v. Bristol and Exeter Railway*, 3 *II. & N.* 510; 27 *L. J. (Ex.)* 401; *London and North-Western Railway Co. v. Bartlett*, 31 *L. J. (Ex.)* 92; 7 *II. & N.* 400. See cases cited, *ante*, pp. 284-293, *Action for not accepting goods*. Where a single box containing the separate property of A. and B. is delivered to the carrier by a joint agent, A. and B. may join in the action; *Metcalf v. London and Brighton Railway Co.*, 4 *C. B.*, *N. S.*, 317; 27 *L. J. (C. P.)* 333. A special property is sufficient to support the action. Thus a laundress may sue a carrier employed by her, who loses the linen returned by her through him; *Freeman v. Birch*, 3 *Q. B.* 492 (*n*). Where the master pays for his servant's place, and the servant's luggage is lost on a railway, the servant may sue in his own name; *Marshall v. York and Newcastle Railway Co.*, 21 *L. J. (C. P.)* 34; 11 *C. B.* 655. The action was there treated as founded on tort and not on contract; but *semb.* this was not material.

Proof of delivery to defendant.] In an action against the proprietor of a stage-coach for the loss of a parcel, it is sufficient to prove the delivery of the parcel to the driver; *Williams v. Cranston*, 2 *Stark.* 82. A delivery of goods to some officer accredited for that purpose, as to the mate, although not made to him on board, binds the shipowner; *Cobban v. Downe*, 5 *Esp.* 41. If the master receives goods at the quay or beach, or sends his boat for them, the shipowner's responsibility commences with the receipt; *Abbott on Shipping*, p. 258, 10th edit., citing *Molloy, B. 2, c. 2, s. 2*; unless it appears that the consignor does not intend to trust the owner with the custody, as where he sends his own servant in charge of the goods, who has the exclusive management of them; *East India Co. v. Pullen*, 1 *Stra.* 690. Where the only proof of delivery was, that the goods were left at an inn-yard where defendant and other carriers put up, it was held to be insufficient; *Schway v. Holloway*, 1 *Ld. Raym.* 46. So leaving goods at a wharf piled up among other goods, without communication with any one there, is not a delivery to the wharfinger; *Buckman v. Levi*, 3 *Camp.* 414. Where the ordinary course of business at a railway office was to accept goods with a special limitation of liability in writing, and this was known to the plaintiff, who, nevertheless, caused his goods to be left with a railway porter at the station without complying with the regular course, and the porter received them, and they were lost: Held, that the company was not liable as on contract, the delivery not being in due course, and the porter not being shown to have, or to have professed to have, power to contract with the plaintiff otherwise than in the ordinary course; *Slim v. Great Northern Railway Co.*, 14 *C. B.* 647; 23 *L. J. (C. P.)* 166.

Proof of non-delivery by defendant.] Very slight evidence of non-delivery is sufficient to call upon the defendant to prove delivery; *Griffiths v. Lee*, 1 *C. & P.* 110; *Hawkes v. Smith*, *Car. & M.* 72. Whether the carrier is bound to deliver at the residence of the consignee seems to depend on the circumstances of each particular case. In the absence of any express contract or usage, carriers by land are bound to deliver the goods to or at the house of the con-

signee; see *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389; *Storr v. Crowley*, M'Cl. & Y. 129; *Duff v. Budd*, 3 B. & B. 182. And if it be the carrier's course of trade to deliver goods at the consignee's residence, he is clearly bound to do so; *Golden v. Manning*, 2 W. Bl. 916. Where goods are conveyed by sea, it seems to be sufficient for the captain to deposit them in some place of safety and give notice to the consignee; see *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 397. And he is bound to keep them a reasonable time until fetched, and is liable during that time; *Bourne v. Gatcliffe*, 3 M. & G. 643; *S. C. in H. L.*, 7 M. & G. 850. Although the consignor of goods directs the carrier to deliver them at a particular place, the carrier may deliver them wherever he and the consignee agree; *London and North-Western Railway Co. v. Bartlett*, 31 L. J. (Ex.) 92; 7 H. & N. 400; and in such a case the carrier is not liable to an action by the consignor for not delivering at such place, as the non-delivery was pursuant to the orders of the consignee, and it makes no difference that the consignor could not recover the price of the goods from the consignee in consequence of there being no acceptance within the meaning of the Statute of Frauds; *S. C.* If the consignee refuses to receive the goods, and the carrier puts them into his warehouse, he is not bound as a carrier to give notice to the consignor of the refusal: it is a question for the jury "whether the carrier has done what is reasonable under the circumstances;" *Hudson v. Bazendale*, 2 H. & N. 575; 27 L. J. (Ex.) 93. *Quere*, if the carrier is bound to keep possession of them after refusal, *S. C.* If the consignee refuses to pay the carriage, the carrier must deal reasonably with the goods in his possession, and ought not (*semb.*) to send them back so as to prevent a tender within a reasonable time; *Crouch v. Great Western Railway Co.*, 26 L. J. (Ex.) 418; 2 H. & N. 491; *S. C. in Ex. Ch.*, 3 H. & N. 183; 27 L. J. (Ex.) 345. If the carrier delivers the goods to a wrong person, he is liable in trover; *Stephenson v. Hart*, 4 Bing. 476; *aliter*, if only lost; *Ross v. Johnson*, 5 Burr. 2825.

The liability of a carrier continues till delivery. Therefore where goods are destroyed by fire after they are deposited in the defendant's wharf, and before a reasonable time has elapsed for the plaintiff to fetch them, the defendant is liable; *Bourne v. Gatcliffe*, 3 M. & G. 643; affirmed in *H. L.*, 7 M. & G. 850. And where the question is, whether the goods have been delivered by the defendant at London, evidence is admissible to show what constitutes a delivery in London according to the usage of that port; and former dealings between the plaintiff and defendant are evidence of such usage; *S. C.*; and see *post*, pp. 375-6.

The declarations of the coachman respecting the loss of a parcel are evidence against the coach proprietor; *Mayhew v. Nelson*, 6 C. & P. 58.

Damages.] Where goods are sent from A. to B. and are lost, the consignee is entitled to their value at B., as distinguished from the place where they were delivered to the carrier; *Rice v. Bazendale*, 30 L. J. (Ex.) 371; 7 H. & N. 96. The damages must be measured by the ordinary consequences of a breach of contract or duty, such as both parties must be supposed to have contemplated; *Hadley v. Bazendale*, 9 Ex. 341; 23 L. J. (Ex.) 179. Thus where, owing to the delay of a month in the delivery of cloth by the defendants, which the plaintiff wanted immediately to make up into

caps, the plaintiff lost the season, it was held that he could not recover as damages the loss of the profit he would have made by the sale of the caps, but that he could recover the amount of depreciation in the market value of the cloth owing to the lapse of the season; *Wilson v. The Lancashire Railway Co.*, 30 L. J. (C. P.) 232; 9 C. B., N. S., 632. So the plaintiff may recover the difference between the market price of hops on the day when they ought to have been delivered and the price when they were available for sale, owing to delay and damage caused by the defendants; *Collard v. South-Eastern Ry. Co.*, 30 L. J. (Ex.) 393; 7 H. & N. 79; see also *Gee v. Lancashire, &c., Ry. Co.*, 30 L. J. (Ex.) 11; 6 H. & N. 211. If, in consequence of the delay, or erroneous information, of the carrier, a passenger is obliged to hire another conveyance, or stop a night on the road, the expenses may be recovered; but the jury cannot give general damages for consequent derangement or loss of business, trouble, or inconvenience; *Hamlin v. Great Northern Ry. Co.*, 26 L. J. (Ex.) 20; 1 H. & N. 408. Where, by reason of a refusal to carry, or of non-delivery, or delay by a railway company, a carrier, who uses the railway for his parcels, is injured in his own business as a carrier, such injury is too remote to be considered in damages; *semb. Crouch v. Great Northern Ry. Co.*, 11 Ex. 742; 25 L. J. (Ex.) 137.

When the plaintiff has made a false declaration of the value of horses, in order to induce a railway company to carry them on lower terms, and they are injured by the company's negligence, he cannot recover more than the declared value; *M'Cance v. London and North-Western Railway Co.*, 31 L. J. (Ex.) 65; 7 H. & N. 477; affirmed in *Ex. Ch.*, 34 L. J. (Ex.) 39; 3 H. & C. 343.

Defence.

By the new rules, H. T. 1853, the plea of non assumpsit, or a plea traversing the contract, operates only as a denial in fact of the contract, promise, or agreement. Thus, in actions against carriers for not delivering or keeping goods safe, &c., it will deny the contract, express or implied, as alleged, but not the breach. If the action is framed in tort, the plea "not guilty" operates to deny the loss or damage, but not the receipt of the goods as carrier, or the purpose for which they were received. If the declaration charges the defendant as a common carrier in respect of his ordinary liability as such, a plea traversing the delivery and receipt *modo et forma*, is supported by proof of a special contract limiting such liability; *Shaw v. York and North Midland Railway Co.*, 13 Q. B. 347; accord, *Crouch v. London and North-Western Railway Co.*, 7 Ex. 705; *Austin v. Manchester, &c. Railway Co.*, 16 Q. B. 600; *Walker v. York and North Midland Railway Co.*, 2 E. & B. 50; *White v. Great Western Railway Co.*, 2 C. B., N. S., 7. But where the defendant is so charged, and the defence is that the goods are of the kind specified in sect. 1 of the Land Carriers' Act, and not declared or paid for as such, this must be specially pleaded; *Syms v. Chaplin*, 5 Ad. & E. 634. A carrier may by his plea set up the title of a third person who has claimed and retaken the goods; *Sheridan v. New Quay Co.*, 4 C. B., N. S., 649-650.

Loss by plaintiff's own default.] It is questionable how far and under what circumstances it is a defence that a parcel was lost by the default of the plaintiff himself. It has been considered that where

the gist of the action is negligence and non-performance of duty, so as to be founded on tort, rather than contract, this may be a defence. Thus, in case for a loss by the defendant's negligence, it appeared that the defendant's cart was unfit for the carriage, and that the packing was improper, and the defendant offered to show that they were packed by the plaintiff himself, that the cart was sufficient for a less weight, and that the plaintiff had mis-represented the real weight, and so over-loaded it; and so, that the loss was attributable to the plaintiff himself: the Court determined the defence inadmissible under the plea of Not guilty, the acceptance to be safely carried being admitted on the record; but Tindal, C. J., thought it would be a defence under a special plea or a traverse of the acceptance *modo et forma*; *Webb v. Page*, 6 M. & G. 196. This case, however, was not that of a common carrier; see further, *Martin v. Great Northern Railway Co.*, 16 C. B. 179; 24 L. J. (C. P.) 209. Where the plaintiff has done anything to disguise the nature of the goods, or to lull the vigilance of the carrier by treating a parcel as of no value, this might be a defence; see *per* Abbott, C. J., in *Sleat v. Fagg*, 5 B. & A. 347; *Batson v. Donovan*, 4 B. & A. 21. Such conduct is in the nature of a fraud; see also *Bradley v. Waterhouse*, *Mood. & M.* 154; 3 C. & P. 318; and *ante*, pp. 360-1. In cases where this is a defence, the fact should be specially pleaded, unless the particular issue taken be such as to make the evidence relevant to it.

Passenger carriers.

Carriers of passengers stand on a different footing from carriers of goods. They are not insurers of the person, and are responsible only for want of due care; *Christie v. Griggs*, 2 Camp. 81; 2 Kent Com. 600. So far, however, as respects the personal luggage of a passenger, such a carrier is said to be liable to the ordinary obligations of common carriers, though there may be no distinct contract for it; *Kent, ubi supra*; and *Richards v. London, Brighton, and South Coast Railway Co.*, 18 L. J. (C. P.) 251; 7 C. B. 839, is a direct authority that the luggage of a passenger is in the same position as goods sent by a carrier; but in *Stewart v. London and North-Western Railway Co.*, 33 L. J. (Ex.) 199, 3 H. & C. 135, Pollock, C.B., dissents from that case, and says a carrier undertakes no responsibility in respect of the goods of a passenger beyond that which he undertakes with respect to the passenger himself; the contrary, however, has been assumed in almost every case. If a man travels in a public coach and takes his luggage with him, and looks after it himself, yet the carrier is not absolved from responsibility, but will be liable for the loss of it; *per* Chambre, J., *Robinson v. Dunmore*, 2 B. & P. 419. So in railway carriages; *Munster v. South-Eastern Railway Co.*, 4 C. B., N. S., 676; 27 L. J. (C. P.) 308. Unless the owner has specially undertaken to watch it; which will be a defence under the general issue; for then the plaintiff had not entrusted the charge of it to the carrier, but relied on his own vigilance alone; *Brind v. Dale*, 2 M. & W. 775. On railways, where the company provide servants to assist passengers to discharge their luggage on arrival, the liability of the company continues until the servants have done their duty; therefore where a passenger took articles with him into a railway carriage, and on getting out, put them in charge of a railway porter to carry to a hackney coach for him, it was held that the company's duty as carriers continued

until they were placed in the coach; *Richards v. London and South Coast Railway Co.*, 7 C. B. 839; 18 L. J. (C. P.) 251, Williams, J., *dubitante*. This ruling was affirmed by the same court in *Butcher v. London and South-Western Railway Co.*, 16 C. B. 13; 24 L. J. (C. P.) 137; where the plaintiff held his bag in his hand and delivered it to a porter on the platform to take to a cab. A carrier is liable only for the personal luggage of the passenger, and not for merchandise; and where a passenger by a railway carries merchandise as personal luggage, it has been held that the company is not liable for the loss, unless it be carried openly, so that its nature is obvious, and no objection has been made by the company's servants; *Great Northern Railway Co. v. Shepherd*, 8 Ex. 30; 21 L. J. (Ex.) 114, 286. In this last case there was no special contract, nor any limit imposed by the company's regulations except as to weight. If a railway company, which by the terms of its regulations allows a passenger to take personal luggage, chooses to take as luggage that which it knows to be merchandise, it does not lie in the mouth of the company, if an article be lost, to say it is exempt from liability on the ground of the article being merchandise and not luggage. On the other hand, if a passenger, who knows that he is only entitled to take personal luggage, takes merchandise, he cannot afterwards claim to be compensated in respect of its loss by the company to whom he has given no notice of the contents of his package; he takes it at his own risk; *S. C.*; *Cahill v. London and North-Western Railway Co.*, 31 L. J. (C. P.) 271; 13 C. B., N. S., 818, (Ex. Ch.). The mere fact that a packet looks like merchandise and is marked glass is not enough to fix the company with knowledge that that which a passenger is taking with him as luggage is in fact merchandise, and so fix them with responsibility; *S. C.* Sketches and drawings carried by an artist among his personal luggage are not within the term "ordinary luggage" of a certain weight usually carried free of charge on railways; *Mytton v. Midland Railway Co.*, 4 H. & N. 615; 28 L. J. (Ex.) 385.

The holder of an excursion-ticket, expressed to be "subject to the conditions contained in the company's time and excursion bills," one of which conditions was "luggage under 60lbs. free at passenger's own risk," is bound by the terms of this special contract, which is not within the Traffic Act, and it makes no difference that the owner was not aware on what condition his luggage was being carried; *Stewart v. London and North-Western Railway Co.*, 33 L. J. (Ex.) 199; 3 H. & C. 135.

The private act of a railway company provided that each first-class passenger might take with him luggage not exceeding a certain weight. The plaintiff took a cheap first-class excursion-ticket subject to the express condition, of which he had notice, that no luggage was allowed. He put his portmanteau, which weighed less than the amount allowed by the act, into the train: held, he was bound to pay for the carriage of it; *Rumsey v. North Eastern Railway Co.*, 14 C. B. 641; 32 L. J. (C. P.) 244.

A passenger carrier is obliged to receive all passengers for whom there is adequate accommodation; *Benett v. Peninsular, &c. Steam-packet Co.*, 6 C. B. 775; 2 Kent Com. 601. Special circumstances may, however, warrant the rejection of a passenger; as misconduct, refusal to comply with reasonable regulations, overloading, &c.; *Kent, supra*. If unlawfully rejected or delayed, the injured party may recover the expense occasioned by hiring another

conveyance; *Great Northern Railway Co. v. Hawcroft*, 21 L. J. (Q. B.) 178; *Hamlin v. Great Northern Ry. Co.*, *ante*, p. 374.

Where a passenger by railway takes a ticket under which he is carried over several railways, the contract is with the first company only; see cases *ante*, p. 363.

Actions for injury by accidents are more frequently treated as founded on tort.

The cases on negligent driving, collision, &c., will be found under those heads in another part of this work.

ACTIONS AGAINST COMMON INNKEEPERS.

This, like the action against carriers, may be treated as founded on tort, or on contract. It is generally an action *ex contractu* for some breach of the contract, express or implied, which the innkeeper has entered into, or professes to be ready to enter into, with his guest, in relation to his personal entertainment.

An innkeeper at common law is answerable for the safe keeping of the goods of a guest; *Culye's case*, 8 Rep. 32; and a loss is *prima facie* evidence of liability on the part of the innkeeper; *Dawson v. Chamney*, 5 Q. B. 164; 2 Kent Com. 592; *Story on Bailments*, ss. 470-1; *Morgan v. Ravey*, *infra*. He may be exonerated by the negligence of the guest; and this is evidence under a plea of Not guilty, where the count is in tort; or on a plea denying loss by negligence, if it is in the form of contract. Where money is lost, the ostentatious display of it in a public room at an inn, and leaving it there in an insecure box, is evidence of negligence conducing to the loss; *Armistead v. Wilde*, 17 Q. B. 261; so where the guest has taken the goods into his own custody, and leaves the door of the room unlocked; *Burgess v. Clements*, 4 M. & S. 306. The omission by the guest to leave valuable articles with the innkeeper, or to fasten his bed-room door at night, is not necessarily such negligence; *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J. (Ex.) 131. The question for a jury will be, whether the loss would or would not have happened if the guest had used the ordinary care that may reasonably be expected from a prudent man; *Cashill v. Wright*, 6 E. & B. 891. It is not enough to ask if the guest had been "grossly negligent;" S. C. The obligation of the innkeeper extends to the horses and carriages of the guest; *Culye's case*, *supra*; *Jones v. Tyler*, 1 Ad. & E. 522; *Baker v. Day*, 32 L. J. (Ex.) 171; 2 H. & C. 14. In the last case the guest had gone from the inn intending to return, leaving his horse there, and after the day of his return had passed without his return, his horse was injured by being driven in a carriage by the innkeeper's servant, and it was held that the innkeeper was liable as such for the injury. But he is not liable for the injury to a horse by a kick from another horse if negligence in him and his servants is disproved; *Dawson v. Chamney*, *supra*.

By 26 & 27 Vict. c. 41, s. 1, no innkeeper shall, after the 13th July, 1863, be liable to make good to any guest any loss or injury to property brought to the inn (not being a horse, or other live animal, or any gear appertaining thereto, or any carriage), to a greater amount than £30, except in the following cases: (1) Where the property shall have

been stolen, lost, or injured, through the wilful act, or fault, or neglect of the innkeeper or any servant in his employ. (2) Where the property shall have been deposited expressly for safe custody with the innkeeper. Provided that, in case of such deposit, the innkeeper may require as a condition to his liability, that the property be deposited in a box or other receptacle, fastened and sealed by the person depositing. By section 2, if an innkeeper shall refuse to receive for safe custody any property of his guest, or if the guest shall, through any default of the innkeeper, be unable to deposit his property, the innkeeper shall not be entitled to the benefit of the act in respect of such property. By section 3, every innkeeper is to cause one copy at least of the first section of the act to be exhibited in a conspicuous part of the hall or entrance of his inn, and is to be entitled to the benefit of the act in respect of such property only, as shall be brought to his inn while such copy is so exhibited. By section 4, "inn" means any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of, which is by law responsible for the property of his guests; "innkeeper" means the keeper of any such place.

An innkeeper by the common law is bound to receive persons who present themselves as guests, if he has accommodation; *R. v. Ivens*, 7 C. & P. 213; *per Holt, C. J., Lane v. Cotton*, 12 Mod. 484; *White's case*, 2 Dyer, 158. See *Fell v. Knight*, 8 M. & W. 276. He is, however, at liberty to set up an inn for the reception of particular classes of people, and is then only bound to do what he publicly professes to do in this respect; see *per Parke B., in Johnson v. Midland Railway Co.*, 4 Ex. 371, 373. And mere coffee-house keepers (not professing to lodge their guests), lodging or boarding housekeepers, and the owners of public-houses merely for sale of beer, &c., are not common innkeepers; for these do not profess to entertain and lodge all travellers; see cases cited, 2 Kent Com. 595-6; and *Thompson v. Lucy*, 3 B. & A. 283.

The lien of innkeepers is treated of hereafter under *Action for Detention of Goods*.

DEFENCES IN ACTIONS ON SIMPLE CONTRACTS.

Plea in Abatement.

The proofs necessary in issues on pleas in abatement are generally apparent on the pleadings, but it will be necessary also to be prepared with evidence to prove the damages in cases where more than nominal damages are sought; for the judgment for the plaintiff is final, and the damages must be assessed by the same jury that tries the issue on the plea. See *Weleker v. Le Pelletier*, 1 Camp. 479; and 2 Wms. Saund. 211, n. (3). The situation of the plaintiff, who succeeds in negating the plea, is the same as if he had judgment by default and was executing a writ of inquiry.

Evidence on plea of nonjoinder of co-contractor.] The plea of nonjoinder alleges a joint contract made by the plaintiff with the defendant and others therein named, who are stated to be alive and to have been resident within the jurisdiction at the commencement

of the suit, and to be 'still' there resident. The replication usually denies the joint promise or contract; but it may deny the residency, or that the person named is alive; or reply his discharge as a bankrupt or insolvent (3 & 4 Will. 4, c. 42, s. 9). The Statute of Limitations may be given in evidence on issue taken on the plea (9 Geo. 4, c. 14, s. 2, cited *post*, p. 393).

Where one of several joint contractors is an infant, he ought not to be joined as defendant, and if the defendant pleads his nonjoinder in abatement, the plaintiff may reply the infancy; *Burgess v. Merrill*, 4 Taunt. 468. But where, instead of replying the infancy, the plaintiff replied that the contract was made by the defendant solely, the court held that the plea was supported by evidence that the promise was made by the defendant and the infant jointly; for that the contract was not void as to the infant, but voidable only; *Gibbs v. Merrill*, 3 Taunt. 307.

Upon the plea of nonjoinder of a co-contractor, and a denial of the joint contract, the question will arise with whom the contract was made. If a contract be made by a person in his own name, though really on account of himself and other persons, those whose names are not mentioned are in the position of undisclosed principals; they are liable to be sued, but the party suing is not obliged to join them. If the contract be made in the name of a firm, then the plaintiff must join all those whom he knows, or has reasonable means of knowing to be members of the firm. But the nonjoinder of secret partners, of whose existence the plaintiff has no reasonable means of knowledge, is no ground for a plea in abatement; *De Mantort v. Saunders*, 1 B. & Ad. 399; *Bullen and Leake on Pleading*, 2nd ed. p. 198. Probably it will be considered that persons in business ought to make some inquiry as to who are members of the firms with which they deal, and that they will be presumed to be aware of the existence of acting partners, although their names do not appear in the style of the firm; *Bonfield v. Smith*, 12 M. & W. 405.

The plea must name *all* the persons alleged to have been joint contractors; if therefore, upon issue on a plea in abatement, it appears that others besides those named in the plea were also co-contractors, the plaintiff is entitled to a verdict; *Crellin v. Culvert*, 14 M. & W. 11. Hence, too, if any one of the contractors was, at the commencement of the action, out of the jurisdiction, there can be no effectual plea in abatement; *Joll v. Curzon*, 4 C. B. 249. And it should seem that the defendant must prove that *all* the persons named are co-contractors; for if one or more are not co-contractors this is a variance, and the plea would not give the plaintiff a better writ, but one on which he could not, at common law, have recovered at all.

On issue joined on the "residence" of the person named, it must be shown that he has a domicile or dwelling within the jurisdiction, and a mere house of business is not enough; but temporary absence abroad will not disprove residence; *Maybury v. Mudie*, 5 C. B. 283; *Lambe v. Smythe*, 15 M. & W. 433. This, however, is a question which more frequently arises on the affidavit to verify the plea, than on the trial of an issue on the plea.

By section 10 of 3 & 4 Will. 4, c. 42, it is enacted that where, after plea in abatement, the plaintiff shall, without proceeding to trial upon issue thereon, bring another action against the defendant in the first action and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in

such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the defendants who shall appear to be liable: and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant who pleaded in abatement the nonjoinder of such person; provided that any defendant who pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

Under the provisions of the Common Law Procedure Act, 1852, certain powers are given to amend on a plea in abatement for nonjoinder of a co-contractor by adding the names of the persons named in the plea, and re-serving the writ (sect. 38). To such a case the act 3 & 4 Will. 4, c. 42, would not apply, and the Legislature has therefore provided for this case by sect. 39 of the Common Law Procedure Act, 1852. By that act, in all cases after such plea in abatement and amendment, if it appears at the trial that the persons named in the plea in abatement were in fact jointly liable with the original defendant, such defendant will have judgment for the costs of the plea and amendment; but if it appears that the original defendant, or any of the original defendants, is or are liable, but that one or more of the added defendants is or are not liable as contractors, the plaintiff shall have judgment against the other defendants who shall appear to be liable; and every defendant not liable shall have judgment for his costs as against the plaintiff, who is to be allowed the same, together with the costs of the plea in abatement and amendment, as costs against the original defendant who so pleaded; provided that the original defendant shall be at liberty on the trial to adduce evidence of the liability of the other defendants named by him in his plea in abatement.

This last provision seems practically to supersede the 10th section of the former act, as it is not now likely that the plaintiff will bring a new action instead of amending.

Other pleas in abatement, such as coverture, pendency of another action, &c., occur too rarely at Nisi Prius to be usefully noticed here.

General Issue.

The exact nature of the issue raised by the plea of *non-assumpsit* to a declaration on a contract is a question of law, which will be found fully discussed in books on pleading; see *Bullen and Leake on Pleading*, 2nd. ed., p. 396. In general terms, the plea puts in issue the fact of whether or no the contract stated in the declaration was entered into; the proof of this depends very much on the nature of the contract, and the rules relating thereto will be found stated under the proper heads in this work.

Accord and Satisfaction.

Accord and satisfaction after breach must be specially pleaded, and

the evidence required in support of it depends on the allegations in the plea, and the replication to it.

In order to be a good discharge of the cause of action, an accord must be executed, that is, performed by the defendant and accepted by the plaintiff, before it can be pleaded; but the plaintiff may accept a valid executory agreement in satisfaction; *Evans v. Powis*, 1 *Ex.* 601; *Hall v. Flockton*, 14 *Q. B.* 380; 16 *Q. B.* 1039; and it will be a question for the jury whether the agreement, and not the performance of it, was accepted in lieu and satisfaction; *Ibid.* The defendant pleaded the pendency of certain disputes, and an agreement respecting them between the plaintiff and defendant entered into in satisfaction, &c.; the plaintiff denied the agreement: Held, that the pendency of the disputes was admitted on the record; *Hey v. Moorhouse*, 6 *N. C.* 52. Accord and satisfaction made by a stranger on behalf of the defendant, and adopted by the plaintiff, will be a defence; *Jones v. Broadhurst*, 9 *C. B.* 193; *Randall v. Moon*, 12 *C. B.* 261; 21 *L. J. (C. P.)* 226.

If one of several joint creditors accept a satisfaction from the debtor, this is a good defence to the action, without proof of any authority from the co-creditors to accept the satisfaction; *Wallace v. Kelsall*, 7 *M. & W.* 264; *Smith v. Lovell*, 10 *C. B.* 6. So if satisfaction be accepted after breach it is a good defence; *Blake's Case*, 6 *Rep.* 43 b.; *Bullen and Leake on Pleading*, 2nd ed., p. 414. The acceptance in satisfaction, as well as the agreement to accept or the accord, must be shown; *Bayley v. Homan*, 3 *N. C.* 920; *Hardman v. Bellhouse*, 9 *M. & W.* 596. It is not sufficient that the defendant was always ready and willing to carry out his part of the agreement; *Collingbourne v. Mantell*, 5 *M. & W.* 289; *Wray v. Milestone*, 5 *M. & W.* 21; *Allies v. Probyn*, 2 *C. M. & R.* 408.

Though an acceptance of a less sum in satisfaction of a debt of a larger liquidated amount is, by itself, no good accord, yet if there be some additional benefit or other consideration for such acceptance, it may be a discharge; see *Cumber v. Wane*, and the cases cited in 1 *Sm. L. C.* 150. On this ground, compositions with creditors, accepted by them or by several of them under an agreement, are pleadable by way of accord; for in cases of doubtful solvency, the agreement of a creditor to give up a part in consideration that others will do so, is valid as against him, and will bind, although all the creditors have not consented; *Norman v. Thompson*, 4 *Ex.* 755. But if the agreement is signed only as an escrow and on the understanding that certain others are to sign it, it is no accord unless the others also agree; *Boyd v. Hind*, 26 *L. J. (Ex.)* 164; 1 *H. & N.* 938, in error, where *Norman v. Thompson* is corrected and explained. Where the demand is not liquidated, as where it is claimed on a *quantum meruit*, acceptance of a less sum in satisfaction is an answer; *Cooper v. Parker*, 15 *C. B.* 822; 24 *L. J. (C. P.)* 68. In that case the defendant pleaded the compromise of another suit (in which the defendant had pleaded infancy), and payment by him of a less sum under the compromise in satisfaction of that and all other causes of action: On issue joined, it was held that proof of infancy was immaterial, the plea being a defence whether defendant was an infant or not at the time of the former suit.

It is questionable whether a plea of accord can be taken distributively, so as to cover part only; see *Gabriel v. Dresser*, 24 *L. J. (C. P.)* 81; 15 *C. B.* 622. This decision, however, was on de-

murrer, and not on issue joined, where such a plea might perhaps be treated on the same footing as a plea of payment.

An agreement to refer to arbitration is not an accord and satisfaction, nor will it oust the jurisdiction of the court, except where the reference is made, by the contract itself, a condition precedent to the right of action; *Scott v. Avery*, 5 H. L. C. 811; 6 H. & N. 239.

An oral agreement to accept something as a satisfaction, followed by performance and acceptance, is a good defence by way of accord and satisfaction, notwithstanding that the substituted agreement is of a kind which by the statute of frauds is required to be in writing, and this formality is not complied with; *Lavery v. Turley*, 30 L. J. (Ex.) 49; 6 H. & N. 239. *Quære*, whether the acceptance in satisfaction of an invalid agreement would be a defence; perhaps it would be contended that there was no consideration.

Alteration.

It is a good defence to an action on a contract, that it has been altered by the plaintiff since its making without the consent of the defendant; *Pigot's case*, 11 Rep. 27 a.; *Davidson v. Cooper*, 13 M. & W. 343; and it will make no difference that the rights of the parties actually in dispute are not thereby affected; *Mollett v. Wackerbarth*, 5 C. B. 181; 17 L. J. (C. P.) 47. An alteration which had absolutely no effect on the liability of either party, as stated in the contract, would perhaps not vitiate the instrument.

If the alteration were made by a stranger, much would depend on whether or no the plaintiff were the person responsible for the safe custody of the instrument. If he were so, then the alteration by a stranger would vitiate the instrument, though it was made without the knowledge of the plaintiff; *Crookewit v. Fletcher*, 1 H. & N. 893; 26 L. J. (Ex.) 153.

If the alteration were made by a stranger at a time when the plaintiff was not responsible for its safe custody, it has never been held that it could be relied on as a defence.

As to the degree of diligence to be exercised by the person having the instrument in his custody there may be some doubt. It would seem from *Shep. Touch.* 69, *Argoll v. Cheney*, Palm. 402, *Bolton v. Bishop of Carlisle*, 2 H. Bl. 259, that he is not absolutely in the position of an insurer; though in *Crookewit v. Fletcher*, *ubi supra*, Martin, B., makes use of language almost strong enough to make him so.

If both parties agree to an alteration then the old contract is rescinded, and a new one substituted, unless it be made simply for the purpose of correcting an error.

This defence may be raised under the general issue.

See cases on the effect of alteration as to stamps, *ante*, p. 133, as to bills and notes, p. 202; as to bought and sold notes, p. 295; as to deeds, *post*, *Action on Covenant*, and *Action on Bond*.

Coverture.

The coverture of the plaintiff or defendant at the time of the contract entered into was formerly a good defence under the general issue; but it must now be pleaded specially. If the coverture was after the contract, it is only a plea in abatement; and where the plaintiff, being a married woman, might have sued jointly with her

husband, her coverture is only pleadable in abatement; *Dalton v. Midland Railway Co.*, 13 C. B. 474; 22 L. J. (O. P.) 177.

In some cases a married woman has been allowed to be sued as a feme sole. If the wife of a foreigner, resident abroad, lives and trades here as a feme sole, she may be sued as such; *De Gaillon v. L'Aigle*, 1 B. & P. 357. And where a French emigrant left his wife in this country, and resided abroad, Lord Kenyon held that this was tantamount to an abjuration of the realm in a native, and that the wife might be sued as a feme sole; *Walford v. Duchess de Piennes*, 2 Esp. 554; *Franks v. Same*, *id.* 587. But in a similar case Lord Ellenborough held that the wife was not so liable, and the Court of King's Bench concurred in that opinion; *Kay v. Duchess de Piennes*, 3 Camp. 123. A feme covert, living apart from her husband and having a separate and sufficient maintenance, cannot be sued as a feme sole; *Marshall v. Rutton*, 8 T. R. 545. Nor can the wife of an Englishman who is resident abroad be so sued; *Marsh v. Hutchinson*, 2 B. & P. 226; *Stretton v. Busnach*, 1 N. C. 139; and see *Boggett v. Frier*, 11 East, 301. Even a divorce *a mensâ et thoro* for adultery was held not so far to destroy the relation of husband and wife as to render her liable as a feme sole; *Lewis v. Lee*, 3 B. & C. 291. But after a divorce *a vinculo*, the wife becomes a single woman by operation of law, and it is the same as if she had always remained single; *Anstey v. Mannors*, Gow. 11. And by sect. 26 of 20 & 21 Vict. c. 85, after judicial separation by sentence of the court there established, the wife is, while separated, to be considered as a feme sole for the purpose of contract and wrongs and of suing and being sued in a civil proceeding. So where the husband has abjured the realm; *Lean v. Schultz*, IV. Bl. 1195; *Lewis v. Lee*, 3 B. & C. 297; or been transported beyond seas as a convict, in which case the wife is to be considered as a feme sole; *Carrol v. Blencow*, 4 Esp. 27.

Except where the marriage is a nullity, it seems proper to reply the above matters specially, and such is the practice; 1 *Chit. Preced.* 607 (h), 2nd ed. In *Ganer v. Lanesborough*, 1 Peake N. P. Ca. 17, where the defendant pleaded coverture, Lord Kenyon, C.J., held that the plaintiff might prove, on a traverse of the plea, that the supposed husband had a former wife living.

Coverture may be proved by a copy of the register of marriage with proof of identity, *ante*, p. 89, or by the usual presumptive evidence of marriage—reputation and cohabitation; *Kay v. Duchess de Piennes*, 3 Camp. 123; *Birt v. Barlow*, 1 Dougl. 171; *ante*, p. 92. And the defendant must show that her husband was living at the time of the debt contracted, or within seven years; *Hopewell v. De Pinna*, 2 Camp. 113. The defendant is not estopped by her previous admissions and acts as a feme sole; *Davenport v. Nelson*, 4 Camp. 26.

Fraud.

The proof of fraud in the party seeking to enforce a contract is a good defence; but it must be specially pleaded. The fraud necessary to maintain a general plea of fraud and covin must be some concealment or deception practised by the plaintiff with respect to the very transaction in question; the illegality of the transaction, by reason of usury or other causes, is not sufficient; *Green v. Gosden*, 3 M. & G. 446. Where a fraudulent representation constitutes the alleged

fraud, it must be on a matter which, in a case of simple contract, was substantially the consideration for the agreement; *per Erle, J.*, in *Mallalieu v. Hodyson*, 16 Q. B. 712. But a false statement to the defendant of the state of accounts between the plaintiff and his debtor will prove the allegation of fraud in an action against the defendant as surety for the debtor; *Stone v. Compton*, 5 N. C. 142; but see *Mason v. Ditchbourne*, 1 Mood. & Rob. 460. Where the owner of a house sued the defendant for not taking the house according to agreement, it was held (Lord Abinger, C. B., *dissentiente*), that the plea of fraud was not supported by proof that the plaintiff's agent had denied the existence of a nuisance of which he, the agent, was ignorant, but which the plaintiff himself knew of; for though this was a mis-statement, it was no fraud; *Cornfoot v. Fowke*, 6 M. & W. 358. But generally, the fraud of the agent, in the course of his principal's business, is the fraud of the principal; *per Parke, B.*, *Murray v. Mann*, 2 Ex. 538. And it has been said that fraud in this plea means moral fraud, and not merely a false statement made in ignorance; *Moens v. Heyworth*, 10 M. & W. 147 (where, however, there was a difference of opinion among the judges on this point). In *Evans v. Edmonds*, 22 L. J. (C. P.) 211, 13 C. B. 777, in an action for arrears of an annuity payable by the defendant to his wife's trustee, the plaintiff, a general plea of fraud was upheld on proof that the plaintiff had induced the defendant to make the settlement by falsely and fraudulently representing the wife to be a virtuous person, though she had committed adultery with the plaintiff; and *semble*, if the plaintiff has fraudulently represented a fact to be true of which he knows nothing, and which is untrue, it will be a defence; *per Maule, J.*, *ibid.* In an action by vendee of a term against vendor for not assigning, it is a defence, on a proper plea, that the defendant's term was not assignable except by consent of the lessor, who was willing to accept a respectable assignee, and that defendant was induced to make the agreement by the false and fraudulent representation of the plaintiff that one M., for whose benefit the purchase was made, was a respectable person, whereas he was not respectable; *Canham v. Barry*, 15 C. B. 597.

The fraud may consist in permitting a party to labour under error. Thus where the defendant erroneously supposed that a picture had been in the possession of an eminent collector, and purchased it from the agent of the plaintiff, who was aware of the defendant's error, but did not undeceive him, Lord Ellenborough held that the sale was void, the price being probably enhanced by the error; *Hill v. Gray*, 1 Stark. 434. So where a vendor knowingly permits the vendee to buy under a false representation by a stranger; *Pilmore v. Hood*, 5 N. C. 97.

Where goods are falsely described as "the property of a gentleman deceased," or "to be sold by executors," it is fraud, for such property is likely to be sold without reserve; *per Lord Mansfield*; *Bexwell v. Christie*, Cowp. 395. So where, at a sale by auction, the owner of the goods employs puffers to bid for him, and the buyer has no notice of such employment, it is a fraud, and the seller cannot recover the price; *Crowder v. Austin*, 3 Bing. 368; *Wheeler v. Collier*, Mood. & M. 126. The employment of a single puffer, when the sale is to be to the highest bidder, is evidence for the jury to sustain a plea of fraud; *Green v. Baverstock*, 14 C. B., N. S., 204; 32 L. J. (C. P.) 181.

If the maker of a chattel make it with such a defect as to render

it worthless, but the defect is patent, and the persons for whom it is made have an opportunity of inspecting it before it is delivered, the maker is not guilty of a fraud if he do not point out the defect; *Horsfall v. Thomas*, 31 L. J. (Ex.) 322.

In an action by a principal against the surety, the surety may sometimes rely on the concealment of material particulars by the principal at the time the contract was made, as a fraud. The duty of the principal must always ultimately be measured by the jury, but the judge will have to point out what their duty is in this respect. The language in which he ought to do this has not yet been very precisely settled. The word "undue," which has been sometimes used to describe the concealment which vitiates a contract of this description, is not very definite. In *Railton v. Matthews*, 10 Cl. & F. 934, it was held, that a direction—that a concealment must be "wilful and intentional, with a view to the advantage they (the principals) were thereby to receive," was wrong. In *Hamilton v. Watson*, 12 Cl. & F. 109, it seems that the House was of opinion that the defence was not properly raised; but Lord Campbell expresses a strong opinion that, if a person undertakes to be responsible for a cash credit given to one of the banker's customers, the banker is not bound to communicate that the intention is to apply the credit to an old debt due from the customer to the banker. He thought that if it were held otherwise, the business of Scotch bankers would be much interfered with. Sitting in Chancery, Lord Truro said:—"The clear law deducible from the decisions is, that the creditor must make a full and fair and honest communication of every circumstance calculated to influence the discretion of the surety in entering into the required obligation;" *Owen v. Homan*, 3 Mac. & G. 396. This is a stricter rule than that laid down by Lord Campbell in *Hamilton v. Watson*. In the case of *The North British Insurance Co. v. Lloyd*, 10 Ex. 523, Pollock, C. B., delivering the judgment of the Court, says that they adhere to Lord Campbell's opinion, and that the rule with respect to guaranties is not the same as with respect to insurances. In *Lee v. Jones*, 14 C. B., N. S. 386, one P. had been employed by the plaintiffs in the sale of coals by commission, for the price of which they took P.'s acceptances; and, in discharge of his acceptances, P. was bound to hand over within six days the sums received from customers. P. was indebted to the plaintiffs to the amount of 1272*l.*, and they required him to find a surety. Thereupon the defendant entered into an agreement to become surety for P. to the amount of 300*l.*; and the agreement recited the terms of the arrangement between P. and the plaintiffs, but no mention was made of the fact that P. was already in arrear. The Court seem to think that there must be what is called "an active misleading;" but they were of opinion that the surety was in this case, in fact, actively misled.

See as to concealment in the case of insurance, *supra*, p. 239. And see as to frauds by vendors, p. 156.

Illegality.

Where a contract is illegal or immoral, it cannot be enforced; but such defence must be specially pleaded; *Potts v. Sparrow*, 1 N. C. 594; even though it appears on the plaintiff's evidence; *Fenwick v. Laycock*, 1 Q. B. 414; or on the declaration, and may therefore be ground for arresting judgment; *Daintree v. Hutchinson*, 10 M. &

W. 85. So a plea that the contract was a wagering one, and void by 8 & 9 Vict. c. 109, must be pleaded specially; *Varney v. Hickman*, 5 C. B. 271, 17 L. J. (C. P.) 102.

Some cases of illegality have been already noticed under the head of *Action for Money had and received*, ante, p. 350. The facts must be stated specially on the record, and the issues joined sufficiently point out the required evidence; yet, as the new rules of pleading do not, it should seem (any more than the late rules, *Brown v. Dabney*, 4 Dowl. P. C. 585), apply to replications, the question of illegality may perhaps still arise at Nisi Prius without appearing on the record, as in answer to a plea of set-off, &c.

In an action for work and labour, the illegality of the transaction will be a defence. A party will not be permitted to recover either for work and labour done, or materials provided, where the whole combined forms one entire subject-matter, made in violation of the provisions of an act of parliament; *Bensley v. Bignold*, 5 B. & A. 335. Thus a printer, who makes a false affidavit that he is sole proprietor of a paper, cannot sue the real proprietors for the printing or for any matter connected with its circulation; *Stephens v. Robinson*, 2 C. & J. 209; 38 Geo. 3, c. 78, s. 2. And the proprietor of a newspaper cannot, before the filing of the affidavit directed by the statute, recover upon a contract for the printing of the paper; *Houston v. Mills*, 1 Mood. & Rob. 325. So the printer of an immoral and libellous book cannot maintain an action for his bill against the publisher who employed him; *Poplett v. Stockdale, Ry. & Mood*, 337; and see *Coates v. Hatton*, 3 Stark. 61, and *Clay v. Yates*, 1 H. & N. 73; 25 L. J. (Ex.) 237, ante, p. 325. A promise to indemnify the plaintiff, in consideration of the plaintiff having published a libel and defended an action brought against him for that libel at the defendant's request, is void; *Shackell v. Rosier*, 2 N. C. 634. A promise by a director of a railway company, A., that the company would indemnify the promoters of another railway company if they failed in obtaining a bill in parliament, is illegal, the company A. having no power by its act so to apply their funds, and no action lies on such promise; *M'Gregor v. Dover Railway Co.*, 18 Q. B. 618. A person who has expended money for the purposes of an unlicensed theatre, cannot recover against another at whose request he expended the money, and who participated in the profits; *De Begnis v. Armistead*, 10 Bing. 107. So money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by his principal, if the principal was at the time aware of the illegal disbursements, or assented to them; *Bayntum v. Cattle*, 1 Mood. & Rob. 265. A London broker cannot maintain an action for commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of the city of London, pursuant to 6 Anne, c. 16; *Cope v. Rowlands*, 2 M. & W. 149: nor for sale of shares in a company, British or foreign. But he may recover money paid by him to the seller on account of his principal, for which the principal is liable by usage; *Smith v. Lindo*, 4 C. B., N. S. 395; affirmed on error, 5 C. B., N. S. 587; 27 L. J. (C. P.) 335. Money lent for the express purpose of playing at an illegal game, such as hazard, cannot be recovered back; *M'Kinnell v. Robinson*, 3 M. & W. 434; or for settling illegal stock-jobbing transactions; *Cannan v. Bryce*, 3 B. & A. 179. Money paid at the implied request of the principal in fulfilment of a wagering contract may be recovered back; *Rosewarne v. Billing*, 33 L. J. (C. P.) 55. A broker or agent cannot sue for commission in respect

of a sale mentioned in an instrument made by him and not duly stamped as required by 23 Vict. c. 15, s. 9. (See the references to the act, *ante*, p. 137.) As to wagers, see now 8 & 9 Vict. c. 109, ss. 15—18. Sir John Barnard's Act (7 Geo. 2, c. 8) is repealed by the 23 & 24 Vict. c. 28.

No action lies for the value of goods knowingly sold for illegal purposes—as brewers' drugs; *Langton v. Hughes*, 1 M. & S. 593; or bricks under statutable size; *Law v. Hodgson*, 11 East, 300. See also *Gas Light Company v. Turner*, 5 N. C. 666; 6 N. C. 324. A collateral security given for payment of the purchase-money of land knowingly sold for the purpose of re-sale by lottery, is illegal; *Fisher v. Bridges*, 3 E. & B. 642; and this though the security be by deed: *ibid*.

Where the party seeking to enforce the contract has been guilty of contravening a law made for the purposes of the revenue only, it has been held that this is not such an illegality as will prevent him from recovering at law on the contract; as where several partners sued the defendant for the price of spirituous liquors sold, it was held that the omission of the name of one of them in the licence to carry on the business of distillers was no answer; *Brown v. Duncan*, 10 B. & C. 93, and cases there cited. The question is, whether the legislature has either expressly or by implication prohibited the contract? If not, a breach of the law regulating the vendor's trade may expose the firm to penalties, but does not necessarily avoid a contract of sale by him; *Smith v. Mawhood*, 14 M. & W. 452; *Bailey v. Harris*, 12 Q. B. 905. Non-delivery of a ticket to the purchaser of coals in London disables the vendor from recovering the price; *Cundall v. Dawson*, 4 C. B. 376.

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows at the time of the sale and delivery that the buyer intends to smuggle them into this country, provided he takes no actual part in the illegal adventure, as by packing, &c.; *Pellecat v. Angell*, 2 C., M. & R. 311. A brewer delivering beer to an unlicensed keeper of the public house, may maintain an action against him for the price; *Brooker v. Wood*, 5 B. & Ad. 1052. A corporate body may be sued for money lent, though for purposes which were *ultra vires*, and though secured by a covenant in a mortgage which they had made without the consent of the treasury; *Payne v. Mayor of Brecon*, 3 H. & N. 572.

Illegality.—Sale of spirituous liquors.] By statute 24 Geo. 2, c. 40, s. 12, no person shall be entitled to, or maintain any action, cause, or suit for, or recover, either in law or in equity, any sum, debt, or demand whatsoever for or on account of any spirituous liquors, unless such debt shall have been really and *bonâ fide* contracted at one time to the amount of twenty shillings or upwards; nor shall any item in any account or demand for such liquors be allowed where the liquors delivered at one time, and mentioned in such item, shall not amount to the full value of twenty shillings at the least, and that without fraud or covin, and where no part of the liquors so sold shall have been returned, or agreed to be returned, directly or indirectly. This statute is repealed, by the 25 & 26 Vict. c. 38, as to liquors to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser in quantities less than a quart. Before the act was so far repealed, it was held that it extended to the case of a person who purchases liquors in small quantities to retail them

again; as the keeper of an eating-house; *Hughes v. Done*, 1 Q. B. 294. And also to the case of a tavern-keeper's bill in which there were items for spirits supplied to the defendant's guests; *Burnyeat v. Hutchinson*, 5 B. & A. 241. And a bill of exchange, part of the consideration of which is for spirituous liquors sold in less quantities than twenty shillings, was held to be wholly void; *Scott v. Gillmore*, 3 Taunt. 226; *Gaitskill v. Greathead*, 1 D. & R. 359. But where a bill for £6 had been accepted by an officer in payment of small quantities of spirits, under twenty shillings, supplied for recruits under the defendant's command, the bill was held valid; *Spencer v. Smith*, 3 Camp. 9. Drunkenness being a punishable offence, a publican cannot recover for beer furnished to the defendant after he has become intoxicated by drinking in his public-house; *Brandon v. Old*, 3 C. & P. 440.

Illegality.—Sale on Sunday.] By 29 Car. 2, c. 7, s. 1, no tradesman, artificer, workman, labourer, or other person shall do or exercise any worldly labour, business or work of *their ordinary callings*, upon the Lord's day, or any part thereof, works of necessity and charity alone excepted. Upon this statute it has been held that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday; *Fennell v. Ridler*, 5 B. & C. 408. But where A., not knowing that B. was a horse-dealer, made a verbal bargain with him on a Sunday for the purchase of a horse, and the price, which was above £10, was then specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid, it was held that there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute; *Bloxsome v. Williams*, 3 B. & C. 232; see *Norton v. Powell*, 4 M. & G. 42, and *Beaumont v. Brengeri*, 5 C. B. 301. Though the contract was made by an agent, and the objection is taken by the party at whose request it was entered to on the Sunday, it cannot be enforced; *Smith v. Sparrow*, 4 Bing. 84. But where goods were bought on a Sunday, and the purchaser afterwards, while the goods were in his possession, made a promise to pay for them, it was held that the seller was entitled to recover on a *quantum meruit*; *Williams v. Paul*, 6 Bing. 653. The statute does not make every work or business done on the Sunday illegal, but only carrying on trade and ordinary callings on that day. Therefore the hiring of a servant by a farmer on a Sunday is good; *R. v. Whitnash*, 7 B. & C. 596; see also *Begbie v. Levi*, 1 C. & J. 180. So is a guarantee given for the faithful services of a tradesman's traveller; *Norton v. Powell*, *supra*; and a contract for enlisting a soldier; *Wolton v. Garin*, 16 Q. B. 48. A farmer does not come within the provisions of this statute; *R. v. Silvester*, 32 L. J. (M. C.) 79.

Illegality.—Contract by bankrupt.] By the 24 & 25 Viet. c. 134, s. 164, "after the order of discharge takes effect, the bankrupt shall not be liable to pay or satisfy any debt, claim or demand provable under the bankruptcy, or any part thereof, on any contract, promise, or agreement, verbal or written, made after adjudication; and if he be sued on any such contract, promise, or agreement, he may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give this act and the special matter in evidence." By s. 166 "any contract, covenant, or security made,

or given by a bankrupt, or other person, with, to, or in trust for any creditor, for securing the payment of any money as a consideration, or with intent to persuade the creditor to forbear opposing the order for discharge, or to forbear to petition for a re-hearing of, or to appeal against the same, shall be void, and any money thereby secured or agreed to be paid shall not be recoverable, and the party sued on any such contract or security may plead in general, that the cause of action accrued pending proceedings in bankruptcy, and may give this act and the special matter in evidence: provided always, that no such security, if a negotiable security, shall be void as against a *bond fide* holder thereof for value, without notice of the consideration for which it was given."

Moreover any agreement whereby the proceedings in bankruptcy or insolvency, or the distribution of the assets is affected, is void as against the policy of the law. Thus even a promissory note given by a third person to a creditor in order to induce him to forbear from opposing the insolvent's petition, is void; *Hill v. Mitson*, 8 *Exch.* 751; *Hall v. Dyson*, 21 *L. J. (Q. B.)* 224.

An agreement of this kind, otherwise illegal, is not the less void because it has been made with the knowledge of the other creditors, and sanctioned by the Commissioners; *Humphreys v. Willing*, 1 *H. & C.* 7; 32 *L. J. (Ex.)* 33.

Immorality.

One who is a party to an immoral contract cannot enforce it. Thus the price of obscene and libellous prints cannot be recovered; *Fores v. Johnes*, 4 *Esp.* 97. And where an action was brought against the defendant for board and lodging, and it appeared that she was a prostitute, and had boarded and lodged with the plaintiff, who kept a house of ill-fame, and partook of the profits of her prostitution, it was held that such a demand could not be supported; *Howard v. Hodges*, *Schw. N. P.* 67, 4th ed. But a person may recover for goods sold to a prostitute, not being evidently sold to enable her to carry on prostitution; *Bowry v. Bennet*, 1 *Camp.* 348. So where the plaintiff was employed to wash clothes for a prostitute, knowing her to be such, and the clothes consisted principally of expensive dresses and men's night-caps, it was held that she was entitled to recover; *Lloyd v. Johnson*, 1 *B. & P.* 340. So for lodging let to one, if not knowingly let for the purpose of prostitution; *Crisp v. Churchill*, cited 1 *B. & P.* 340; *Jennings v. Throgmorton*, *Ry. & Mood.* 251.

Infancy.

That the defendant was an infant at the time of the contract made, is a good defence, unless the action be for necessities; and this defence must now be specially pleaded. Where the action, though in form *ex contractu*, is in fact founded upon *tort*, infancy will be no defence. Thus an action for money had and received lies against an infant for money which he has appropriated by fraud or embezzlement; *Bristow v. Eastman*, 1 *Esp.* 172. But if the action be founded on mere fraudulent representation, infancy is a defence;

Johnson v. Pye, 1 Sid. 258; *Liverpool Adelphi v. Fairhurst*, 9 Ex. 422. It is no answer to the defence of infancy that the infant fraudulently represented himself to be of full age; *Bartlett v. Wells*, 1 B. & S. 836; 31 L. J. (Q. B.) 57; *De Ros v. Foster*, 12 C. B., N. S. 272.

What are necessities.] An infant may bind himself for necessities, that is, for meat, drink, apparel, lodging, medicines, &c., and also for his good teaching, or instruction; *Co. Litt.* 172, a; *Com. Dig. Infant* (B 5). The question of what are necessities is to be governed by the fortune and circumstances of the infant; and the proof of those circumstances lies on the plaintiff; *per* Lord Kenyon, C. J.; *Ford v. Fothergill*, 1 Esp. 211. They may be necessities, without being absolutely requisite for bare subsistence; *Peters v. Fleming*, 6 M. & W. 42. It is a mixed question of law and fact to be left to the jury, subject to the opinion of the court as to the manner in which the jury have exercised their judgment; *Harrison v. Fane*, 1 M. & G. 550, 553; *Wharton v. Mackenzie*, 5 Q. B. 606. An infant, a captain in the army, has been held liable for a livery ordered by him for his servant; but not for cockades for the soldiers of his company; *Hands v. Slaney*, 8 T. R. 578; and see *Coates v. Wilson*, 5 Esp. 152. So an infant may contract to pay a fine due upon his admission to a copyhold estate; *Evelyn v. Chichester*, Burr. 1717; or for necessities supplied to his wife; *Turner v. Trisby*, 1 Str. 168, B. N. P. 155; or for money advanced in order to liberate him when taken in execution for necessities; *Clarke v. Leslie*, 5 Esp. 28. A fair contract for work and labour to be done by him is binding; *Wood v. Fenwick*, 10 M. & W. 195. But not if such contract is inequitable, as if his master reserves a right to stop wages at will; *R. v. Lord*, 12 Q. B. 757; *Cooper v. Simmons*, 31 L. J. (M. C.) 138; 7 H. & N. 707. And a feme infant may bind herself for the expenses of her husband's funeral, though he left no assets; *Chapple v. Cooper*, 13 M. & W. 252.

It is not material to the defence whether the infant was in fact supplied by his friends with an allowance sufficient to buy all necessities with ready money; *Burghart v. Hall*, 4 M. & W. 727. Nor is it a condition precedent to a recovery that the plaintiff should have made inquiry as to the necessity of the articles sold, before he supplied them; *Brayshaw v. Eaton*, 5 N. C. 231; *Dalton v. Gib*, 5 N. C. 198.

What are not necessities.] Although an infant may enter into a partnership, he will not be liable for the contracts of the partnership made during his infancy; but he will be liable upon such contracts made after his full age, unless he notifies his disaffirmance of the partnership; *Goode v. Harrison*, 5 B. & A. 147. An infant is not liable upon an account stated, even though it appears to be for necessities; nor can the account stated be used as evidence by way of admission on the part of the defendant to show that necessities have been supplied to that amount; *Ingledeu v. Douglas*, 2 Stark. 36. Nor is he liable on a bill of exchange, though given for necessities; *Williamson v. Watts*, 1 Camp. 552. But he is liable on a bill accepted by him after twenty-one, though drawn before; *Stevens v. Jackson*, 4 Camp. 164. Where goods, not being necessities, are delivered to a carrier for an infant, the infant cannot be charged, though the goods do not reach him till after he is of age; *Griffin v. Langfield*, 3 Camp.

254. An infant cannot be sued on a warranty of a horse; *Howlett v. Haswell*, 4 *Camp.* 118. Nor is he liable for money lent, though it has been laid out in necessities; *Darby v. Boucher*, 1 *Salk.* 279; *Probart v. Knouth*, 2 *Esp.* 472 (n.). An infant lieutenant in the navy is not liable for the price of a chronometer; he being out of employment at the time of its being furnished; *Berolles v. Ramsay*, *Holt*, N. P. C. 77. Dinners, confectionery, and fruit, supplied to an undergraduate out of college, are not *primâ facie* necessities; *Brooker v. Scott*, 11 *M. & W.* 67; *Wharton v. Muckenzie*, 5 Q. B. 606. And articles supplied cannot be considered as suitable necessities, if they are merely of an ornamental character, as gold rings, &c.; *Peters v. Fleming*, 6 *M. & W.* 42.

If issue is joined on the goods being necessities, the plaintiff need not prove that *all* are necessities, but may recover *pro tanto*; *per cur.* in *Tapley v. Wainwright*, 5 B. & Ad. 399.

Ratification of promise after full age.] If infancy is pleaded, the plaintiff may reply that the defendant ratified and confirmed the contract after he attained the age of twenty-one, and before action brought; *Thornton v. Illingworth*, 2 B. & C. 824; or, that he promised; &c., after full age; *Cohen v. Armstrong*, 1 *M. & S.* 724. As to the form of replication, see *Williams v. Moor*, 11 *M. & W.* 256. A bare acknowledgment, or part payment after age, will not be sufficient; there must be a promise; *Thrupp v. Fielder*, 2 *Esp.* 628; and such promise must be voluntary; *Harmer v. Killing*, 5 *Esp.* 102; and, since 9 Geo. 4, c. 14, s. 5, it must be in writing, signed by himself. But no particular form is necessary; the paper need have neither date nor address; nor need the amount be stated; *Hartley v. Wharton*, 11 *Ad. & E.* 934. Any letter or writing, which in the case of a principal amounts to an adoption of the act of an agent, will be equivalent to a ratification; *Harris v. Wall*, 1 *Ex.* 122; and see *Mawson v. Blane*, 10 *Ex.* 206.

Where the defendant pleads infancy, and the plaintiff replies a ratification after twenty-one, which defendant denies, the plaintiff need only in the first instance prove a promise; and it lies upon the defendant to prove his infancy; *Borthwick v. Curruthers*, 1 *T. R.* 648; *Hartley v. Wharton*, 11 *Ad. & E.* 934. But if the plaintiff replies to the plea of infancy, that the goods were necessities, the defendant need not prove his infancy; but the plaintiff must, in the first instance, show that the goods were necessities.

Infant shareholders.] An infant in whom shares in a joint-stock or railway company have vested either by contract or purchase or devolution, becomes thereby the possessor of an interest analogous to an interest in a real estate, and he so continues until repudiation either during infancy, or within a reasonable time after he has come of age. Hence a simple plea of infancy is insufficient in an action for calls, unless it also shows that the interest is divested by such repudiation; *North-Western Railway Co. v. M'Michael*, 5 *Ex.* 114, 120; *Dublin and Wicklow Railway Co. v. Black*, 8 *Ex.* 181. In such an action, the evidence will depend on the allegation traversed by the plaintiff in his replication. If the action be on a *contract for the sale of shares* by the plaintiff to the defendant, a simple plea of infancy will probably suffice, for an infant is not compellable to complete an agreement to buy them, though he may be liable to the obligations incidental to shares actually vested in him.

Infancy—how proved.] Infancy may be proved by calling any person who can speak as to the time of his birth; or by declarations of deceased members of his family mentioning the time of his birth. See further as to evidence of birth, *ante*, pp. 89, *sqq.* As to proof of birth by reputation, *ante*, p. 96. If the defendant was of age when the action was commenced, the date of the contract must be shown, as well as his non-age at that date. But where the defendant pleaded infancy to an action against him as acceptor of a bill, it was held that the acceptance, not being dated, ought to be presumed to have been made shortly after the date of the bill itself according to the common practice, the drawer and acceptor not living far apart; therefore where a bill at four months was dated 9th November, 1850, and the defendant came of age in March, 1851, the jury rightly presumed that he was not of age when he accepted; *Roberts v. Bethell*, 12 C. B. 778; 22 L. J. (C. P.) 69. If plaintiff has entered a nol. pros. on the plea of infancy by one defendant, he cannot recover against another co-defendant as on a joint promise; *Boyle v. Webster*, 17 Q. B. 950. He should apply to strike out the infant defendant from the record.

Insanity.

It is not a good defence that the defendant, at the time of the contract entered into, was of unsound mind, unless the plaintiff knew of it and took advantage of that circumstance to impose upon him; *Browne v. Joddrell*, *Mood. & M.* 105; *Lery v. Baker*, *Mood. & M.* 106 (n.). The inquiry as to the necessity of the goods supplied, and their suitability to the defendant's condition, may arise on this plea as in that of infancy. See *Barter v. Earl of Portsmouth*, 5 B. & C. 170. A lunatic is liable for necessities supplied to his wife; *Read v. Legard*, 6 *Exch.* 637; or monies expended for her protection; *Williams v. Wentworth*, 5 *Beav.* 325. The rule is that the contracts of a lunatic, entered into fairly and *bona fide* with a person ignorant of his incapacity, where the transaction is in the ordinary course (as the purchase of an annuity), and is wholly or in part executed, are valid; *Molton v. Camroux*, 2 *Ex.* 487; in error, 4 *Ex.* 17. Insanity, and the probable knowledge of it by the adverse party, may be proved by showing that it existed and was apparent either shortly after, or shortly before, the alleged contract; *Beavan v. M'Donnell*, 9 *Ex.* 309; 23 L. J. (*Ex.*) 326.

Insolvency.

Plea of insolvency of defendant.] Where a defendant pleads in the usual form that he has been discharged under the Insolvent Debtors' Act, and the replication denies that such a discharge took place, the defendant need not prove the filing of the petition; *Andrew v. Pledger*, *Mood. & M.* 508; nor the affidavit of notice; *Pascall v. Brown*, 3 *Stark.* 54. The only evidence which appears to be necessary under the plea of discharge is the copy of the schedule, to show that the defendant is discharged from the debt in question, and the copy of the adjudication to prove the actual discharge. By the general Insolvent Debtors' Act (1 & 2 Vict. c. 110, s. 105), a copy of the petition, schedule, order, and other orders and proceedings under

the act, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order, or other proceeding, and purporting to be sealed with the seal of the Insolvent Court, shall at all times be admitted in all courts and places whatever as sufficient evidence of the same without any proof whatever given of the same. The provisions of this act differ from those of previous acts, which required proof of the seal of the court. See *Doe v. Willetts*, 7 C. B. 709. To prove the imprisonment of the petitioner, the "copy of the causes" filed with the petition, and sealed by the officer of the court, is not made evidence, by sect. 105, of the fact of imprisonment stated in it; for it is not a proceeding by the court, nor, *semble*, does the section make the copy of proceedings evidence of the facts necessary to sustain their validity; *Hills v. Mitson*, 8 Ex. 751.

When the 7 Geo. 4, c. 57, was in force, it was held that proceedings which had taken place under the 1 Geo. 4, c. 119, might be proved in the manner directed by the 7 Geo. 4, c. 57, s. 76; *Doe v. Evans*, 1 C. & M. 450; and see *Doe v. Hardy*, 6 A. & E. 335; *Doe v. Sellers*, 6 A. & E. 328. The power given by the above act of offering a certified copy in evidence, does not exclude the admission of the original order of adjudication; *Northam v. Latouche*, 4 C. & P. 143. An insolvent who inserts in his schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description of it as satisfies the act, is discharged as to all the parties on the bill, though not named in the schedule, and also as to the original debt for which it was a security; *Boydell v. Champneys*, 2 M. & W. 433. The later Insolvent Debtors' Acts are 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102; but the whole of the insolvency acts, with some unimportant exceptions, are repealed by the 24 & 25 Vict. c. 134. As to the necessity of calling the attesting witness to an insolvent's schedule, see the cases cited *ante*, p. 77.

Plea of insolvency of the plaintiff.] When the defendant pleads the insolvency of the plaintiff, and the consequent vesting of the right of action in the assignee, the proof depends on the form of the replication. A verbal acknowledgment by the plaintiff of his discharge under the act has been held not enough to prove it; *Scott v. Clare*, 3 Camp. 236. But see *ante*, p. 58. The order for the appointment of an assignee, reciting the date of the vesting order, is not evidence of such date. It must be proved by a certified copy of the vesting order, or of the adjudication of discharge, which also shows it; *Yorke v. Brown*, 10 M. & W. 78.

Limitations, Statutes of.

The statutes of limitations must be pleaded, and could not, even before the new rules of pleading, have been relied on under the general issue; 2 *Saund.* 63; and upon issue joined the burden of proof lies on the plaintiff; *Wilby v. Henman*, 2 C. & M. 658. The date of the first writ is stated on the Nisi Prius record and is presumably the true one; but after the lapse of six years, strict proof of the regular continuance by other writs was necessary in order to rebut this plea; *Pritchard v. Bagshaw*, 11 C. B. 459. But the first writ is now kept alive by renewal under s. 12 of the Common Law Procedure Act, 1852. As it was held unnecessary to reply specially the issuing and

return of successive writs under 2 W. 4, c. 39 (*Higgs v. Mortimer*, 1 Ex. 711), so it seems to be unnecessary to reply the renewal of the original writ under the process substituted by the new act. By sect. 13 of this act the production of a writ, purporting to be marked with the seal of the court showing the same to have been renewed according to the act, shall be sufficient evidence of such renewal, and of the commencement of the action as of the first date of such renewal writ for all purposes. It is not yet decided whether the renewal must be within six months, including or excluding the day of renewal; *Black v. Green*, 15 C. B. 262; 24 L. J. (C. P.) 1. A mis-dated writ, with its endorsement, is amendable under sect. 222 of the Common Law Procedure Act, 1852, according to the facts; though the effect may be to defeat the statute of limitations; *Cornish v. Hockin*, 1 E. & B. 602. But there is no power to alter the true date; *Clarke v. Smith*, 2 H. & N. 753.

The principal statutes of limitation applicable to personal actions are—21 Jac. 1, c. 16; 4 & 5 Anne, c. 16; 9 Geo. 4, c. 14 (Lord Ten-terden's Act); 3 & 4 W. 4, c. 27, s. 4; 3 & 4 W. 4, c. 42, ss. 3 to 7; and 19 and 20 Vict. c. 97, cited hereafter.

The distinguishing forms of action having been practically disregarded, and, to a certain extent, abolished by the Common Law Procedure Acts, it is necessary to consider the operation of the statutes of limitation on actions on contract framed under the new system of pleading. By stat. 21 Jac. 1, c. 16, s. 3, actions of [or for] account, and on the case (other than concerning the trade of mer-
chandise between merchants or their factors or servants, and other than for slander), actions of debt on lending or contract without specialty, or for rent arrear, are to be brought within six years after the cause of action, and not after.—Under the head "case" is here included assumpsit on promises, and the part of the statute above cited therefore includes all the causes of action founded on simple contract, whether expressed to be for a debt, or on a promise or contract, express or implied, heretofore prosecuted in the form of debt or assumpsit.

The exception in this statute of merchants' accounts has been held to apply only to actions of account, or, perhaps, for not accounting; or at all events only to cases in which account would lie; *Inglis v. Haigh*, 8 M. & W. 769; *Cottam v. Partridge*, 4 M. & G. 271. And by 19 & 20 Vict. c. 97, s. 9, all actions of account, or for not accounting, and suits for such accounts as concern the trade of merchandise between merchants, their factors, or servants, shall be commenced within six years after the cause of action; and no claim in respect of a matter which arose more than six years before such action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action.—This provision seems to refer only to actions or suits for an account within the exception of 21 Jac. 1, c. 16.

An action of debt on the by-law of a chartered company is an action on a contract without specialty; *Tobacco Pipe Co. v. Loder*, 16 Q. B. 765. But an action given by statute, as for calls on a shareholder in a joint-stock company, as provided by the Companies Clauses Consolidation Act, 1845, is founded on specialty; *Cork and Bandon Railway Co. v. Goode*, 13 C. B. 826.

The above clause in the statute having been construed somewhat strictly so as to exclude cases which were not, when it passed, regarded

as contracts, the stat. 3 & 4 Wm. 4, c. 42, s. 3, enacted that actions of debt on an award (where the submission is not by specialty), or for copyhold fines, or an escape, or money levied on a *fi. fa.*, should be brought within six years after the cause of action.

When the statute begins to run.] The statute begins to run from the time of the breach of promise or contract, and not the discovery of it. Therefore in an action against an attorney for neglecting his duty six years before, the statute was held a bar, though the omission was discovered within the six years; *Short v. M'Carthy*, 3 B. & A. 626; *Battley v. Faulkner*, Id. 288; *Colvin v. Buckle*, 8 M. & W. 680; and though the defendant had fraudulently concealed the cause of action; *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39; 23 L. J. (Ex.) 303. Where a contract to deliver goods is once broken, the statute runs, and a subsequent refusal to deliver after the loss of the goods during an inquiry touching the first breach will not revive the right; *East India Co. v. Paul*, 7 Moo. P. C. 85. Upon promises to indemnify, the statute runs from the time of damnification; *Huntley v. Sanderson*, 1 C. & M. 467; *Reynolds v. Doyle*, 1 M. & G. 753. Where a bill of exchange is drawn payable at a future time for a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may sue for money lent at any time within six years from the time when the money was to be repaid; i. e., when the bill became due, and not from the time of the loan; *Wittersheim v. Carlisle*, 1 H. Bl. 631; *Wheatley v. Williams*, 1 M. & W. 533. Where a bill is not accepted, and the holder gives notice thereof to the drawer, the statute begins to run against him; and he does not acquire a fresh right of action against the drawer on the non-payment when due; *Whitehead v. Walker*, 9 M. & W. 506. The defendant drew a bill, due in May, 1843, payable to the plaintiff, who indorsed it for the acceptor's accommodation to C.: C. sued the plaintiff on the dishonoured bill in 1847, and received the amount from him in 1850: the plaintiff then sued the defendant on the bill: it was held that the action was barred; *Webster v. Kirk*, 17 Q. B. 944. A note, payable on demand, is payable immediately, and the statute begins to run from the date; *Christie v. Fonsic*, Selw. N. P. 12th ed. 399; *Norton v. Ellam*, 2 M. & W. 461. But where a note is made payable so many months after demand, the cause of action does not accrue until that number of months after demand made; *Thorp v. Booth, Ry. & Mood*. 388. So where the note is payable after sight, the statute runs only from the time of presentment; *Holmes v. Kerrison*, 2 Taunt. 323; and see *Savage v. Aldren*, 2 Stark. 232. Where the cause of action does not arise until after request made, the statute will only run from the time of such request; *Gould v. Johnson*, 2 Salk. 422; 2 Saund. 63 b (n.). Where the defendant promised to pay a bill of exchange barred by the statute "when able," the statute was held to run from the time of his being able, though the plaintiff did not know when this was, and made no demand; *Waters v. Thanet*, 2 Q. B. 757. After the statute has begun to run, it continues to run though the debtor dies within the six years and an executor is not appointed until after the expiration of the six years; *Rhodes v. Smethurst*, 6 M. & W. 351. But if an action, brought within six years, abates by the defendant's death and no administration is taken out till six years have elapsed, the statute does not run, provided a fresh action be brought within a reasonable time after administration or probate; *Curteis v.*

Mornington, 7 E. & B. 283; 26 L. J. (Q. B.) 181; in error, 27 L. J. (Q. B.) 439.

Money deposited with a banker is money lent to him, and the statute runs from the deposit; *Pott v. Clegg*, 10 M. & W. 321; but *qu.* if this is so with money deposited with a private person; see *Poth. Contr.* by *Evans*, vol. 2, p. 126.

The contract by an attorney to conduct a suit is entire, so that if the suit has ended within six years, the statute of limitations is not a bar to so much of the demand as is for business relating to the suit not actually transacted within the six years; *Harris v. Osbourn*, 2 C. & M. 629; *Martindale v. Falkner*, 2 C. B. 706; for the attorney cannot sue for his costs while the suit is progressing, although he may refuse to proceed for want of funds; *Whitehead v. Lord*, 7 Ex. 691.

C., wishing to open an account with a bank, the defendant, in the year 1855, joined him as surety on a promissory note, payable to the bank on demand for 200*l.*; and at the same time C. and the defendant signed an agreement that the bank should be at liberty at any time thereafter to recover from both or either of them any balance that might be due from C. up to 200*l.*; the production of the note to be conclusive evidence as against the surety of the amount claimed by the bank being due from C. An account was opened, and on the 31st of December, 1855, C. was indebted to the bank, but no balance was struck until June, 1856, at which time the account was made up; and from that time the account was made up half-yearly until February, 1861, when C. was indebted to the bank to the amount of 172*l.* The action was brought in March, 1862, and it was held that the claim was not barred by the statute. The court thought the memorandum and the note ought to be read together, and that the statute did not begin to run from the time when C. first became indebted to the bank. It is not said from what point of time the statute did begin to run in this case; *Hartland v. Jukes*, 32 L. J. (Ex.) 162; 1 H. & C. 667.

Disabilities.] The act 21 Jac. c. 16, s. 73, provides that, if the plaintiff be an infant, covert, non compos, in prison, or beyond seas, when the action accrues, the six years shall run from the removal of the disability. In the case of a defendant beyond seas at the time of action accrued the action may be brought within six years after his return, by sect. 19 of 4 & 5 Anne, c. 16. In both cases a special replication is necessary.

By 3 & 4 Will. 4, c. 42, s. 4, if a person entitled to any action mentioned in that act [*ante*, p. 395] is, at the time of the accruing of the cause, under age, covert, non compos, or beyond seas, he may bring it within six years after coming of age, &c.; and if a person against whom the action accrues shall then be beyond seas, the action may be brought within six years after his return. It will be observed, that the imprisonment of a creditor is not a disability in cases governed by this last mentioned act, though it is one in cases within the 21 Jac. 1, c. 16. But now by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 10, no person entitled to an action within the time limited by the Statutes of Limitations shall be entitled to any further time by reason only that such person, or one or more of such persons, is beyond seas or was in prison when the cause accrued. And by sect. 11, in the case of joint debtors, the statutes will now run as to such as are not beyond seas, though some of the debtors

may be beyond seas; but a judgment recovered in such case will not *per se* be a bar to another action against the absent debtor after his return.

The last-mentioned act, 19 & 20 Vict. c. 97, also defines the expression "beyond seas," by enacting that no part of the United Kingdom, nor Man, nor the Channel Islands, being dominions of the Queen, shall be deemed beyond seas within either 4 & 5 Anne, c. 16, or of this last act, which last act, we have seen, extends to the disabilities provided by the previous statutes.

The proviso in case of persons beyond seas was held to extend as well to persons resident abroad as to the natives of England, and the word "return" in the acts not to imply that they must have been in this country before; *Lafond v. Raddock*, 13 C. B. 813.

When the statute once begins to run, no subsequent disability will prevent its operation; *Cotterell v. Dutton*, 4 Taunt. 826; *Rhodes v. Smethurst*, *suprà*, p. 395.

Subsequent acknowledgment.] The effect of the statute of limitations may be avoided by proof (on the common replication) of an unqualified acknowledgment of the debt within six years, which is evidence of a new promise to pay the debt, and not a mere revival of the original promise; *Heyling v. Hastings*, 1 Ld. Raym. 421; *Hurst v. Parker*, 1 B. & A. 93. A verbal promise was, before Lord Tenterden's Act, held sufficient to revive even a written guarantee, not under seal; *Gibbons v. M'Casland*, 1 B. & A. 690. The rule seems to be that a subsequent promise is only admissible, under a denial of the plea to defeat the statute, when it proves, or is evidence of the promise or other contract of the defendant as stated in the declaration.

By the 9 Geo. 4, c. 14, s. 1, "in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always, that nothing herein contained shall alter or lessen the effect of any payment of principal or interest made by any person whatever; provided also, that in actions against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

By s. 2, "if any defendant or defendants in any action on any simple contract shall plead any matter in abatement to the effect that any other person or persons ought to be jointly sued, and issue be

joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts, or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

By s. 3, "no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

By s. 4, "the recited acts, and this act, shall be deemed taken to apply to the case of any debt on simple contract alleged by way of set-off, on the part of any defendant, either by plea, notice, or otherwise."

The most material change in the law made by this act is the requiring of an acknowledgment or promise in writing signed by the party chargeable. No alteration is introduced in the language of the required acknowledgment or promise, or with regard to the party to whom it is to be made; see *Haydon v. Williams*, 7 Bing. 163, 166. No particular form is specified: a paper signed by the defendant, though without date, address, or amount due, may be sufficient; *Hartley v. Wharton*, 11 Ad. & E. 934; but it must appear what debt is intended; *Kennett v. Milbank*, 8 Bing. 38. And an acknowledgment, to take the case out of the statute, must still be such as implies a definite promise to pay; *Brigstocke v. Smith*, 1 C. & M. 483.

It was ruled at Nisi Prius that an oral statement of an account within six years and a promise to pay the balance would, in effect, take the original debt out of the statute by giving a new cause of action on the account stated; *Smith v. Forty*, 4 C. & P. 126. And this is law where there are really items of account on both sides; *Ashby v. James*, 11 M. & W. 512. See per Alderson, B., in *Hopkins v. Logan*, 5 M. & W. 248. But a mere parol statement of an antecedent debt without any new contract or consideration, made within six years, does not constitute a sufficient new cause of action to prevent the operation of the statute; *Jones v. Ryder*, 4 M. & W. 32.

Acknowledgment by part payment.] Part payment of the debt is an acknowledgment of its existence, and, as such, has always been held to take a case out of the statute as evidence of a fresh promise to pay the debt; and as Lord Tenterden's Act leaves the effect of payment as before, the cases relating to part payment are still to be considered as authority. The payment must be such as to warrant the jury in inferring an intention to pay the rest; thus, if the defendant, on paying a part, says that "he owes the money but will not pay it," this will not entitle the plaintiff to a verdict, unless the jury think that the latter words were spoken in jest. *Wainman v. Kynman*, 1 Ex. 118. It must appear that the payment was on account of the debt for which the action was brought, and that it was made as part payment of a greater debt; *Tippels v. Heane*, 1 C., M. & R. 252. It has been said that a part payment where there are two debts, without any appropriation of it, is insufficient to take either out of the statute; *Burn v. Boulton*, 2 C. B. 476; *Mills v. Fowkes*, 5 N. C. 455, post. But Martin, B., seems to doubt this in *Collinson v. Margeson*, 27 L. J.

(*Ex.*) 305. It is otherwise if the debts consist of supplies of the same nature; and even where the debts are unconnected, it may be proper to leave the payment to the jury as evidence of a payment on account of all of them; *Walker v. Butler*, 6 *E. & B.* 506; and see *Evans v. Davies*, 4 *Ad. & E.* 840. An appropriation of one payment by the creditor without the debtor's knowledge or assent is not *per se* enough to take any particular debt out of the statute; and it seems that where a debtor on two separate notes pays interest on account generally after one had been barred by the statute, it ought to be taken *prima facie* as paid on account of the note not barred, and not to be applied exclusively by the creditor to the note that is barred; *per* Lord Cranworth, *Nash v. Hodgson*, 25 *L. J. (Ch.)* 186. Part payment in goods taken as money will be an answer to the statute; *Hart v. Nash*, 2 *C. M. & R.* 337; *Hooper v. Stevens*, 4 *Ad. & E.* 71. Payment of interest on a note, due more than six years ago, will take the note out of the statute; *Bealy v. Greenslade*, 2 *C. & J.* 61; *Purdon v. Purdon*, 10 *M. & W.* 562. Part payment may be by bill or note, and this will rebut the statute if so made as to imply a promise to pay the rest, although the bill or note may never be in fact paid; *Turney v. Dodwell*, 3 *E. & B.* 136. And the delivery of a bill in part payment operates from the delivery, and not from the falling due of the bill; *Irving v. Veitch*, 3 *M. & W.* 90.

Where a payment of part is made as and for a payment of the whole that the defendant admits to be due, such payment will not take the rest out of the statute; *Waugh v. Cope*, 6 *M. & W.* 824. A payment made to the creditor to the use of his debtor by a third party, cannot be appropriated by the creditor so as to bar the statute; *Waller v. Lacy*, 1 *M. & G.* 54. Where the defendant authorised an agent to offer the plaintiff a part of his debt in discharge of the whole, and, on the plaintiff's refusal so to accept it, the agent exceeded his authority and paid the sum offered in part discharge, it was held that this was not a part payment to bar the statute; *Linsell v. Bonsor*, 2 *N. C.* 241. But generally payment by an authorised agent is payment by the principal, and the authority is a question for the jury.

Where A., B., and C., overseers, borrowed money for the parish, and gave promissory notes, signed by them as overseers, for the amount, payment of interest by the vestry or overseers for the time being, was held to bar the statute in a suit on the notes against the drawers; *Rew v. Pettet*, 1 *Ad. & E.* 196; *Jones v. Hughes*, 5 *Ex.* 104. A. gave B. a promissory note in order to get an advance on it from B.'s banker; B. indorsed it to his banker, who credited him with the amount: it was held that a payment of interest by B. to his banker within six years did not keep alive the liability of A. to the banker on the note; *Harding v. Edgecumbe*, 28 *L. J. (Ex.)* 313.

Notwithstanding several decisions, beginning with *Willis v. Newham*, 3 *K. & J.* 518, to the contrary, it is now settled that a part payment within six years, though proved only by an oral or unsigned admission of the defendant, will take a case out of the statutes; *Cleave v. Jones*, 6 *Ex.* 573. But such admission cannot be proved by the production of a book by the plaintiff, confidentially intrusted to him as the defendant's attorney in the course of business, in which book payment of interest by the defendant to the plaintiff within six years was entered; *Cleave v. Jones*, 7 *Ex.* 421, in error. An answer to a bill in chancery against the defendant, admitting the payment of

certain sums, but denying that they were paid as interest on the alleged debt due to the plaintiff, is enough to take the debt out of the statute, if the jury are satisfied by other evidence that they were in fact so paid; *Baillon v. Walton*, 1 *Ex.* 617.

The 9 Geo. 4, c. 14, s. 1 (*suprà*, p. 397), prevents an acknowledgment or promise by one of several co-contractors from taking the case out of the statutes, but part payment was unaffected by that act; *Whitcomb v. Whiting*, 2 *Doug.* 652. But now, by the 19 & 20 Vict. c. 97, s. 14, when there are several co-contractors or co-debtors bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor, co-debtor, executor, or administrator shall lose the benefit of the statute of limitations, so as to be chargeable by reason only of payment of any principal, interest, or other money, by any other co-contractor, co-debtor, executor, &c. As to the effect of such payment by a co-executor, or by a surviving contractor, or by the executor of a deceased co-contractor, before the last act; see *Slater v. Lawson*, 1 *B. & Ad.* 396; *Scholey v. Watson*, 12 *M. & W.* 510; *Atkins v. Tredgold*, 2 *B. & C.* 23. Sect. 14 of the last act is not retrospective, and payment of a co-contractor before the act still prevents the operation of the statute of limitations; *Jackson v. Woolley*, 8 *E. & B.* 778, in error, reversing the judgment below. The statute applies even if the payment be made with the knowledge and consent of the defendant, the co-debtor; *per* Crompton, J., in *Jackson v. Woolley*, *ubi suprà*.

Payment on a note to an administrator, who had neglected to take out administration in the diocese in which the note was *bonum notabile*, was held sufficient to bar the operation of the statute as against a subsequent administrator *de bonis non*; *Clark v. Hooper*, 10 *Bing.* 480. The trustees of certain legatees lent to the defendant part of the trust money upon a promissory note, describing themselves as such trustees: a payment of the principal and interest to one of the legatees within six years was held to take the case out of the statute; *Meggison v. Harper*, 2 *C. & M.* 322; 4 *Tyr.* 94. As to admissions made in a book of a testator to rebut the statute when set up against his executor, see *Bradley v. James*, 13 *C. B.* 822, and *ante*, p. 46.

Acknowledgment—by whom.] Since 9 Geo. 4, c. 14, an acknowledgment signed by an agent in the name of the principal, and with his assent, was held insufficient in *Hyde v. Johnson*, 2 *N. C.* 776. But now, by 19 & 20 Vict. c. 97, s. 13, an acknowledgment or promise made in a writing, signed by an agent of the party chargeable, duly authorised to make it, has the same effect as if signed by the party himself.

Even before Lord Tenterden's Act it was held that, as against an executor, a mere acknowledgment is not sufficient to take the case out of the statute, but there must be an express promise; *Tullock v. Dunn*, *Ry. & Mood.* 416; *Scholey v. Walton*, 12 *M. & W.* 510. Where an action was brought against A., B., and C. the wife of B., upon a joint promissory note made by A. and C. before the marriage of the latter, and the statute of limitations was pleaded, it was held that an acknowledgment of the note by A. after the inter-marriage of B. and C., was not evidence to support the issue; *Pittam v. Foster*, 1 *B. & C.* 248. An admission by a bankrupt in his balance-sheet will not take the debt out of the statute as against his assignees; *Pott v. Clegg*, 16 *M. & W.* 321. An acknowledgment by an infant

under age, of a debt for necessities supplied to him, is an answer to a plea of the statute; *Willins v. Smith*, 4 E. & B. 180.

The 9 Geo. 4, c. 14, s. 1, expressly provided that, in future, a promise by one of several debtors shall not deprive the rest of the benefit of the statute; *ante*, p. 397.

A stamp is not necessary on instruments given in evidence as acknowledgments; see 9 Geo. 4, c. 14, s. 8; but an unstamped promissory note cannot be used for this purpose; *Jones v. Ryder*, 4 M. & W. 32; see p. 145.

Acknowledgment—to whom.] Before the case of *Tanner v. Smart*, 6 B. & C. 603, *infra*, there was a good deal of confusion as to the nature of the acknowledgment which was necessary to take a case out of the statute of limitations. It was always considered that the acknowledgment must be made for the benefit of the person who relied upon it, and must correspond with the promise in the count; therefore, in an action by an executrix, a statement by the defendant to her, that "the testator always promised never to distress him for it," was held to be no evidence of a promise to pay made to the testator within six years; *Ward v. Hunter*, 6 Taunt. 210. So an acknowledgment by the acceptor of a bill that he was indebted on it to the payees, but that he was not indebted to the drawer, there being no consideration for the bill, was held not sufficient in an action by the drawer; *Easterley v. Pullen*, 3 Stark. 186.

There are, however, several older authorities to show that an admission to a third party, for the benefit of the creditor, is enough, at least under the stat. 21 Jac. 1, c. 16. Thus an acknowledgment made to a stranger that the debt is owing to the plaintiff, has been held sufficient; *Peters v. Brown*, 4 Esp. 46. So an acknowledgment in a deed between the defendant and third persons of the existence of a debt due to the plaintiffs, who are strangers to the deed; *Mountstephen v. Brooke*, 3 B. & A. 141; and see *Clark v. Hougham*, 2 B. & C. 149; *Halliday v. Ward*, 3 Camp. 32; *Clark v. Hooper*, 10 Bing. 481. So, since Lord Tenterden's Act, an admission of the existence of the debt, made by the defendant in his examination as a bankrupt taken under a superseded commission, has been held to rebut a plea of the statute of limitations; *Eicke v. Nokes*, 1 Mood. & Rob. 359; *Smith v. Poolè*, 12 Sim. 17.

On the other hand, it has been doubted whether a promise made by the maker of a note to the payee, while it was in his hands, will be available in a suit by an indorsee against the maker; *Cripps v. Davis*, 12 M. & W. 159; and, with respect to the other cases cited above, it is to be observed that they were mostly decided before the effect of an acknowledgment, as an answer to the statute, had been put on its right footing; and the better opinion is that an admission of a debt, made to a mere stranger, can only repel the statute when it can be properly left to the jury as equivalent to, or implying a promise to the plaintiff to pay him. See *Everett v. Robertson*, cited *infra* p. 405; *Howcott v. Bonser*, 3 Ex. 491, and *Forsyth v. Brittoice*, 8 Ex. 716, *post*, *Actions on Bond*.

Acknowledgment—what sufficient.] "The legal effect of an acknowledgment of a debt barred by the statute of limitations is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new

promise. But the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But, if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." *Per Wigram, V. C., Philips v. Philips*, 3 *Hare*, 281, 299. This was, in effect, the law laid down in *Tanner v. Smart*, 6 *B. & C.* 603, which overruled many previous cases; see *Buckmaster v. Russell*, 10 *C. B.*, *N. S.* 745, where Williams, J., expresses his entire concurrence in the law as stated by Wigram, V. C.

But the reports still show considerable difference of opinion as to the effect of the words on which the creditor relies for proof of the supposed promise. A mere admission of the debt, without any expressions as to the intention or ability to pay, may be sufficient. See the observations in *Hart v. Prendergast*, 14 *M. & W.* 741, 742, 746. But if the admission be so qualified as to show present inability to pay, and only the hope of coming to "some satisfactory arrangement," in the event of increased means, it is insufficient, though coupled with a disclaimer of any wish to rely on the statute; *Rackham v. Marriott*, 2 *H. & N.* 196, in error. Such expressions in a letter as, "you will certainly be repaid;" "wait a little, and all will be right;" amount to a promise, though the letter may also explain the source from which the writer expects to obtain funds; *Collis v. Stack*, 1 *H. & N.* 605. See also *Godwin v. Culley*, 4 *H. & N.* 373; *Cornforth v. Smithard*, 5 *H. & N.* 13, where Pollock, C. B., intimates that stronger words would be required to re-establish a debt already barred, than to keep alive a debt before it is barred. And a general admission of some debt being due, coupled with evidence to prove the amount, is sufficient; *Cheslyn v. Dalby*, 4 *F. & C.* 238; *Waller v. Lucy*, 1 *M. & G.* 51. But without such evidence, damages can only be nominal; *Dickinson v. Hatfield*, 1 *Mood. & Rob.* 141.

There are many reported cases in which particular letters and other written communications have been held sufficient to prove a promise; but the language in each varies, and is not likely to be exactly repeated in other cases, so that a collection of them is of little use as a guide to the decision of such points when they arise at *Nisi Prius*; nor can any reported cases on this head be relied upon before the case of *Tanner v. Smart*. A promise to pay a proportion of a joint debt has been held sufficient to entitle the plaintiff to such proportion, though no sum is specified; the plaintiff may prove the amount by other evidence; *Lechmere v. Fletcher*, 1 *C. & M.* 623, 3 *Tyr.* 450; *Bird v. Gammon*, 3 *N. C.* 883.

Acknowledgment—what not sufficient.] A paper admitting the debt, and signed by the defendant on the occasion of an agreement that it should be extinguished by an existing set-off, cannot be used to show a promise to pay; for it did not, in fact, contemplate any future payment at all; *Cripps v. Davis*, 12 *M. & W.* 159. Where, in answer to a letter from the plaintiff's attorney, the defendant wrote, "As soon as I am able to attend to my concerns, I shall wait on Captain C. (the plaintiff), whom I shall be able to satisfy respecting the misunderstanding which has occurred between

us," Gibbs, C. J., thought it not sufficient to take the case out of the statute; *Craig v. Cox*, *Holt N. P. C.* 380. So where, in answer to a demand for charges relative to the grant of an annuity, the defendant said, he thought it had been settled at the time the annuity was granted; that he had been in so much trouble since, that he could not recollect anything about it; *Hellings v. Shaw*, 1 *B. Moore*, 340; 7 *Taunt.* 611. So where the defendant, having denied the existence of the debt, said, on being requested to look at documents in proof of it, "It is no use for me to look at them, for I have no money to pay it now;" *Snook v. Mears*, 5 *Price*, 636. So where the defendant referred the plaintiff to his attorney, "who was in possession of his determination and ability;" *Bicknell v. Keppel*, 1 *N. R.* 20. Where A. admits a debt due to B. only on the understanding that a cross claim is to be also allowed, and the arrangement goes off, this is no admission by A. to bar the statute; *Francis v. Hawkesley*, 28 *L. J. (Q. B.)* 370; 1 *E. & E.* 1052; *Goate v. Goate*, 1 *H. & N.* 29.

Where the debtor stated in writing that arrangements had been making to enable him to discharge the account, that funds had been appointed of which B. was trustee, to whom he had handed the account, and that B. had authorised him to refer the plaintiff to him; this was held not sufficient to take the case out of the statute; the debtor not charging himself by the acknowledgment; *Whippy v. Hillary*, 3 *B. & Ad.* 399. So if the debtor merely refers the creditor to certain funds in the hands of others, and tells him "to pay himself" out of them, this is no promise charging himself; *Routledge v. Ramsay*, 8 *Ad. & E.* 221.

Where the acknowledgment was, "I cannot afford to pay my new debts, much less my old ones," it was held to be insufficient; *Knott v. Farren*, 4 *D. & R.* 179. So, "I will see my attorney, and tell him to do what is right;" *Miller v. Caldwell*, 3 *D. & R.* 267. But where the defendant, on being arrested, said, "I know that I owe the money, but the bill I gave was on a three-penny receipt stamp, and I will never pay it;" the acknowledgment was held sufficient; *A'Court v. Cross*, 3 *Bing.* 329. See now, however, the cases cited, *suprà*, p. 402. The following letter from the defendant to plaintiff's attorney was held not sufficient: "Since the receipt of your letter (and indeed for some time previously) I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you in the matter;" *Morrell v. Frith*, 3 *M. & W.* 402. "Send me your bill, and, if just, I will not give you the trouble of going to law," is not sufficient, as it contains no admission of any debt; *Spong v. Wright*, 9 *M. & W.* 629. The writing must import an unqualified acknowledgment of a debt, from which a promise may be inferred by the court; *Fearn v. Lewis*, 6 *Bing.* 349; *Williams v. Griffith*, 3 *Ex.* 335. And mere general expressions of a hope that the debtor may be in a condition to pay at a future day are not sufficient; *Hart v. Prendergast*, 14 *M. & W.* 741; *Smith v. Thorne*, 18 *Q. B.* 134.

Where the defendant acknowledges the debt, but insists that it is paid or discharged, the whole of his admission must be taken together, and the case will not be taken out of the statute. Thus, where the defendant said, "I have paid the debt, and will send you a copy of the receipt," but such a copy was never sent, Lord Ellen-

borough held the acknowledgment insufficient; *Birk v. Guy*, 4 *Esp.* 184; *Anon.* cited *Holt*, N. P. C. 381. Where the acknowledgment was, "You owe me more money; I have a set-off against it," it was held not sufficient; *Swann v. Sowell*, 2 B. & A. 759. "I acknowledge the receipt of the money, but the testatrix gave it me," was also held not sufficient; *Owen v. Wolley*, B. N. P. 148.

Where the defendant, in his acknowledgment, rests his discharge upon a written instrument to which he refers with precision, evidence of that instrument has been admitted to show that it does not operate as a legal discharge; *Partington v. Butcher*, 6 *Esp.* 66; *Hellings v. Shaw*, 1 B. Moore, 344; 7 *Taunt.* 608. But the doctrine is adverted to by the court with expressions of doubt in *Beale v. Nind*, 4 B. & A. 568, and can only be supported on the assumption that such an acknowledgment amounts to a conditional promise.

Where the expressions of the defendant are ambiguous, it was formerly held to be a question of fact for the jury whether they amounted to an acknowledgment of the debt; *Lloyd v. Maund*, 2 T. R. 760; and see *Linsell v. Bonsor*, 2 N. C. 241. But this has been questioned in later cases, and it has been since decided that the construction of a doubtful document, given in evidence to defeat the statute of limitations, is for the court and not for the jury; though, if intrinsic facts are adduced in explanation, these facts are for the consideration of the jury; *Morrell v. Frith*, 3 M. & W. 402; *Routledge v. Ramsay*, 8 Ad. & E. 221; *Smith v. Thorne*, 18 Q. B. 134.

An acknowledgment since action brought is not sufficient; *Bateman v. Pinder*, 3 Q. B. 574, overruling *Ma v. Fouraker*, Burr. 1099.

A. and B. were joint and several makers of a promissory note, and A. having made an assignment for the benefit of his creditors, B. gave to the payee of the note the following memorandum:—"I hereby consent to your receiving the dividend under A.'s assignment, and do agree that your doing so shall not prejudice your claim on me for the same debt." It was held that this was insufficient as against B.; *Cockrill v. Sparke*, 32 L. J. (Ex.) 118; 1 H. & C. 699. Where there were disputed accounts, and the parties agreed to refer them to an arbitrator "to ascertain the amount due," the amount to be paid "at such times and in such proportions as the arbitrator may appoint;" it was held to be insufficient; *Hales v. Stevenson*, 11 W. R. 33, Q. B.; affirmed in error, 11 W. R. 952.

In *Bush v. Martin*, 2 H. & C. 311, 33 L. J. (Ex.) 17, the claim was for work and labour as an attorney against commissioners under a local improvement act. The commissioners appointed a committee to inquire into the state of their finances, and the committee delivered a signed report, in which the sum claimed was shown to be due to the plaintiff. The commissioners adopted the report, and ordered a rate to be levied in accordance with the recommendation of the committee to defray the sums therein found to be due. This was held not to be sufficient; Pollock, C.B., relying on *Emery v. Day*, 1 C., M. & R. 245, where a somewhat similar acknowledgment was attempted to be set up. But no decision was there given as to whether or no the acknowledgment was sufficient, because the plaintiff failed to produce it.

In *Parmiter v. Parmiter*, 30 L. J. (Ch.) 508, the acknowledgment was, "I have sent you a note for the money due to you, which your mother left for you." With this acknowledgment was sent a promissory note, on a receipt stamp. It was held by Lord Campbell that

there was no sufficient acknowledgment without the promissory note, and that the promissory note, not being properly stamped, could not be looked at.

In *Everett v. Robertson*, 1 F. & E. 16; 28 L. J. (Q. B.) 23, the plaintiff proved that the defendant had presented a petition for arrangement with his creditors under the 7 & 8 Vict. c. 70, and had inserted in his accounts the debt on which the action was brought; and his proposal was to assign all his property to trustees "for the future payment or compromise of such debts and engagements." This was held to be insufficient.

Acknowledgment—conditional.] When the promise relied upon is conditional, the plaintiff must show the condition performed; thus, where the defendant promised to pay the debt when he was able, it was ruled that the plaintiff was bound to show that the defendant was then of sufficient ability to pay; *Davis v. Smith*, 4 Esp. 36; *Beafield v. Saunders*, 2 H. Bl. 116. So where the promise was, "I cannot pay the debt at present; but I will pay it as soon as I can," the Court of King's Bench held it necessary for the plaintiff to show the defendant's ability to pay; *Tanner v. Smart*, 6 B. & C. 603. If the debtor promises to pay the old debt "when he is able," or "by instalments," or "in two years" or out of a certain fund, the creditor can claim nothing more than the new promise gives him. *Per Wigram, V. C.*, in *Philips v. Philips*, 3 Hare, 281, 299, cited in *Smith v. Thorne*, 18 Q. B. 139. And the statute runs from the time of becoming able to pay, though the plaintiff had no notice of the ability, and made no demand; *Waters v. Thanet*, 2 Q. B. 757.

A doubt has existed whether the plaintiff is bound to declare specially on such qualified promise, or can show, under the common replication of denial to the plea of the statute, that the promise is become absolute by the performance of the condition; but it seems to be now settled that a conditional promise may, after performance of the condition, be shown under the common issue on a plea of the statute; *per Parke, B.*, in *Hart v. Prendergast*, 14 M. & W. 743, 745; *Smith v. Thorne*, 18 Q. B. 134, 143; and such is the practice, though cases may occur of a promise so qualified as to require a special declaration, as to pay in a particular manner.

Whether the promise be qualified, or not, is a question of construction for the court and not for the jury, except where extrinsic evidence affects the construction; *Routledge v. Ramsay*, 8 Ad. & E. 221.

Mutual accounts, &c.] Before the 9 Geo. 4, c. 14, it was held that, where there have been mutual current and unsettled accounts between the parties, and any of the items are within six years, such items are evidence (under the replication that the defendant did promise, &c.) as an admission of an open account so as to take the case out of the statute, like any other acknowledgment; *Catling v. Skoulding*, 6 T. R. 189; 2 Saund. 227, a. (n.). But since that statute there must be part payment, or something equivalent to it, or a distinct, written acknowledgment, to have this effect; *Williams v. Griffiths*, 2 C. M. & R. 45; *Mills v. Fowkes*, 5 N. C. 455; *Cottam v. Partridge*, 4 M. & G. 271. See also as to merchants' accounts, *ante*, p. 394.

Payment.

The new pleading rules of H. T. 1853, direct that payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar; and that in any case in which the plaintiff (in order to avoid the expense of the plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted, to have been paid to the plaintiff, it shall not be necessary for the defendant to plead payment. But the rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. See rules 13 & 14. There is nothing in the rules to prevent the plaintiff from giving express credit for payments in his declaration; *Nicholl v. Williams*, 2 M. & W. 758, 764; but this course, though it would avoid a plea of payment, would not relieve the plaintiff from proving the whole debt, including the amount alleged to have been paid; *Price v. Rees*, 11 M. & W. 576.

Since these rules payment cannot be given in evidence without a plea, though only for the purpose of showing that interest is not due on the debt demanded, the debt itself being admitted by payment into court; *Adams v. Pulk*, 3 Q. B. 2. Where the plaintiff gave the defendant credit in his particular for a bill endorsed to the plaintiff and debited him with the amount as dishonoured, the defendant was not permitted to show, under non-assumpsit, that the plaintiff had made the bill his own by laches; for the particular, in effect, gives no credit at all, and the constructive payment must therefore be pleaded; *Green v. Smithies*, 1 Q. B. 796. The plaintiff's particular set forth a bill amounting to 116*l.*, and professed to go for "a balance of 27*l.* after credit for payments on account and set-off:" held that this did not amount to giving credit for the exact difference, but the defendant was bound to plead payments; *Morris v. Jones*, *id.* 397.

Payment cannot be shown on a plea of set-off; *Linley v. Polden*, 3 Dougl. P. C. 780; and see *Lewis v. Samuel*, 8 Q. B. 685. It is however sometimes difficult to say whether a receipt or retainer of money by a creditor amounts to a payment or a set-off; see *Thomas v. Cross*, 7 Ex. 728; 21 L. J. (Ex.) 251. But probably, if the effect of the transaction were wrongly stated, a judge would amend in such a case.

It is difficult to understand the reasoning upon which the decision in one case and an alleged dictum in another is founded that, where goods are sold for ready money, and the delivery in exchange for money takes place immediately, no debt arises, and that consequently in an action for goods sold and delivered in such a case it is not necessary to plead payment, but that the nature of the transaction may be shown under the plea of never indebted. Of course, if this view be taken of the transaction, there is, strictly speaking, no payment, for when there is no debt there can be no payment. But it is scarcely possible to suppose a case of exchange for goods for money which is not preceded by a prior offer and acceptance, and it is upon the contract thus made, and which the plea of payment confesses and avoids, that the action is brought. The ruling in *Bussey v. Barnett*, 9 M. & W. 312, which is usually relied on for the doctrine under

discussion, seems to be contrary to the opinion of Parke, B., in *Goodchild v. Pledge*, 1 M. & W. 363. It was also disputed in *Littlechild v. Banks*, 7 Q. B. 739; and in *Smith v. Winter*, 21 L. J. (C. P.) 158; 12 C. B. 487, was said to have gone "to the very verge of the law." In *Timmins v. Gibbons*, 18 Q. B. 726, Lord Campbell said, that "where money is paid over the counter at the time of sale, there must be a moment of time when the purchaser is indebted to the vendor." It is said, however, that a similar opinion was again expressed by the Court of Exchequer in a case of *Wood v. Bletcher*, 5 Week. Rep. p. 566.* In *Smith v. Winter*, *supra*, in debt for work and labour, it was held that where work was to be done by a debtor for his creditor as a set-off against the debt, that in action for work and labour this might be shown under the general issue. But this is obviously an entirely different case.

An account stated between plaintiff and defendant, and payment of the balance, is evidence under a plea of payment, though it may be specially pleaded according to the facts; *Callander v. Howard*, 10 C. B. 290; 19 L. J. (C. P.) 312.

Where, in answer to a claim for 10*l.* 13*s.* 4*d.*, the defendant sent 10*l.*, which the plaintiff said he should not accept in discharge of his claim, but nevertheless retained, it was held that there was evidence of payment; *Cuine v. Coulton*, 1 H. & C. 764.

Where the plaintiff's particular admits a payment, he can recover only the amount by which his claims, as proved, exceed the payment, as alleged; *Rowland v. Blaksley*, 1 Q. B. 403; see also *Price v. Rees*, 11 M. & W. 576, ante, p. 406. And if it gives credit thus, "creditor,—by bills of exchange, 1500*l.*," this will be taken to be a payment by the defendant, and the plaintiff cannot show that it was a payment by another person, for which the defendant is not entitled to credit; *Smethurst v. Taylor*, 12 M. & W. 545. But the plaintiff may explain that the payment, for which the particular gives credit, was not made on account of the balance he claims; *Mercy v. Galot*, 3 Ex. 851. In this case the plaintiff seems to have included in the particular items which he could not have recovered, but which had been paid by the defendant. In another case, the particular claimed a balance of 29*l.* for goods sold, and gave credit for 920*l.* paid; the plaintiff proved a claim of 949*l.* for goods sold; it appeared that 84*l.* worth of the goods had been taken back, and defendant insisted at the trial that this sum, added to the sum credited, left nothing for the plaintiff to recover: Held, that the plaintiff might turn the balance in his favour by showing that he had given credit for 84*l.* as part of the payment; *Lamb v. Micklethwait*, 1 Q. B. 400. Where credit is given for a sum paid, whether before or after action, a plea of payment applies only to the balance, and proof of payment of that amount is sufficient; *Eastwick v. Harman*, 6 M. & W. 13. Where the plaintiff proceeded in his particular for a "balance" of 37*l.*, and the particular stated sales to the amount of 100*l.*, and gave no credit for specific payments, and the defendant pleaded and proved a set-off of 5*l.*, with other pleas, it was held that the defendant was not necessarily entitled to deduct the set-off from 37*l.*; but the jury might find that sum to be the "balance" after deducting the 5*l.*; *Townson v. Jackson*, 13 M. & W. 375.

In an action brought to recover 30*l.* for work and labour, the defendant pleaded the general issue, and payment of all the monies

* Not reported by *Hurlstone* and *Norman* or in the *Law Journal*.

in the declaration mentioned; at the trial, the defendant proved payment of 90*l.*: it was held that plaintiff might show work done to an amount exceeding 90*l.*, and recover the balance, and no new assignment is necessary; *Freeman v. Crafts*, 4 *M. & W.* 4. This decision has been recognised and confirmed in *James v. Lingham*, 5 *N. C.* 553; *Alston v. Mills*, 9 *Ad. & E.* 248; and *Moses v. Levy*, 4 *Q. B.* 213. In *Rogers v. Cusance*, 1 *Q. B.* 77, the declaration was for work and labour, and particulars were delivered for contract work and extra work; the defendant pleaded *nunquam indebitatus*, and a plea of payment confined to contract work; the replication traversed the payment: it was held that the plaintiff could not recover for extras without a new assignment.

By the Common Law Procedure Act, 1852, s. 75, pleas of payment and set-off shall be taken distributively; and, if issue be taken thereon, and so much as shall be an answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes as shall be answered, and for the plaintiff in respect of so much as shall not be so answered.

As to payment of bills or notes, see *ante*, p. 209.

Payment to an agent.] Payment to an authorised agent is sufficient; *Goodland v. Blewitt*, 1 *Camp.* 477; *Coutes v. Leves*, *Id.* 444; *Owen v. Barrow*, 1 *N. R.* 101. Thus payment to an attorney, while an action is subsisting, is good; *Anon.* 1 *Doct. P. C.* 173; but not to his clerk, who shows no other authority than his master's order to receive it; *per* Lord Kenyon, C. J., *Coore v. Callaway*, 1 *Esp.* 115. The attorney's authority to receive seems to continue as long as the retainer; and this is presumed to continue after judgment until payment, voluntarily, or under execution: *Bevis v. Hulme*, 15 *M. & W.* 88, 96. Payment to the attorney's agent is not good; *Yates v. Freckleton*, 2 *Doug.* 623. But payment to a person found in a merchant's counting-house, and appearing to be entrusted with the conduct of the business there, is a good payment to the merchant, though the person was, in fact, not employed by him; *Barrett v. Deere*, *Mood. & M.* 200; and see *Wilmott v. Smith*, *Mood. & M.* 238. But this is on the assumption that the payment relates to the merchant's business; for if it be payment in respect of a private debt due to him, as a mortgage debt, or a legacy, it will not be sufficient; *Sanderson v. Bell*, 2 *C. & M.* 304, 313. So if a clerk, authorised to receive cash over the counter, obtains payment in another way by a cheque, which he appropriates, this is not a discharge; *Kaye v. Brett*, 5 *Ex.* 269. An agent employed to sell land has no authority, as such, to receive payment; *Mynn v. Joliffe*, 1 *Mood. & Rob.* 326; and, generally, an agent for taking a bond, or for negotiating, or concluding a contract, has no implied authority to receive money due under it; *Story on Agency*, s. 98. Even the possession of the instrument, as the possession by the agent of a conveyance to secure a loan of money negotiated by the agent, is no authority to receive the principal, although the creditor may have sometimes permitted the agent to receive interest; *Wilkinson v. Candlish*, 5 *Ex.* 91. So possession of an executed conveyance with a receipt indorsed by vendor is no sufficient authority to the solicitor of vendor to receive the purchase money; and circumstances may justify the vendee in requiring the personal attendance or written

authority of the vendor; *Viney v. Chaplin*, 27 L. J. (Ch.) 434; 2 De G. & J. 468. Possession of a negotiable security is evidence of authority to receive payment; *Story on Agency*, s. 104, citing *Owen v. Barrow*, 1 N. R. 103. But such possession will not alone justify payment. It is only *prima facie* evidence of agency as against the real owner, and may be rebutted; *Anon.* 12 Mod. 564. As a general rule, when a person employs an agent to receive a debt he must receive it in money, and if the agent sets it off against a debt from himself, the creditor cannot rely on this as payment; *Barker v. Greenwood*, 2 You. & Coll. Ec. 418; though if it be the usage of a particular trade that debts should be set off in this way, the principal may be bound by the usage; *Scott v. Irving*, 1 B. & Ad. 605; *Sweeting v. Pearce*, 29 L. J. (C. P.) 265; and the principal would be taken to be bound by the usage if such were the general usage of the trade or market in which the transaction took place, and he did not object to it; *ib.*

An auctioneer, though he is authorised to receive the deposit, has no general authority to receive the purchase-money; *Sykes v. Giles*, 5 M. & W. 645. Payment to the factor who sold the goods, and who was known to sell as such, is good against the principal, though made prematurely; *Fish v. Kempton*, 7 C. B. 687.

Where a creditor directs his debtor to transmit money or a bill in payment by the post, and it is lost (without default of the debtor), the creditor must bear the loss; *Warwick v. Noakes*, 1 Peake Ca. 98; and where no directions are given about the mode of remittance, yet if this be done in the usual way of business between the parties, it seems that the debtor is discharged; *per Lord Kenyon*, C. J.; *ib.*

A payment to one of several persons who have deposited money in a bank, and who are not partners, is not good as against the others; *Innes v. Stephenson*, 1 Mood. & Rob. 145; *Stewart v. Lee*, Mood. & M. 158. But a payment to one partner is payment to all; and a receipt by one is *prima facie* evidence of payment against all; but it may be rebutted by proof that it was given in fraud of the other partners in order to defeat the action; *Farrar v. Hutchinson*, 9 Ad. & E. 641.

Payment by an agent will support an averment of payment by the principal, though the latter has not in fact repaid the agent; *Adams v. Dunsey*, 6 Bing. 506.

Payment by one of several partners is payment by all; but where one of several partners paid a sum of money to a creditor in consideration that the creditor would assign the debt to a trustee for the partner, it was held that, in an action brought by the trustee in the name of the creditor against the partnership, the above facts did not support a plea of payment; *McIntyre v. Miller*, 13 M. & W. 725. Where it was agreed between A., B., and C., that A. should advance money to B. in anticipation of money of B. that was coming into A.'s hands, and on receiving in the meantime the security of C.'s acceptance, which was to be satisfied out of such money; it was held that, on receipt of B.'s money by A., it might be relied on by C. as payment by him in an action against him by A. on the acceptance; *Hills v. Mesnard*, 10 Q. B. 266. In an action against the surety of A., a bankrupt, there was a plea of payment by A., and acceptance in satisfaction by the plaintiff: held, on issue taken on the plea, that a payment by A. to the plaintiff, which was recovered back by A.'s assignees as a fraudulent preference, would not support the plea, and

that the verdict and judgment of the assignees was evidence, but not conclusive, for the plaintiff to show that the payment was illusory; *Pritchard v. Hitchcock*, 6 M. & G. 151.

Payment by a third person, if made on behalf of the defendant, accepted by the plaintiff, and adopted by the defendant, is a good defence; *Simpson v. Egginton*, 10 Ex. 845; *Belshaw v. Bush*, 11 C. B. 191; 22 L. J. (C. P.) 24; *Kemp v. Balls*, 10 Ex. 607. But payment by a third person without the debtor's knowledge, and not on behalf of the defendant, but as an advance for the creditor's convenience, is no payment, though pleaded as such by defendant; *Lucas v. Wilkinson*, 1 H. & N. 420; 26 L. J. (Ex.) 13.

Application of payments.] In general, the party who pays money has a right to direct the application of it; but where money is paid to a creditor generally without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to whichever of those demands he pleases; *Hall v. Wood*, 14 East, 243 (n); *Clayton's case*, 1 Merivale, 572. The appropriation by the debtor need not be express: it may be inferred from conduct or circumstances indicating his intention; *Clayton's case*, *ubi supra*; *Newmarch v. Clay*, 14 East, 239. The intention of the debtor ought to be notified at or before the time of payment; *Mayfield v. Wadshay*, 3 B. & C. 357. But the creditor need not apply it to any particular demand at the moment of payment; he has a right to make the application at any subsequent period; nor will an entry in his private books applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand; *Simson v. Ingham*, 2 B. & C. 65. See also *Grigg v. Cocks*, 4 Sim. 438. The creditor, in such cases, may apply the payment to the discharge of a prior and purely equitable demand, and sue his debtor at law for the subsequent legal debt; *Bosanquet v. Wray*, 6 Taunt. 597. But this can only be done if the equitable debt be of agreed and ascertained amount; for it will not be competent for the creditor to apply it in satisfaction of some equitable demand, the amount of which can only be ascertained by an account in equity or general settlement of partnership; *Goddard v. Hodges*, 1 C. & M. 33; or which depends only on an equitable assignment to the creditor of some claim of a third party on the debtor; *semble*, *Birch v. Tebbutt*, 2 Stark. 74. The creditor may apply it to a debt barred by the statute of limitations; though we have seen that part payment so appropriated by the payee only will not *per se* take the whole debt out of the statute; *Mills v. Fockes*, 5 N. C. 455. See *ante*, p. 398. Where the party paying is indebted to the party receiving for a sum due from his wife *dum sola*, and also on another demand, the party receiving may apply the money to the first demand; *Goddard v. Cox*, 9 Stra. 1194.

In some instances, and in the absence of any proof of special appropriation, the law will direct or presume the application of money paid generally. Of this nature are accounts current with bankers and others, where there are various items of debt on one side and credit on the other, occurring at different times, and no special appropriation is made by the parties; successive payments will then be applied to the discharge of antecedent debts in the order of time in which they stand; *Story's Equity*, s. 459 a. Such cases stand on the presumed intention of the debtor, or of both parties, arising out of the nature of the dealings between them. Thus, where one

of several partners dies while the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, who joins the transactions of the old and new firm in one entire account, the payments made from time to time by the surviving partners will be applied to the old debts; *per* Bayley, J., *Simson v. Ingham*, 2 B. & C. 72; *Clayton's case*, 1 Merivale, 572; *Brooke v. Enderby*, 2 B. & B. 71. So payments by a debtor, from time to time, to surviving partners, upon one general account, including an old debt due to the former firm, will be applied in the first place to such old debt; *Bodenham v. Purchas*, 2 B. & A. 39. But where the old debts are not brought into the new account, general payments on the new account are not to be considered as made in discharge of an old debt; *Simson v. Ingham*, 2 B. & C. 65. And where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the debt of the individual; *Thompson v. Brown*, Mood. & M. 40.

In the absence of special application by either party, there is no rule in which a general payment is applied on any principle grounded on the comparative burden of different debts, or with reference to the interest of the debtor or of his sureties; *Mills v. Fowkes*, 5 N. C. 455. Thus the law will not, in favour of a surety, direct the application of money, paid generally, to the discharge of the debt secured, without some circumstances to show that it was so intended; *Plomer v. Long*, 1 Stark. 153; *Williams v. Raulinson*, 3 Bing. 71; and where a surety joined in a money bond to secure advances by a bank to his principal, and it appeared that the security was intended, though not expressed, to be a continuing one, payments will not be applied to the extinction of the bond in preference to later debts; *Henniker v. Wigg*, 4 Q. B. 792. The case of *Marryatts v. White*, 2 Stark. 101, occasionally cited in proof of the doctrine that payment will be applied in favour of sureties, is one in which the evidence tended to show that the payments were *in fact* made by the debtor in relief of the surety, and not on account of an earlier debt to which creditor claimed to apply it.

When A. has a demand against B.'s wife as executrix, and also another demand against him in his own right, and B. makes a general payment, A. cannot apply it to the former demand; for the obligation to pay it depends on whether or no there are assets; *Goddard v. Cox*, 2 Stra. 1194. Where there are two demands, one legal, and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal demand; *Wright v. Laing*, 3 B. & C. 165. But the party receiving money may himself apply it to a demand for spirituous liquors supplied in quantities not amounting to 20s. at a time; for the statute 24 Geo. 2, c. 40, only prevents the seller from maintaining an action; *Cruickshanks v. Rose*, 1 Mood. & Rob. 100. And in such a case, the creditor may apply the payment to the demand for spirituous liquors, although his particulars claim the whole demand; and he may make the appropriation at any time before the matter comes before the jury; *Philpott v. Jones*, 2 Ad. & E. 41.

Payment by a bill or note.] If the seller of goods takes notes or bills for them without agreeing to run the risk of the notes being paid, and they turn out to be worth nothing, this will not be considered as payment; *Owenson v. Morse*, 7 T. R. 64; *Swinyard*

v. *Bowes*, 5 M. & S. 62. But if the seller agrees to run the risk, and to take it as payment or cash, he cannot, on the dishonour of the bill, resort to his original cause of action: *Ward v. Evans*, 2 Salk. 442; *Sard v. Rhodes*, 1 M. & W. 153. The legal effect of accepting, on account of a debt, a bill or note not treated as cash is that of a conditional payment. It implies an agreement to suspend the remedy on the original demand during the currency of the bill or note, except in the case of specialty debts, or rent, in which last cases no such implication is held to arise; *Griffiths v. Owen*, 13 M. & W. 58, 64; *Belshaw v. Bush*, 11 C. B. 191; 22 L. J. (C. P.) 24, 28. And a bill given by a stranger and received by the creditor on account of the debt has the same effect, if such payment be adopted by the debtor, *ib.*; *Constable v. Andrew*, 2 C. & M. 298. And taking a bill "for and on account, and in payment of the price," is not a satisfaction of the debt, but only a conditional payment; *Bottomley v. Nuttall*, 5 C. B., N. S. 122; 28 L. J. (C. P.) 119. Where a purchaser gives the seller an order upon a third person entitling him to receive cash, instead of which the vendor elects to take a bill, in such case, though the bill is dishonoured, the purchaser is discharged; *Vernon v. Boverie*, 2 Show. 296; *Smith v. Ferrand*, 7 B. & C. 19. But it is otherwise if the order is upon the purchaser's agent, and the seller takes from him a cheque, which is dishonoured; *Everett v. Collins*, 2 Camp. 515. Where the master of a vessel took from the freighter's agent abroad, who was furnished with funds to pay him the freight, a bill upon a third person, which was dishonoured, it was held by Gibbs, C. J., that the freighter was not thereby discharged; *Marsh v. Pedder*, 4 Camp. 257.

There may be some difficulty in saying precisely what is the duty of a creditor to whom a cheque is sent by his debtor in discharge of the debt. The question is, whether the debtor has the right to throw on his creditor the burden of accepting the cheque as payment, or sending it back, and this would in some cases depend on the usages of trade and the previous dealings between the parties. If there were no such right, then the sending the cheque would go for nothing; if there were any such right, then the creditor, by retaining the cheque, might reasonably be presumed to have accepted it in discharge of the debt. The whole is a question of fact, which is, perhaps, best left to the decision of the jury; see *Pearce v. Davis*, 1 Mood. & Rob. 365; *Boswell v. Smith*, 6 C. & P. 60; *Hough v. May*, 4 Ad. & E. 954.

Proof that bills have been given for a debt (and *qy.* that the bills are due) is *prima facie* evidence of payment, without showing that such bills were in fact paid, and it is for the plaintiff in an action for goods sold to show that they have been dishonoured; *Hebden v. Hartsink*, 4 Esp. 46; *Stedman v. Gooch*, 1 Esp. 4.

The rule, as now settled, is that, if a negotiable bill or note be received by the creditor and afterwards lost, this is an answer to an action on the original consideration; *Croce v. Clay*, in error, 9 Ex. 604; S.C. 23 L. J. (Ex.) 150. See also the cases, *ante*, p. 137.

If the value of the security be diminished by the creditor's laches or misconduct, it is made his own, and operates as payment of the debt; *Alderson v. Langdale*, 3 B. & A. 660, 663. A vendor took from his vendee, as collateral security, a bill accepted by a third person, indorsed by the drawer and payee to the vendee, the bill was retained by the vendor, and at its maturity it was not paid by the

acceptor, who was insolvent, but no notice of dishonour was given by the vendor: and it was held, in an action for goods sold, that the laches of the plaintiff operated so as to make the bill (though taken originally as collateral security only, and though unpaid) payment *pro tanto*; *Peacock v. Purcell*, 32 *L. J. (C. P.)* 266. The vendor of goods received an acceptance of the vendee, and sent it back with a request to make it payable at a banker's. The bill not being returned by the vendee, the vendor sued him for goods sold, and defendant set up the bill and its non-production as a defence, denying that it had been returned to him: Held that this was no defence if the jury were satisfied that it had been returned to, and kept by the defendant; *Widders v. Gorton*, 1 *C. B., N. S.* 576; 26 *L. J. (C. P.)* 165.

Other kinds of payment.] A payment may be made by the mere transfer of figures in an account without any money passing; *Eyles v. Ellis*, 4 *Bing.* 112; *Bodenham v. Purchas*, 2 *B. & A.* 39.

In an action on a bill of exchange the defendant pleaded payment. It appeared that the plaintiff had sold shares for A. on credit, but that A., being in the want of money, obtained an advance from the plaintiff of the amount due for the shares, the defendant giving his acceptance also for the amount as further security; but it was agreed between the plaintiff and defendant and A. that the plaintiff should apply the proceeds of the sale of the shares, when paid, in payment of the bill. The plaintiff received the proceeds: it was held that these facts constituted payment; *Hills v. Mesnard*, 10 *Q. B.* 266.

If a debtor pay a sum of money to a third person, by direction or with the assent of his creditor, in discharge of a liability of the creditor, it is the same as if the money were paid into the creditor's own hands; *Waller v. Andrews*, 3 *M. & W.* 312; *Bramston v. Robins*, 4 *Bing.* 11; *Chit. Contr.* 4th ed. 615.

If goods be accepted in satisfaction of a debt this constitutes payment; *Cannon v. Wood*, 2 *M. & W.* 465; *Hooper v. Stephens*, 4 *Ad. & E.* 71. In neither of these cases did the question arise upon a plea of payment, but it seems that giving goods in satisfaction might be proved under that plea.

Release.

A release must be specially pleaded, and the evidence depends on the replication. After breach, the contract can only be discharged by a release under seal, or accord and satisfaction; but before breach it may be discharged by parol, *ante*, p. 31.

A plea of release under seal may be answered by a traverse of the release *modo et formâ*; *Wilkinson v. Lindo*, 7 *M. & W.* 81, 86; and under such a replication it should seem that the plaintiff may contend that the operation of the release was so qualified by the recital as not to include the plaintiff's debt; *ibid.* So if to a plea alleging a release under seal plaintiff replies *non est factum*, the plaintiff may show that the release expressly excepted the debt from its operation, for the replication puts in issue the execution of *such a deed* as released the defendant; *North v. Wakefield*, 13 *Q. B.* 536; if the deed appears verbatim on the plea and the defendant does not profess to state only its legal effect, then *non est factum* only puts the defendant to prove the execution, and its legal effect will be open on

demurrer, or motion for judgment *non obstante veredicto* : *semb. ib.* But *Jubb v. Ellis*, 3 Dowl. & L. 364, 15 L. J. (Q. B.) 94, in the Bail Court, seems *contra*. There Patteson, J., held, that where the plaintiff replied *non est factum* to a plea of release, he could not give evidence that the debt was subsequent to the release pleaded, but that a new assignment was necessary. In *Henderson v. Stobart*, 5 Ex. 99, the construction of the deed pleaded as a release was admitted on the replication of *non est factum*. In *Todd v. Emly*, 11 M. & W. 1, to a plea of the release of one defendant, *non est factum* was replied and issue taken thereon. The plea was held to be proved by production of a lease cancelled by the release since the plea ; “for the meaning of the replication is, that it is not the deed of the plaintiff for the purpose of proving a release,” and that the plea was proved by a deed which *had* operated as a release, though since cancelled. Where there were cross debts, and the plaintiff sued for the whole of his debt, and defendant pleaded a release of the whole, it appeared that plaintiff had signed a composition deed releasing the defendant from any debts owing to the plaintiff. The deed left the amount of debt released in blank : Held that, on a finding by the jury that the debt meant to be released was the difference between the plaintiff’s debt and a set-off of less amount, the plaintiff was entitled to a verdict on the issue of *non est factum* replied to the release, although the blank had, after execution and without the plaintiff’s authority, been filled up with the *whole* amount of the debt sued for ; *Fitzakerly v. McKnight*, 6 E. & B. 795. *Semb.* the defendant should have pleaded the set-off and a release of the difference. See *Bullen and Leake on Pleading*, 2nd ed. 567.

A release of one of two joint, or joint and several, debtors, is a discharge of all ; *Nicholson v. Kevill*, 4 Ad. & E. 675. But although a release of the whole debt, given to one of two joint, or joint and several, contractors, enures to the benefit of both, yet receiving a portion of a debt and putting an end to an action against one of them, is not a release of the other ; *Walters v. Smith*, 2 B. & Ad. 889. And a release to one of several contractors if qualified,—as a release, reserving the right to join the releasee in a suit for the purpose of recovering against the others,—is not pleadable as a release of all ; *Solly v. Forbes*, 2 B. & B. 38. But where the right is not reserved in the release itself, parol evidence of the reservation cannot be given ; *Cocks v. Nash*, 9 Bing. 341.

An unqualified covenant not to sue will support a plea of release ; but a covenant by one of several joint creditors not to sue the defendant is not pleadable as a release to an action by all ; *Walmesley v. Cooper*, 11 Ad. & E. 216. And a covenant not to sue for a certain time is inoperative as a bar. See note to *Fowell v. Forest*, 2 Wms. Saund. 48 ; *Ford v. Beech*, 11 Q. B. 853.

Fraud practised on the releasor must be replied, if relied upon ; *Wild v. Williams*, 6 M. & W. 490 ; and where the clerk of the defendant’s attorney procured a cunningly worded release from an illiterate plaintiff, this was held evidence of fraud ; *Sargent v. Wedlake*, 11 C. B. 732.

Rescission.

Before breach a simple contract may be rescinded and discharged by a mutual parol agreement ; *Milton v. Edgeworth*, 6 Bro. P. C.

587, and see cases, *ante*, p. 31. To a declaration on a general breach of contract to deliver goods weekly for a year, it was pleaded that the contract was rescinded before breach. It was held that if there was a single breach before rescission, the plea failed in toto; and that there was no need of a new assignment; *Burgess v. De Lane*, 27 L. J. (Ex.) 151.

Set-off.

The plea of set-off is given by 2 Geo. 2, c. 22, s. 13, which enacts that where there are mutual debts between the plaintiff and the defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other by plea or notice. By 8 Geo. 2, c. 21, s. 5, it is declared, that mutual debts may be set against each other, though they be of a different nature; but where either debt accrues by reason of a penalty in a bond or specialty, the plea must show how much is truly and justly due on either side, and, in case of recovery, judgment shall be entered for no more than appears due to the plaintiff after so setting one debt against the other.

A set-off must now be specially pleaded, unless the set-off and the particulars of such set-off be stated and admitted to be due to the defendant in the plaintiff's particular. *R. G. Hil.* 1853, r. 13. And the set-off must continue down to the time of trial; *Eyton v. Littledale*, 4 Ex. 139. Therefore payment since plea may be replied, *ib.*; and *semble*, when the replication alleges that the plaintiff "was not, nor is indebted," in the usual form, he may show such payment or other extinction of the debt.

By the Common Law Procedure Act, 1854, s. 75, the plea of set-off is to be taken distributively.

The common replication *nil debet*, or *nunquam indebitatus*, to a plea of set-off will enable the plaintiff to prove any defence to it (*e.g.*, payment), that would have been admissible before the late rules of pleading; for those rules do not apply to replications; *Jackson v. Robinson*, 8 Doct. P. C. 622, accord. *Grover v. Price*, 3 Q. B. 240, note. But where the plaintiff replied "*nunquam*" *indebitatus*, the plaintiff was held not entitled to prove payment; for on that issue the defendant was only put to prove that a debt once existed; *Stockbridge v. Sussans*, 3 Q. B. 239; *Miller v. Atlee*, 3 Erch. 799; *Faithful v. Ashley*, 1 Q. B. 183. A discharge of the plaintiff under the Insolvent Debtors' Act must be specially replied; for the statute 1 & 2 Vict. c. 110, s. 91, extends to replications as well as pleas; *Ford v. Dornford*, 8 Q. B. 583. So, of the statute of limitations, for this has always been held necessary in pleading; *Chapple v. Durston*, 1 C. & J. 1; and see 9 Geo. 4, c. 14, s. 4, cited *ante*, p. 398. In order to reply the statute with effect, it must appear that the set-off was barred before action, for the set-off is in lieu of a cross action brought at the same time as the plaintiff's action; *Walker v. Clements*, 15 Q. B. 1046.

Since the Common Law Procedure Act, 1852, it seems to be no longer necessary or expedient to apply at *Nisi Prius* for a special finding, or indorsement on the *postea*, to protect the plaintiff from another action for the amount allowed on the set-off in reduction of the plaintiff's demand (see *Laing v. Chatham*, 1 Camp. 252); for the jury will be directed as of course to find for the defendant as to the

amount proved by him, and for the plaintiff for the difference, if any.

The sum stated in a general plea of set-off is not material, so long as the proof does not exceed the amount stated; therefore, where a set-off is alone pleaded, the only question raised is, whether the true amount of set-off exceeds [or equals] the balance claimed on the plaintiff's particular; and it is immaterial that it is less than the demand in the declaration; *Nichols v. Tuck*, 22 L. J. (Q. B.) 351, in the Bail Court. Where the statute of limitations was alone replied to a set-off, Tindal, C. J., held that the plaintiff could not dispute that the set-off exceeded the plaintiff's demand; *Moore v. Wood*, 2 Mood. & Rob. 407. But this is doubtful; for the Court, in *Fairthorne v. Donald*, 13 M. & W. 424, intimated an opinion that under the usual form of plea, the single replication of the statute of limitations puts the defendant on proof of a debt equal to, or exceeding, the plaintiff's, and due within six years. There are, however, precedents of replications denying part of the set-off, and pleading the statute as to another part; *ibid.*; *Blakesley v. Smallwood*, 8 Q. B. 538; and the difficulty is now put an end to by the divisibility of the plea, and the power of replying double to it.

Where the defendant has been obliged to finish work which the plaintiff had contracted to do, and for which he seeks to recover in an *indebitatus* count, the amount laid out by the defendant is not a set-off, but matter of deduction on the general issue; *Turner v. Diaper*, 2 M. & G. 241. So if the defendant finds materials for work done by the plaintiff for him, he may deduct the value of such materials in an action for the work, without a plea of set-off; *Newton v. Forster*, 12 M. & W. 772. So where there are no cross demands, but the nature of the employment or dealings necessarily constitutes an account consisting of receipts and payments, debts and credits, the balance only is the debt. See *Green v. Farmer*, Burr. 2221; *Le Loir v. Bristow*, 4 Camp. 134.

The defendant pleaded by way of set-off, a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person which had been previously granted by the defendant, and that a certain sum was in arrear: It was held that the defendant was not bound to prove that he had paid the money in order to set it off; but that on production of the bond the plaintiff was bound to prove payment; *Penny v. Foy*, 8 B. & C. 11.

Where the defendant pleads a set-off, the plaintiff who claims several debts is not obliged to prove the whole of them in the first instance, but may, in the discretion of the judge, be permitted to prove the balance which he claims, and, on the defendant's establishing his set-off, may prove the items of his account to cover it; *Williams v. Davies*, 1 C. & M. 464. If the defendant puts in evidence to prove a set-off an account rendered by the plaintiff, he must take both sides of the account. This was held even where the plaintiff was an attorney, and the other side of the account consisted of the plaintiff's bill of costs, and no signed bill had been delivered by the plaintiff under the statute; *Harrison v. Turner*, 10 Q. B. 482. An attorney's bill may be set off without any previous delivery of a signed bill; for the 6 & 7 Vict. c. 73 (cited *ante*, p. 266), only prevents an attorney from bringing "any action" before such delivery; *Brown v. Tibbits*, 31 L. J. (C. P.) 206, 11 C. B., N. S. 855; in which the decisions under the old acts, 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, which were not uniform, are reviewed.

See *Martin v. Winder*, 1 *Doug.* 199, n.; *Bulman v. Birkett*, 1 *Esp.* 449; *Lester v. Lazarus*, 2 *C., M. & R.* 669, *per Parke, B.*; *Murphy v. Cunningham*, 1 *Anstr.* 198. The plaintiff may obtain an order for the delivery of a bill under sect. 37 of the act.

By R. II. 1853, No. 19, with every plea of set-off containing claims particulars whereof, in the case of a declaration, must have been delivered by a plaintiff, the defendant must also deliver particulars; and the plaintiff's attorney must annex a copy of such particulars of set-off to the record when entered for trial.

As to the effect of such particulars of set-off as evidence, see cases cited *ante*, p. 67.

Where the particular of set-off claimed on an "acceptance" of the plaintiff, and it was in fact an indorsement by him, the variance was held immaterial, the amount and date being sufficient to prevent the plaintiff from being misled; *Parsons v. Wilson*, 3 *M. & G.* 445. By the Truck Act, 1 & 2 Will. 4, c. 37, s. 5, in a suit for wages of an artificer or workman in certain manufactures, a plea of set-off for goods supplied by the employer cannot be pleaded.

Nature of the debt set off, and of the debts against which it is set off.] The debt set off must be a legal and not a mere equitable debt, for the sole object of the statute is to make cross actions unnecessary; and the debt must be due from the plaintiff to the defendant; therefore, although the plaintiff may be a mere trustee for a third person not a party, a debt from that person to the defendant cannot be set off; *Isberg v. Bowden*, 8 *Ex.* 852. A joint and several note of the plaintiff and others to defendant may be set off against a debt due from defendant to plaintiff alone; *Owen v. Wilkinson*, 5 *C. B., N. S.* 526; 28 *L. J. (C. P.)* 3. The two debts must be mutual and due in the same right; therefore, if the set-off is due from the plaintiff and another, this answers the plea on the replication of *nil debet*, for it is not such a debt from the plaintiff as can be set off; *Arnold v. Bainbridge*, 9 *Ex.* 153; 23 *L. J. (Ex.)* 59. A set off is not an equity which runs with a bill or note indorsed when overdue; and therefore a set-off between the maker and indorser of such a note cannot be set up against the indorsee; *Whitehead v. Walker*, 10 *M. & W.* 696; *Oulds v. Harrison*, 10 *Ex.* 572; 24 *L. J. (Ex.)* 66.

The demand intended to be set off must be liquidated; *Freeman v. Hyett*, 1 *W. Bl.* 394. In *Morley v. Inglis*, 4 *N. C.* 58, Tindal, C. J., said the test to be applied to ascertain whether the claim could be set off was, whether *indebitatus assumpsit* could be maintained for it; if it could, then it might be set off. This test is approved by Hill, J., in *Crampton v. Walker*, 30 *L. J. (Q. B.)* 19. Where the plaintiff guaranteed payment of all expenses incurred by defendant, and the defendant paid travelling expenses so guaranteed, this was held a proper set-off as money paid; *Hutchinson v. Sidney*, 10 *Ex.* 438; 24 *L. J. (Ex.)* 25. So in an action by a servant against his master for wages, the latter cannot set off the value of goods lost by the negligence of the former; but if it should be proved to be part of the original contract that the servant should pay out of his wages the value of his master's goods lost through his negligence, this would be tantamount to an agreement that the wages should be paid only after deducting the value of the things so lost, which, in an action of *indebitatus assumpsit*, would be a defence *pro tanto* under the general issue; *Le Loir v. Bristow*, 4 *Camp.* 134. A servant who was engaged on the terms of receiving a quarter's salary on dismissal

without notice, may, upon such dismissal, set off the salary against an action against him by his late master for money received to the plaintiff's use; *East Anglian Railway Co. v. Lythgoe*, 10 C. B. 726. A stipulated sum, to be paid on the non-performance of certain work as liquidated damages, may be a subject of set-off; *Fletcher v. Dyche*, 2 T. R. 32. Money allowed in account in error may be set off as money had and received by the plaintiff. If in the settlement of an account an error be made, and the party in whose favour it is made afterwards sue the other, the latter may set off the amount wrongly credited to the plaintiff, as money had and received by the plaintiff to the use of the defendant; *Gingell v. Purkins*, 4 Ex. 720.

A judgment may be pleaded by way of set-off, though a writ of error be pending thereon; *Reynolds v. Beerling*, cited 3 T. R. 188; see *Curling v. Innes*, 2 H. Bl. 372; and where, in an action on a promissory note for 30*l.*, the plaintiff took a verdict for the whole sum, and the defendant had at the same sittings an action against the plaintiff for 11*l.*, to which there was a notice to set off the note of hand, the Court held that, notwithstanding the verdict, the note might be set off; *Baskerville v. Brown*, B. N. P. 180; *Burr*, 1229; *Evans v. Prosser*, 3 T. R. 186. A debt cannot be set off till it is actually due; *Rogerson v. Ladbroke*, 1 Bing. 99. A debt barred by the statute of limitations cannot be set off; and if pleaded, the plaintiff may reply the statute; B. N. P. 180; and it must be replied, if relied on.

With regard to the nature of the demand against which the set-off is claimed, it must be liquidated damages. Therefore an underwriter cannot set off unpaid premiums in an action on a valued policy for a partial loss, although adjusted by agreement before action brought; for such adjustment is only evidence for the jury of the amount of loss; *Luckie v. Bushby*, 13 C. B. 864; 22 L. J. (C. P.) 220. So in assumpsit for not indemnifying the plaintiff against certain accommodation acceptances, whereby he was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses, it was held that a set-off could not be pleaded; *Hardcastle v. Netherwood*, 5 B. & A. 93; but the defendant might, perhaps, have pleaded a set-off to that part of the count which charged him with the amount of the acceptances paid by the plaintiff; *ibid.*; *Auber v. Lewis*, *Manning's Nisi Prius Index*, 251. And where the plaintiff declared specially in assumpsit for not accounting with a count for money had and received, and non-assumpsit was pleaded to the whole declaration and a set-off to the general count, and the plaintiff proved a balance due to him, which might have been recovered under either count, Gibbs, C. J., held that the defendant might avail himself of his set-off; *Birch v. Depeyster*, 4 Camp. 387. But see *Brune v. Thompson*, 4 Q. B. 543.

By bankrupts.] The cases on mutual credit and set off between a bankrupt and other persons, will be found, *post*, Part III., tit. *Actions by Assignees of Bankrupts*.

By executors.] In an action by an executor in his own name to recover money due to the testator in his lifetime, and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator; *Shipman v. Thomson*, *Willes* 103. So though the plaintiff declares as executor, if the cause of action

really arose after the death of the testator; *Kilrington v. Stevenson*, *Schw. N. P.* 145. And it has now been decided in error that in an action for money received, by the defendant to the use of the plaintiff as executor or administrator, and on an account stated with the plaintiff as executor or administrator, defendant cannot set off monies lent by him to the testator or intestate; *Rees v. Watts*, 11 *Ex.* 410; 25 *L. J. (Ex.)* 30. So where the plaintiff sues an executor for a debt due from the testator to the plaintiff, the defendant cannot set off a debt for money received by the plaintiff to the use of the defendant as executor, or for money due to the defendant as executor on an account stated between the plaintiff and defendant; *Murdall v. Thelluson*, 6 *E. & B.* 976. The above decisions turn on the mutuality required by the statute between the testator or intestate and the other party.

By factors and agents.] An agent employed to recover a sum of money is entitled to retain a just allowance for his labour and service therein, and, as such allowance is not in the nature of a cross demand or mutual debt, he may give it in evidence under the general issue in an action for money had and received; *Dale v. Sollet*, *Burr.* 2133; and when the plaintiff sues in *indebitatus assumpsit* for an alleged balance in the agent's hands, this appears to be still law, notwithstanding the new rules. See also the cases cited *ante*, p. 417.

Where a factor sells goods without disclosing the name of his principal, the purchaser, being ignorant of the fact, in an action by the principal for the price, may set off a debt due to himself from the factor; *Rabone v. Williams*, 7 *T. R.* 360 (*n*); *George v. Clayett*, 7 *T. R.* 359; *Carr v. Hinchliff*, 1 *B. & C.* 547. So if, on a sale of goods to defendant, the agent holds himself out as owner, and not as agent of the plaintiff, the real owner, and the jury find that the plaintiff allowed him to do so, then the plaintiff's claim is subject to any right of set-off existing between the agent and defendant; *Ramozotti v. Burring*, 29 *L. J. (C. P.)* 30. But if the factor was known to be such, and to sell in that character, no such set-off can be pleaded against the principal; *Fish v. Kempton*, 7 *C. B.* 687; and if, before the goods are all delivered, and before any part is paid for, the purchaser is informed that they belong to the plaintiff, it has been ruled that the purchaser cannot set off a debt due to him by the factor; *Moore v. Clementson*, 2 *Camp.* 22; see *Wagner v. M'Kay*, 1 *M. & W.* 591. This head of set-off is not strictly the subject of a plea under the statute, for there is no mutuality between the plaintiff and defendant in such an action; but it is a set-off arising from the rule of law that a vendor, who accredits his agent and authorises him to contract as principal with a purchaser who knows him only as principal cannot, by resuming the character of principal, deprive his vendee of the equities which he has against the apparent vendor whether by common law (as by payment), or by a set-off. Hence this set-off was evidence under the general issue under the old system of pleading without notice of set-off; and under the new rules, though a special plea may be necessary, it should not properly profess to be pleaded "by virtue of the statute;" see *Tucker v. Tucker*, 4 *B. & Ad.* 745; *Isberg v. Bowden*, 8 *Ex.* 852, 859; and *Carr v. Hinchliff*, 4 *B. & C.* 547, *per* Little Dale, J. If the agent sues in his own name, as in the case of a ship's master, defendant cannot set up a debt due to him from the owner, although the plaintiff sues for the

sole benefit of the owner; *Isberg v. Bowden*, *supra*. It has been held that a broker (whose character differs materially from that of a factor), in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and that the buyer therefore cannot set off a debt due from the broker to him in an action for the price by the principal; *Baring v. Corrie*, 2 D. & A. 137; though, of course, the relation is capable of being modified by the course of dealing between the broker and his principal. A judgment debt recovered in the name of a trustee may be pleaded by the *cestui que trust* by way of equitable set-off to a demand to which it would have been pleadable, if recovered in the *cestui que trust's* own name; *Cockrane v. Green*, 30 L. J. (C. P.) 97; 9 C. B., N. S. 448. To a declaration for freight, the defendant pleaded a set-off; the plaintiff replied, on equitable grounds, that before the freight had become due, the plaintiff assigned his claim in respect thereof to one E., and that he was bringing the action as trustee for E., and alleged that the defendant had notice of the assignment; this was held to be a bad plea; *Wilson v. Gabriel*, 11 Weekl. Rep. 803, Q. B.

In an action for calls brought by liquidators in the name of a company in the course of being wound up, the contributor may set off a debt due to him from the company; 11 Weekl. Rep. 167, Q. B.

If a creditor sues one of two debtors jointly liable, the defendant may show that fact, and plead a set-off of a debt due from plaintiff to the defendant and his co-debtor; *Stackwood v. Dunn*, 3 Q. B. 822.

Tender.

A plea of tender (like a plea of payment of money into court) operates as an admission of the special contract stated in the count to which it is pleaded; *Cox v. Brain*, 3 Taunt. 95. Thus, in an action on a guarantee it supersedes the necessity of proving it to be in writing; *Muddleton v. Brewer*, Peake C. 15. On issue joined as to the tender, the date of the writ, as stated on the record, is evidence of the commencement of the action; *Whipple v. Manley*, 1 M. & W. 432.

If the defendant pleads to several general counts (besides other pleas as to all but the sum tendered), a tender of a single sum "as to parcel of the monies in the declaration mentioned," which the plaintiff traverses, proof of the tender as to the demand in one of the counts satisfies the plea; *Robinson v. Ward*, 8 Q. B. 920.

By whom a tender must be made.] The tender need not be made by the debtor himself; it is sufficient if made by his agent; and a tender by an agent, at his own risk, of more than the money given to him by his principal, is good; *Read v. Goldring*, 2 M. & S. 86.

To whom a tender must be made.] A tender to a person authorised by the creditor to receive money for him is sufficient; *Goodland v. Blewitt*, 1 Camp. 477; *Kirton v. Braithwaite*, 1 M. & W. 310. Where a clerk, in the habit of receiving money for his master, was directed by him not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money assigning the reason, it was held

to be a good tender to the principal; *Moffat v. Parsons*, 5 Taunt. 307. But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaimed any authority from his master to receive the debt, was held insufficient; *Bingham v. Allport*, 1 N. & M. 398. Accord. *per Parke, B.*, *Watson v. Hetherington*, 1 C. & K. 36. A tender of the debt sued for to the attorney on the record, while he continues to be such, is a good tender to the principal; *Crozer v. Pilling*, 4 B. & C. 26. And a tender to a person in the office of the plaintiff's attorney, to whom the defendant was referred by a clerk in the office, and who refused the tender only as being not enough, was held a good tender without showing who that person was; *Willmott v. Smith*, Mood. & M. 238. So a tender to a person in the plaintiff's (a merchant) place of business, who appeared to be conducting it, is good, though not, in fact, entrusted to receive money; *Barrett v. Deere*, Mood. & M. 200. But it is otherwise where the payment is not connected with the plaintiff's business, but quite collateral to it; *Sanderson v. Bell*, 2 C. & M. 304. Where the money was brought to the house of the plaintiff and delivered to his servant, who appeared to go with it to his master and returned saying that his master would not take it, it was held to be evidence from which the jury might infer a tender; *Anon.*, 1 Esp. 349. A tender of a partnership debt to one of several partners is sufficient; *Douglas v. Patrick*, 3 T. R. 683.

Tender—to what amount.] Tender of part of one entire debt is inoperative; *Dixon v. Clark*, 5 C. B. 365. If a man tenders more than he ought to pay, it is good; for the other ought to accept so much as is due to him; *Wade's case*, 5 Rep. 114; *Astley v. Reynolds*, 2 Str. 916. Thus proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver will support a plea of tender of 20*l.*; *Dean v. James*, 4 B. & Ad. 546. But it seems that such a tender is only good where it is made in monies numbered, so that the creditor may take what is due to him; therefore, a tender of a 5*l.* note, requiring change, is not good; *Betterbec v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336; *Watkins v. Robb*, 2 Esp. 711; *Brady v. Jones*, 2 D. & R. 305. But a tender of too much, without requiring change, is good; *Reed v. Goldring*, 2 M. & S. 86. So tender of enough to pay one of several items in a bill, if offered in satisfaction of the whole, is not good; but if specifically applied by the debtor to that one item at the time of payment it is a good tender; *Hardingham v. Allen*, 5 C. B. 793. And where a greater sum is tendered than the sum pleaded, and the creditor refuses to receive it only on the ground that the amount is not sufficient, and not on account of the form of the tender, the tender is good; *Black v. Smith*, Peake Ca. 88; *Saunders v. Graham*, Gow. 121. So where defendant laid down a gross sum in coin, and desired the plaintiff to tell him what was due, and to take principal and interest out of it, this was held good; *Bevans v. Rees*, 5 M. & W. 306. Where a party has several demands for unequal sums against several persons, a tender of one sum for the debts of all, is not a good tender of any one of the debts; *Strong v. Hurvey*, 3 Bing. 304. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender; *Douglas v. Patrick*, 3 T. R. 683; and see *Black v. Smith*, Peake Ca. 88.

Tender—in what kind of money.] By stat. 56 Geo. 3, c. 68, s. 11, the gold coin of the realm was declared to be the only legal tender for payments (except as thereafter provided) within the United Kingdom of Great Britain and Ireland. And by sect. 12, no tender of payment of money made in the silver coin of the realm, of any sum exceeding the sum of 40s. at one time, shall be a legal tender.

By the 3 & 4 Wm. 4, c. 98, s. 6, it is provided, that from and after the 1st day of August, 1834, a tender of a note or notes of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes for all sums above 5*l.* on all occasions on which a tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin; provided that no such note shall be deemed a legal tender of payment by the Bank of England, or any of its branch banks.

The party to whom the tender is made is not obliged to state his objection to receiving it, but, if he does so, he must rely on the objection he states, and he will be taken to have waived other objections. Thus, if he claim a larger amount than that offered, and give that alone as a reason for not accepting it, he cannot afterwards object that the tender was in country bank notes; *per* Bayley, B., in *Polyglass v. Oliver*, 2 C. & J. 15; *Lockyer v. Jones*, Peake 180 (n). A tender of a banker's cheque may be good under the like circumstances; *Walby v. Warren*, Tidd Prac. 8th ed. 187; *Jones v. Arthur*, 8 Doucl. P. C. 442.

Tender—money must be produced.] The actual production of the money due is necessary, unless the creditor dispenses with the production of it at the time, or does anything which is equivalent to a dispensation; *Thomas v. Evans*, 10 East, 101; *Polyglass v. Oliver*, *ubi supra*. In *Thomas v. Evans* the defendant left 10*l.* with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called, and the plaintiff said he would not receive the 10*l.* nor anything less than his whole demand, but the clerk did not produce the 10*l.*, this was held to be no tender; and *Dickinson v. Shee*, 4 Esp. 68, is to the same effect. But where the defendant went to the plaintiff and told him that he had eight guineas and a half in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff told him, "he need not give himself the trouble of offering it, for that he would not take it," the tender was held to be good; *Douglas v. Patrick*, 3 T. R. 684; and see *Ryder v. Townsend*, 7 D. & R. 119. The agent of the defendant met the plaintiff in the street, and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*; the plaintiff said he would not take it; the witness then said he would give him the other 10s. out of his own pocket and run the risk of being repaid; he then pulled out his pocket-book, and told the plaintiff that, if he would go into a neighbouring public-house, he would pay him, but the plaintiff said he would not take it; this was held to be a good tender of 4*l.* 10s.; *Read v. Goldring*, 2 M. & S. 86. Where a witness stated that the defendant was willing to give the plaintiff 10*l.*, and the witness offered to go and fetch that sum, but that the plaintiff said "she need not trouble herself, for he could not take it," this was held to be as good as a tender; *Harding v. Davies*, 2 C. & P. 77. And see also *Polyglass v. Oliver*, *supra*, p. 421, from which it would appear that

the tender in *Thomas v. Evans*, *supra*, ought to have been held sufficient. Where money was offered by letter, which the plaintiff declined by letter, saying, "I decline your tender," this was held insufficient; *Powney v. Blomberg*, 14 Sim. 179. On a plea of tender of 1*l.* 12*s.* 6*d.*, the jury found, specially, that the defendant's attorney called on the plaintiff, and said, "I come to pay you 1*l.* 12*s.* 6*d.* which the defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying, "I can't take it; the matter is now in the hands of my attorney:" It was held that, upon this finding, the defendant was not entitled to judgment; *Finch v. Brook*, 1 New Ca. 253, S. C. 1 Scott, 70. But the court seem to have been of opinion that a dispensation of the production might have been inferred from the above facts, and found by the jury. See *Ex parte Dunks*, 22 L. J. (Bank.) 73.

Tender must be unconditional.] In order to support a plea of tender, there must be evidence of an *unqualified* offer. An offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender; *Evans v. Judkins*, 4 Camp. 156; *Hurham v. Smith*, 2 Camp. 21; *Strong v. Hurvey*, 3 Bing. 304; *Hough v. May*, 4 Ad. & E. 954. But a tender, accompanied by a statement by the defendant that "he has come to pay the amount of his (the plaintiff's) bill," is sufficient, though the plaintiff insisted that "it was not his bill," and refused it on that account; for such statement is no more than is implied in every tender, viz., that the debtor intends to cover the whole demand, and asserts that it does so; *Menwood v. Oliver*, 1 Q. B. 409; *Bowen v. Owen*, 11 Q. B. 130. So a tender of the full amount demanded, accompanied with a protest, is good; *Manning v. Lunn*, 2 C. & K. 13; *Thorpe v. Burgess*, 8 Dougl. P. C. 603; and *Simmons v. Wilmott*, 3 Esp. 94, seems to be not law. If the tender cannot be accepted without supplying evidence of an admission that no more is due, then it is conditional, and therefore bad; *Bowen v. Owen*, *supra*. So where a tender is accompanied with a demand of a receipt in full of all demands; *Glasscott v. Day*, 5 Esp. 48; *Higham v. Baddely*, Gosc. 213; *Ryder v. Townsend*, 7 D. & R. 119. Where the defendant tendered the money, saying, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff refused to take it, Abbott, C. J., held this to be no tender; *Laing v. Meuder*, 1 C. & P. 257. It was held in that case that the debtor ought to bring a receipt with him, and require the creditor to sign it; if the latter refused to do so and to pay for the receipt stamp, he was liable to a penalty by the 43 Geo. 3, c. 126, ss. 4, 5. The 16 & 17 Vict. c. 59, introduced a uniform duty of one penny, but the 43 Geo. 3, c. 126, ss. 4 & 5, are not repealed, and the further duty of cancelling the stamp is imposed by s. 4 on the recipient. But though a party, tendering money, cannot, in general, demand a receipt for it, yet where the creditor did not object to the demand of a receipt, but only that the sum was insufficient, the tender was held good; *Richardson v. Jackson*, 8 M. & W. 298. Some doubt seems to have been expressed in this case as to whether the demand of a receipt, in any case, would render a tender insufficient, but where two quarters' rent, due Michaelmas and Christmas, was demanded, and the tenant tendered the Christmas only, and demanded a receipt for that quarter's rent, this was held to be no sufficient tender even of that quarter's rent; *Finch v. Miller*, 5 C. B. 428. Where the defendant tendered a sum

of money, and at the same time delivered a counter claim upon the plaintiff, and the plaintiff did not take up the money or paper but simply said, "You must go to my attorney," the tender was held insufficient; *Brady v. Jones*, 2 D. & R. 305.

Whether a tender be conditional or not is a question for the jury, where the words or facts accompanying it are disputed; *Eckstein v. Reynolds*, 7 Ad. & E. 80. But if the goodness of it turns on the meaning or legal effect of a letter or writing accompanying it, then the question is for the judge; *semble*, *Bowen v. Owen*, 11 Q. B. 130. And the same rule would seem, on principle, to apply to unwritten expressions used by the party tendering, where the tenor of them is not disputed.

Tender—prior or subsequent demand and refusal.] The plaintiff may reply a prior or subsequent demand and refusal; and such demand must be proved to be of the precise sum tendered; *Rivers v. Griffiths*, 5 B. & A. 630. The demand must be by a person authorised at the time to receive the money; and therefore a demand by the clerk of the plaintiff's attorney (who does not bring his master's receipt) is insufficient; *Coore v. Callaway*, 1 Esp. 115. And the subsequent adoption of an unauthorised demand is not enough; *Story on Agency*, s. 247. A subsequent demand upon one of two joint debtors is sufficient; *Peirce v. Bowles*, 1 Stark. 323. A letter sent by the plaintiff and received by the defendant, demanding the sum tendered, is not sufficient evidence of a subsequent demand; for, at the time of the demand, the defendant should have an opportunity of immediately paying the sum demanded; *Edwards v. Yeates*, Ry. & Mood. 360; but see *Hayward v. Hague*, 4 Esp. 93.

ACTIONS ON SPECIALTIES.

ACTION ON COVENANTS RELATING TO LAND.

The evidence in this action depends upon the particular breaches of covenant alleged by the plaintiff, and the mode in which they are stated or denied in the pleadings. A covenant is nothing more than an agreement expressed in an instrument in writing, executed as a deed. Such agreements, after proof of the deed in which they are contained, are subject to the rules of construction applicable to ordinary documents. As land is for the most part conveyed and leased by instruments under seal, certain covenants usually inserted in these instruments are frequently the subject of an action. The evidence necessary in the proof of a breach of several of the more important of these covenants will hereafter be given.

Covenants in general.] There need be no formal words of covenant. Any words in a deed, showing an agreement to do a thing, make a covenant; as "that the lessee shall repair;" *Com. Dig. Covenant* (A. 2). "It is agreed that A. shall pay B. for his goods," is a covenant by B. to deliver them to A., as well as by A. to pay. So a lease by A. to B. "excepting a room and free passage to it," is a covenant by B. not to disturb the passage, but is not a covenant as to disturbing in the room. So a covenant may be in the form of a proviso or condition; *Id.* A recital of an intended line in an agreement may amount to a covenant to levy one; *Id.*; *Farrall v. Hilditch*, 5 C. B., N. S. 840. But a conveyance by A. to a railway company of land "intended to be formed into a new course" for a river, and a covenant by the company to make a bridge over the new cut for A.'s use, does not imply a covenant to make the new cut or divert the river; *Rashleigh v. The South-Eastern Railway Co.*, 10 C. B. 612. An acknowledgment by A. in a deed that he owes B. £—, may be treated as a covenant to pay; *Courtney v. Taylor*, 6 M. & G. 851. See also *Knight v. The Gravesend Water Works*, 27 L. J. (Ex.) 73; 2 H. & N. 6; where *Rashleigh v. The South-Eastern Railway Co.* is said to have been doubted in the House of Lords on an appeal, and to have been compromised. An indenture between A. and B. provided that A. should buy all the coal used by him from B., but that B. "should not be compelled to supply more than 500 tons per week," and in case of inability to supply "to the extent agreed upon," and notice thereof to A., A. might buy elsewhere: This was held to be a covenant by B. to supply coal to the extent of 500 tons unless unable from substantial cause; *Wood v. The Copper Miners' Co.*, 7 C. B. 906. A covenant by the lessee of a coal mine to draw to, and deposit on the surface of the demised premises by some of the pits or shafts of the demised mine, for the use of the lessor, all the manure made underground, does not imply a covenant by the lessee to make pits or shafts on the demised land, although such pits may have been contemplated by both parties; *James v. Cochrane*, 7 Ex. 170; in error, 8 Ex. 556.

By the 8 & 9 Vict. c. 106, s. 4, in deeds executed since the 1st Oct., 1845, the words "give" and "grant" are not to imply any

covenant in respect of real property, except by force of some Act of Parliament (such as by 8 & 9 Vict. c. 18, s. 132). This is in reference to the old authorities by which covenants were implied from the words "demise" and "grant;" *Com. Dig. Covenant (A. 4)*. Implied covenants for title are restrained by express covenants contained in the same deed and incompatible with them; for *expressum facit cessare tacitum*. *Shep. Touch. cap. 7, p. 165*.

The following are some of the most material issues arising in actions on leases or other conveyances of real property:—

Evidence on plea of non est factum.] By the rules of H. T. 1853, R. 10 and 12, under this plea the plaintiff need only produce and prove the execution of the deed; see *ante*, p. 77. Where the action is not for any liquidated sum, it is also necessary to prove the amount of damage.

Where a deed is pleaded according to its supposed legal effect, *non est factum* puts in issue not only the execution of it, but the legal effect as stated; *North v. Wakefield*, 13 Q. B. 536. The plea in such a case in effect denies execution of any deed corresponding with the one described in the count. But where the deed is recited *verbatim*, the construction is for the court on demurrer, and *non est factum* only denies the execution, or the accuracy of the transcript of the deed set forth.

If the deed after sealing be tendered to the covenantee, and he expressly rejects it, and refuses to take any benefit from it, the execution is incomplete. This defence may be given in evidence under *non est factum*; *Whelpdale's case*, 5 Co. Rep. 119 a.; *Xenos v. Wickham*, 33 L. J. (C. P.) 13. So also under the same plea the covenantee may show that the deed was executed upon the understanding that it should operate only upon some given event which has not happened; *Murray v. The Earl of Stair*, 2 B. & C. 82. This plea also admits objections to the deed under the stamp laws; *Mason v. Bradley*, 11 M. & W. 590.

In an action by lessor on covenants contained in a lease under seal, and which depend on the existence of the term, as, for instance, those to repair and pay rent during the term, the defendant may set up that the lease has not been executed by the lessor; *Swatman v. Ambler*, 8 Ex. 72; *Pitman v. Woodbury*, 3 Ex. 4. But it seems that this is a defence which must be pleaded specially, and cannot be set up under the general issue; *Swatman v. Ambler*, *ubi supra*; *Morgan v. Pike*, 14 C. B. 473; 23 L. J. (C. P.) 64. And such a defence is not applicable to a covenant to invest money contained in a mortgage deed; *Morgan v. Pike*, *ubi supra*.

Where one of several covenantees sues as sole covenantee without joining the others or showing their death, this will be a variance on *non est factum*; but if one of several joint covenantors be sued without naming or joining the rest, this is only pleadable in abatement; 1 Wms. Saunders, 154, n. (i). A covenant by A., B. and C., that they or some of them will pay, &c., may be sued as on a covenant by any one of them; *Caldwell v. Breke*, 2 Ex. 318.

A question may arise under *non est factum*, or other appropriate plea, whether the plaintiffs, who sue, are the proper parties to an action. Where the covenant is with A. and B. jointly, yet if the interest of each is several, as on a conveyance of distinct lands by each, they cannot join as plaintiffs; 1 Wms. Saund. 154, n. (1). But if the covenant is expressly made to several, though for the benefit

of one only, it is a joint covenant and all must join; *Anderson v. Martindale*, 1 *East*, 497. The rule, as expressed in the latest cases, is, that where the covenant is to or with several persons, it will be construed to be joint or several according to the interest of the covenantees apparent in the deed, provided the words admit of such construction. But if the covenant be expressly and unambiguously a joint one, then the interest will not control the construction, and all the covenantees must join; *Sorsbie v. Park*, 12 *M. & W.* 146; *Hopkinson v. Lee*, 6 *Q. B.* 964; *Haddon v. Ayers*, 28 *L. J. (Q. B.)* 105. On a covenant to repair, or to work mines, in a lease which all the tenants in common of the land (including the trustees and *cestui que trusts* of some) concurred in granting, all the covenantees or their survivors must join; *Bradburne v. Botfield*, 14 *M. & W.* 559; see also *Wakefield v. Brown*, 9 *Q. B.* 209; *Keightley v. Watson*, 3 *Ex.* 716; *Magnay v. Edwards*, 13 *C. B.* 479; *Pugh v. Stringfield*, 3 *C. B., N. S.* 2.

The insertion of more covenantors than ought to be joined creates a variance, but the superfluous ones will generally be struck out at the trial, on application. Where the action is on an implied covenant, persons who are parties to the deed only for confirmation with no legal estate (as where trustee and *cestui que trust* join as lessors), should not be joined as defendants; *Smith v. Pocklington*, 1 *C. & J.* 445. Whether, in an action by assignees of the reversion on express covenants, it is proper to join as co-plaintiffs persons who have no legal interest in the reversion, is a question not yet at rest; see *Wakefield v. Brown*, and *Magnay v. Edwards*, cited *supra*.

As to the execution of deeds, see *ante*, p. 77.

Alteration of deed.] Where the defence is that the deed of covenant has been altered since execution, so as to avoid it, it must be specially pleaded. It was held in *Pigot's case*, 11 *Co.* 26, *b.*, that an immaterial alteration by a stranger does not avoid a deed; but, if made by a party interested, the alteration will avoid it as against him, whether material or not; and a material alteration by a stranger avoids it. But see *contra*, as to this last point, 2 *Sugd. Powers*, 193, citing *Henfree v. Bromley*, 6 *East*, 310; and *Alderson, B.*, in *Hutchins v. Scott*, 2 *M. & W.* 814. An alteration in a deed may be accounted for on the ground of accident, and the better opinion seems to be that the cancellation or destruction of a deed by him or his means that is bound by it does not render the deed void; *Shep. Touch.* p. 69. Where a deed appears to have erasures and interlineations, the presumption is that they were made before execution; *Doe v. Catmore*, 16 *Q. B.* 745. The rule is different in wills. In *Adsetts v. Hires*, 9 *Jur. N. S.* 1063, it was held that a mortgage deed was not made void by the fact that the date of the day of payment in the proviso for redemption, and the names of the tenants in the parcels, had been filled in by the mortgagee after the execution of the deed. The alleged alteration cannot be proved by the declarations of a deceased attesting witness; *Stobart v. Dryden*, 1 *M. & W.* 615. See further, *post*, under *Action on Bond*, and *Alteration of Contract*, *supra*, p. 382.

Evidence on plea of assignment over by defendant.] In an action against the assignee of a term on a covenant in the lease, he may plead that he assigned over the term before breach; and if the plea be traversed, he must prove the assignment; that is, that the whole

term has been legally transferred by him to another. The 8 & 9 Vict. c. 106, s. 3, requires that an assignment should be proved by an instrument under seal. Where the defendant proved that, although he had executed the assignment, it had not been delivered to his assignee, having remained in the hands of the defendant's solicitor who had prepared it for, and by order of, the assignee, and who had a lien upon it, it was held sufficient; *Odell v. Wake*, 3 Camp. 304. It would be otherwise if delivered as an escrow, or rejected by the assignee. The defendant need not prove notice to the plaintiff of the assignment; *Pitcher v. Tovey*, 1 Salk. 81; nor the assent of the assignee to the assignment, for assent is presumed; *Thompson v. Leach*, 1 Show. 296; 1 Freem. 503 (ed. 1826), n. (b). But his express refusal may, of course, be shown; and perhaps his incapacity to accept from infancy or some other cause. A replication that the assignment was fraudulent will not be supported by mere proof that the assignment was to a beggar in order to get rid of liability; *Taylor v. Shum*, 1 B. & P. 21. But if there was real fraud, as a secret trust for the benefit of the assignor, it would probably defeat the plea; *ib.*: which it would certainly do in Equity, 1 Fonb. Treat. Eq. 259, and seq.

Evidence on plea traversing assignment to plaintiff.] Where the plaintiff sues as assignee of the reversion, and the defendant traverses the title as stated, it will be incumbent upon the plaintiff to prove it, either by showing the mesne conveyances from the original lessor, or by showing that the defendant has paid rent to himself, which will be evidence of the plaintiff's title as assignee; *Doe v. Parker*, Peake Er. 283, 5th ed.; see also *Carvick v. Blaggrave*, 1 B. & B. 531.

Where a lease, made by *cestui que trust* under a power in a settlement, with covenants for rent, &c., with the lessor and "his assigns," recited the equitable estate of the lessor, it was held that "assigns" meant assigns of the settlor, and that the assignee of the legal reversion, though not assignee of the lessor, was entitled to take advantage of the covenants and condition of re-entry; *Greenaway v. Hart*, 14 C. B. 340; 23 L. J. 115; and that the lessee was not estopped from disputing the lessor's title to sue; *ib.* The question who are assignees of the reversion, so as to be entitled to sue by virtue of the 32 Hen. 8, c. 34, is usually decided upon the pleadings, and not at *Nisi Prius*.

Evidence under the plea of eviction.] An action of covenant for non-payment of rent can be defeated by proof of an eviction of the defendant from the premises in question, either by the lessor or one whose title is better than his. As to what amounts to an eviction, see *ante*, p. 169. An eviction of the lessee by the lessor from part of the demised premises will operate as a suspension of the rent; *Co. Litt.* 148, b.; *Reece v. Bird*, 1 C., M. & R., per Parke, B. In *Williams v. Hayward*, 1 E. & E. 1040, where a lease of mines provided that the lessee should have jointly with the lessor the use of a railroad upon the demised premises, it was held that an expulsion from this railroad did not amount to an eviction. Eviction from part of the demised premises by a stranger does not suspend the whole rent, but is merely a ground for its being apportioned; *Walker's case*, 3 Co. 22, b. But an eviction from part of the subject matter of the lease was held, in *Newton v. Allen*, 1 Q. B. 518, to be no defence to an action for breaches of covenants to repair, and not to assign or

underlet. And it would seem that the tenant in such a case cannot discharge himself from his liability to such covenants by surrendering the residue of the premises from which he has not been ousted to the landlord, if the latter refused to accept possession of them ; *Morrison v. Chadwick*, 7 C. B. 266.

Evidence on a plea of bankruptcy of the plaintiff.] In an action of covenant for rent the defendant pleaded that the defendant became bankrupt after the rent was due. The plaintiff replied that he let the premises in question as trustee for a third person, and had no beneficial interest in the rent. It was held sufficient, under this replication, to show that the plaintiff had from time to time been in the habit of paying over the rent to the person who was stated to have the beneficial interest in the premises, and that there was no need of proving an express declaration of trust under the Statute of Frauds ; *Houghton v. Kœnig*, 18 C. B. 235 ; 25 L. J. (C. P.) 218.

Evidence where defendant is sued as assignee of the lessee.] Where an issue is taken upon the assignment it will be necessary to prove either a transfer of the interest by deed, or facts from which an assignment may by law be inferred. Where the declaration states that the term has vested in the defendant by assignment, it will be sufficient *prima facie* evidence to show that the defendant has paid rent as assignee, or is in possession of the premises ; 2 *Phill. Ev.* 125 ; *Peake Ev.* 284, 5th ed. Thus, where A. had been tenant of certain premises, and upon his leaving them B. had taken possession, it was held that he might be presumed to come in as assignee of H., though he had never paid rent ; *Doe v. Williams*, 6 B. & C. 41. The jury may, however, decline to act upon such evidence, and find that there was no assignment in writing ; *Paull v. Simpson*, 9 Q. B. 365. When the defendant has never entered or done anything to admit the assignment, his title may be proved by producing memorials of the mesne conveyances registered by parties under whom the defendant claims, after notice to the defendant to produce the originals ; *Woollaston v. Hakewill*, 3 M. & G. 297. In *Dearsley v. Custance*, 4 T. R. 75, proof that the defendant was heir was held sufficient to charge him as assignee. In *Woollaston v. Hakewill*, 3 M. & G. 297, it was decided that an executor who had not entered was liable as assignee, unless he discharged himself by pleading that he was no otherwise assignee than as executor, and that he had never entered into possession. Proof that the defendant is *executor de son tort* appears sufficient to impose upon him the liability of assignee ; *Paull v. Simpson*, 3 Q. B. 365. But one who has occupied premises under an *executor de son tort*, without any legal assignment of the lease, would seem to be free from such liability, except perhaps where the substitution in the tenancy could be proved to be fraudulent ; *S. C.* Where the lessor at the time of granting a lease has no title, but afterwards acquires one, the lease and reversion take effect in interest, and an action will lie by the assignee of the reversion on the covenants in the lease ; *Webb v. Austen*, 7 M. & G. 701, note, p. 728 ; *Sturgeon v. Wingfield*, 15 M. & W. 224. And in *Cuthbertson v. Irving*, 4 H. & N. 742, the Court of Exchequer decided that a mortgagor of premises having leased them to the defendant by an instrument which did not, and afterwards assigned the reversion by an instrument which *did*, declare his title, the defendant was estopped from objecting to the equitable title of the assignee. In this last

case the interest of the plaintiff was purely one by estoppel. Where a term has been assigned by way of mortgage it is not necessary, in an action on a covenant charging the mortgagee as assignee, to prove that he has entered upon the mortgaged premises; *Williams v. Bosanquet*, 1 B. & B. 238.

Defence.] In answer to this action the defendant may prove that he is not an assignee of the whole term, but only an undertenant; *Holford v. Hatch*, 1 Dougl. 183; *The Earl of Derby v. Taylor*, 1 East, 502. If he is charged as assignee of all the estate in certain premises, and he is in fact an assignee of an undivided part of the premises only, he can make use of this fact as an answer to the action; *Merceron v. Dawson*, 5 B. & C. 479. But the defendant is not chargeable as assignee of the land for the entire rent, if the assignment be of part only; *Curtis v. Spitty*, 1 New Ca. 756. The defendant may show that he is only devisee in trust of the legal estate; *Mayor of Carlisle v. Blamire*, 8 East, 487; or only appointee, and not liable as such on a covenant binding the assigns not being in by the appointee; *Rouch v. Wudham*, 6 East, 289.

Here it may be useful to note the powers exercised by the bankrupt acts over leasehold property of a bankrupt. It was formerly held that the interest of a lessee or tenant did not upon his bankruptcy become vested in the assignees, unless they by some act denoted their acceptance of it, and that until then the estate remained in the bankrupt; *Copeland v. Stephens*, 1 B. & Ad. 593. This decision proceeded upon the ground that the conveyance to the assignees by the commissioners of bankruptcy operated by force of the statute 49 Geo. 3, c. 121, only for the purpose of transferring an estate which should be beneficial to the creditors. In consequence of the great inconvenience which resulted from this decision, it was enacted by 12 & 13 Viet. c. 106, s. 145 (extending the relief afforded by 6 Geo. 4, c. 16, s. 75), that if the assignees of a bankrupt declined to take the benefit of any conveyance, lease, or agreement for a lease to which he was entitled, the bankrupt should not be liable if he restored the lease to the lessor within fourteen days after notice of the refusal of the assignees; and that if the assignees did not, upon being required, elect to take the benefit of the lease, the lessor should be at liberty to apply to the court for an order calling upon the assignees to elect and deliver up the lease and the possession of the premises, &c. The following are some of the numerous decisions upon what is evidence of the renunciation or acceptance of a lease by assignees in bankruptcy. Meddling with the management of the bankrupt's farm is some evidence of acceptance by the assignees; *Thomas v. Pemberton*, 7 Taunt. 206; *Welch v. Myers*, 4 Camp. 368. So also where they entered and kept possession for several months of the bankrupt's premises upon which his effects remained, and delivered up the keys immediately after the effects were sold; *Hanson v. Stevenson*, 1 B. & A. 303. So where they put up a lease for sale and accepted a deposit from the purchaser; *Hastings v. Wilson*, Holt N. P. C. 290. But the mere fact of putting up a lease to auction, the assignees having never taken possession, and there being no actual sale, is not evidence of an acceptance; *Turner v. Richardson*, 7 East, 335; for assignees have a right to do reasonable acts to ascertain the value of the property; per Lord Tenterden, C.J., in *Hope v. Booth*, 1 B. & Ad. 505 (where *Welch v. Myers*, *supra*, appears to be questioned). Where an assignee kept the

bankrupt upon the premises, carrying on the business for the benefit of the creditors, and himself occasionally superintended it, but disclaimed the lease by a letter to the landlord; it was held, nevertheless, that there had been an acceptance; *Clark v. Hume, Ry. & Mood.* 207. But where the assignees allowed the bankrupt's effects to remain on the premises for nearly twelve months, and in order to prevent a distress paid arrears of rent, intimating at the same time to the landlord that they did not intend to take the lease, unless it could be advantageously disposed of, and the lease was put up to sale by the assignees, but there were no bidders for it, and the assignees omitted for nearly four months to return the key to the landlord; this was not held to be satisfactory evidence of an acceptance; *Wheeler v. Bramah*, 3 Camp. 340. Where the bankrupt was an innkeeper, and the assignees paid rent before as well as after their appointment, in order to prevent a sale of the furniture, put a messenger in possession of the tap, and kept it open in order to preserve the licence, and continued in possession for a year and a-half, and threatened to resist an ejectionment; it was held, in an action of covenant against them as assignees, that this did not amount to an election to take the lease of the hotel; *Goodwin v. Noble*, 8 E. & B. 587. Where an action was brought by the original lessor against the bankrupt on a covenant to pay rent, to which the defendant pleaded his bankruptcy and the acceptance of the lease by his assignees before the rent was due, and that the assignees had expressly refused to accept when called upon by the plaintiff to elect, a release of rent, &c., executed by the assignees to an undertenant of the bankrupt, was held not equivalent to an acceptance of the original lease; *Hill v. Dobie*, 8 Taunt. 325. An election once made cannot be retracted; *Id.* And it is absolutely necessary that it should be made within a reasonable time, and what is a reasonable time is a question for the jury; *Mackley v. Pattenden*, 1 B. & S. 178, 30 L. J. (Q. B.) 225; and see *Cartwright v. Glover*, 2 Giff. 620, 30 L. J. (Ch.) 324.

The recent Bankruptcy Act, 24 & 25 Vict. c. 134, contains provisions which are calculated to prevent a recurrence of cases such as those above cited. By sect. 131, "In every case of a lease or an agreement for a lease it shall be lawful for the assignees to elect to take the same and the benefit thereof, and to keep possession of the premises up to some quarter or half-yearly day on which rent is made payable by the same lease or agreement, such day not being more than six months from the adjudication of bankruptcy, and upon such day to decline such lease or agreement for a lease." It would appear, therefore, that the assignees would be liable for rent for the period during which their decision is suspended. The provisional assignee, under the old insolvent acts, 53 Geo. 3, c. 102, and 1 Geo. 4, c. 119, could not refuse the assignment of a lease, and was deemed to have accepted the property; *Crafts v. Peck*, 1 Bing. 354; *Doe v. Andrews*, 4 Bing. 348. Under 1 & 2 Vict. c. 110, ss. 37 and 56, the vesting order is the act of the court, and the distinction between the bankrupt and insolvent acts is in this respect removed; *Bishop v. Bedford Charity*, 29 L. J. (Q. B.) 53. The importance of this decision is, however, materially lessened by the recent abolition of the Insolvent Court under 24 & 25 Vict. c. 134.

By 24 & 25 Vict. c. 134, sect. 197, "from and after the registration of a trust deed, the debtor, creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all

matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of the act in the same or like manner as if the debtor had been adjudged a bankrupt." It is probable that this section will be construed so as to give to trustees under deeds of assignment the same powers as those enjoyed by assignees of a bankrupt as to accepting or declining leases. Some doubt seems formerly to have existed as to whether trustees, after taking possession under such an assignment, could reject any part of the debtor's property; *Carter v. Warne*, *Mood. & M.* 479; *How v. Kennett*, 3 *A. & E.* 659.

The question of whether a covenant runs with the land so as to bind the assignees is one which is not often determined at *Nisi Prius*.

Breach of covenant not to assign, &c.] On a covenant "not to assign, transfer, set over, or otherwise do or put away the indenture of demise, or the premises hereby demised, or any part thereof," it has been held that an underlease is no evidence of a breach, but that an assignment of the whole term must be proved; *Crusoe v. Rugby*, 3 *Wils.* 234; see 1 *Smith's Leading Cases*, 20. But where the proviso was "not to set, let, or assign over the demised premises, or any part thereof," an underlease was considered to be within the terms of the proviso; *Roe v. Harrison*, 2 *T. R.* 425; and where a lease contained a proviso for re-entry in case the lessee "should demise, lease, or grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term;" it was held, that proof that the lessee had entered into partnership with A. and agreed that he should have the use of a back-room and other parts of the premises exclusively, was evidence of a forfeiture; *Roe v. Sales*, 1 *M. & S.* 297. Taking a lodger is not a breach of a covenant not to underlet the house; *Doe v. Laming*, 4 *Cump.* 77; unless there be a distinct agreement for exclusive occupation of particular rooms; *Greenlade v. Tupscott*, 1 *C., M. & R.* 59.

On a covenant "not to let, assign, transfer, or otherwise part with the premises demised, or the lease," depositing the lease as a security is no breach; *Doe v. Hogg*, 4 *D. & R.* 226; *Doe v. Laming*, *Ry. & Mood.* 36. A lease contained a stipulation that for every acre, and so in proportion for a less quantity, of the land which the lessee should "suffer to be occupied" by any other person without the consent of the landlord, an additional rent should be paid; and the tenant undertook to "use, occupy," dress and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop, and it was proved to be the custom of the country for farmers to pursue that course: Held, that the landlord was entitled to the additional rent, this being an occupation of the land by other persons; *Greenlade v. Tupscott*, *supra*. The lessee of a theatre, under a covenant not to grant, assign, or dispose of stalls or boxes "for a longer period than one year or season," let a box for a year, and then let it to another person in reversion for one year, commencing on a day certain in the following year or "such subsequent day during the year on which the theatre may be opened:" This was held to be no breach; *Croft v. Lumley*, 6 *H. L. Ca.* 672; 27 *L. J. (Q. B.)* 321.

A compulsory assignment by law is not a breach of a covenant not

to assign. Thus the sale of a lease under a *bonâ fide* execution against the lessee is not a forfeiture of a condition not to assign. But if the tenant gives a warrant of attorney to his creditor for the express purpose of enabling him to take the lease in execution, it will be a fraud, and a breach of the condition, *Doe v. Carter*, 8 T. R. 57, 64; *Doe v. Skeggs*, cited 2 T. R. 134. So an assignment under a commission of bankruptcy is no breach of a covenant not to assign; *Doe v. Bezan*, 3 M. & S. 335. But an assignment of the whole of the debtor's personal property under the Bankruptcy Act, 1861, is a breach of the covenant, *Holland v. Cole*, 1 H. & C. 67; 31 L. J. (Ex.) 481; and see *Doe v. Smith*, 5 Taunt. 795. And an assignment operating as an act of bankruptcy, and therefore void, will not be a breach of the covenant, *Doe v. Powell*, 5 B. & C. 308. In such cases, where the covenant binds the lessee and "his assigns" not to assign over without licence, it does not appear that the compulsory assignment will discharge the covenant in the hands of subsequent voluntary assignees. An assignment by operation of law is not within this covenant, as by devolution to an executor; but if assigns are named in the covenant the executor cannot assign without licence; *Doe v. Harrison*, 2 T. R. 425. Whether a devise by will is a breach of a covenant not to assign seems to be an unsettled question; *Sheph. Touch* 144, *Iox v. Swann*, *Styles*, 482, *Crusoe v. Bugby*, 3 Wils. 237, *Doe v. Bezan*, 3 M. & S. 361, *Doe v. Etans*, 9 Ad. & E. 719. As a right of re-entry is commonly annexed to this covenant, its effect is more likely to come into question in an action of ejectment than of covenant.

To prove the breach of a covenant not to assign or underlet, Lord Alvanley held it to be *prima facie* sufficient to show that a stranger was in possession of the premises, apparently as a tenant, and that on inquiry such stranger said he rented the house, *Doe v. Rickarby*, 5 Esp. 4. But on a covenant "not to assign, set over, or otherwise let," Lord Ellenborough held that evidence that a stranger was in possession of the premises, with his name on the door, and that he said he had taken the premises from another stranger, was not sufficient, for *non constat* that the party in possession was not a tortious intruder, *Doe v. Payne*, 1 Stark. 86. According to *Doe v. Williams*, 6 B. & C. 41, *supra*, p. 429, mere possession would seem to be evidence of an assignment.

[*Breach of covenants for good husbandry.*] The proof of any act which, according to the natural and ordinary meaning of their words, is forbidden by these covenants, will entitle the plaintiff to a verdict. If the breach alleges that the defendant did not use the farm in a husbandlike manner, "but on the contrary committed waste," the plaintiff is bound to prove waste; *Harris v. Mantle*, 3 T. R. 307. See *post*, p. 439, and *Edge v. Pemberton*, 12 M. & W. 187, *cit. post*, p. 437. Where the breach is for bad husbandry, and the particulars delivered rely on non-cultivation, the plaintiff cannot show mere bad cultivation; *Doe v. Broad*, 2 M. & G. 523. But in such cases as these, the judge would probably now amend the breach or the particular. A Judge, however, will not amend, as of course, if the amendment will only entitle to nominal damages for a breach, which defendant probably would not have contested; *Times Insurance Co. v. Hawke*, 28 L. J. (Ex.) 317. A covenant to spend on the farm all manure collected on it, extends to manure made by the

cattle of strangers not fed on the farm, but turned on by a temporary licence; *Hindle v. Pollitt*, 6 M. & W. 529.

We have seen, *supra*, p. 22, that husbandry covenants may be controlled or explained by proof of custom not expressly or impliedly excluded by the covenant. See also *antè*, p. 172. Such customs apply to leases under seal as well as by parol; *Wigglesworth v. Dallison*, 1 Doug. 201. But the course of pleading on covenants will sometimes require that the custom shall be pleaded by the defendant, except where it is only used to explain the covenant. In a covenant to pay a penal rent for using land otherwise than for pasture or meadow, it is for the jury to say whether the use of it as a race-course was in fact incompatible with the covenant. *Semb. Aldridge v. Howard*, 4 M. & G. 921. In the *Duke of Marlborough v. Osborne*, 33 L. J. (Q. B.) 148, the clause, the tenant to perform each year for the landlord at the rate of one day's team-work with two horses, and one proper person, for every 50l. of rent, when required, was held to give the landlord a right to team-work not merely for agricultural purposes, but for conveying coals from a railway station.

A covenant not to sell or carry away from the demised premises any hay, straw, &c., grown or produced there, without the consent in writing of the plaintiff first had and obtained, under the increased rent of 10l. for every ton so given, sold, or carried away, was held to give the tenant a right to remove hay, straw, &c., upon paying the increased rent; *Leyh v. Lillis*, 6 H. & N. 165; 30 L. J. (Ex.) 25. Where there was a lease reserving yearly rent, payable on half-yearly days, and a further rent, payable on the same days, for every acre converted into tillage without licence, or planted with rape, woad, or potatoes, or from which successive crops should be taken without summer fallows, &c., it was held that, after one breach of covenant the increased rent attached and continued to the end of the term; *Bowers v. Nixon*, 12 Q. B. 558 (n.), *Affirm. in Error*. A covenant not to take more than two crops during four years, means any four years, and not each succeeding four years reckoning from taking the lease; *Fleming v. Snook*, 5 Beav. 250.

Breach of covenant to insure.] The covenant to insure has always been construed strictly in Courts of Common Law. As the plea to a declaration on the covenant is commonly in the affirmative that he has insured, it will generally lie upon the defendant to show that he has complied with his contract. The covenant, however, usually provides some mode of proof, as that the lessee shall produce his policy when required. In *Doe v. Ulph*, 13 Q. B. 204, where there was a covenant "to insure at all times previously to the expiration of the term thereby granted," and the lessee did not effect an insurance till a month after the creation of the term, it was held that in the absence of evidence to explain this delay the plaintiff was entitled to a verdict, and that the jury ought not to be asked whether the insurance was effected within a reasonable time. Pattenon, J., however, expressed his opinion that if the lessee had insured the premises shortly after the execution of the lease he would have complied with his covenant. In *Price v. Worwood*, 4 H. & N. 512, the omission to insure had been repeatedly confessed by the tenant, who excused himself by saying that he could not afford the insurance. As he appeared to be no richer at the time of issuing the writ it was held that there was some evidence to go to the jury of the breach.

If the covenant is to insure in the name of A., it is a breach to

insure in the joint names of A. and the lessee; *Penniall v. Harborne*, 11 Q. B. 368. But see *Havens v. Middleton*, 22 L. J. Chanc. 746.

Breach of covenant to repair.] A covenant to repair, or put in repair, or deliver up in repair, runs with land, and binds assignees though not named in it; *Martyn v. Clue*, 18 Q. B. 661. The assignee of a lease is liable, on a general covenant, to repair buildings erected during the term, though assigns are not named in it; *Minshull v. Oakes*, 2 H. & N. 793. In *Cornish v. Cleife*, 34 L. J. (Ex.) 19, there was a covenant, in a demise of three houses and a field, to repair during the term the said tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, in houses, buildings, &c. It was held that the covenant to repair did not extend to houses erected during the term in the field. A covenant to keep a house in repair is satisfied by keeping it in substantial repair according to the nature of the building; and with a view to determine the sufficiency of the repair, the jury may inquire whether the house was new or old at the time of the demise; *Stanley v. Towgood*, 3 N. C. 4, accord. *Mantz v. Goring*, 4 N. C. 451; for it is not meant that the house should be delivered up in an improved state, or that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise by the timely expenditure of money and care; *Gutteridge v. Munyard*, 1 Mood. & Rob. 334. And therefore on an issue as to the amount of damages for not keeping in repair, the bad state of the premises when demised is legitimate evidence for the defendant; *Burdett v. Withers*, 7 Ad. & E. 136. In *Payne v. Hayne*, 16 M. & W. 541, a tenant under such covenant was held bound to put in repair; though the nature of the repairs ought to be measured by the age and class of the demised premises. But the tenant under such a covenant is liable for repairs only, and not for the extra expense of laying a new floor on an improved plan, or the like; *Seward v. Leggatt*, 7 C. & P. 613. And there seems to be a distinction between a covenant to put in repair and to keep in repair; the former covenant is not governed by the state of the premises when demised, but may require something more; but the lessee is not bound in either case to substitute new buildings for old; *Belcher v. McIntosh*, 2 Mood. & Rob. 186; *Martyn v. Clue*, 18 Q. B. 661, 674. And where the covenant is to keep and leave the house in as good a plight as it was in at the time of the making of the lease, it is said that ordinary and natural decay is no breach of the covenant, and that the covenantor is only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c.; *Fitz. Ab. Cov. 4*; *Shep. Touch.* 169; *Johnson v. Churchwardens, &c., of St. Peter, Hereford*, 4 Ad. & E. 520. The lessee, under the ordinary covenant to keep in repair, is not bound to repair damage done before the lease was executed, though since the date fixed by the habendum for the beginning of the term; *Shaw v. Kay*, 1 Ex. 412.

On a covenant to repair, it is not sufficient evidence of a breach to show that the house has been thrown down by a tempest, unless the covenantor has not repaired within a reasonable time after; *Shep. Touchstone*, 173. Where the defendant pleads that he was always ready to repair, but a reasonable time had not elapsed, and the replication consists of a general traverse of the plea; proof that the defendant absolutely refused to repair entitles the plaintiff to a verdict; *Green*

v. Eales, 2 Q. B. 225. In a case in which the damage was alleged to be occasioned by the defendant's neglect to repair and "from no other cause," it was held sufficient to show that the premises became insecure by the removal of an adjoining wall by a third party, and that the defendant did not set about the repair in time to prevent the mischief consequent on such removal; *Id.* If the lessee is bound to repair and leave in the same plight as he found it, and the house is burnt by sparks from the chimney of the lessor's house near, the lessee is excused from rebuilding, for this is the fault of lessor; 1 *Roll. Ab.* 454, 1, 10.

Where the premises have passed through successive hands, it is sometimes not easy to prove in whose hands the want of repair occurred, and each assignee is liable to the lessor only for his own default. But where the plaintiff, a lessee under covenant to repair, assigned over to defendant, who assigned to B., who assigned to C., &c., and the plaintiff, being then obliged to pay damages for non-repair to the ground landlord, sued defendant for the amount, there was evidence of want of repair while in the hands of one of defendant's assignees: held, that the plaintiff was entitled to substantial, and not nominal, damages, without showing the exact amount of non-repair attributable to the defendant himself; *Smith v. Peat*, 9 *Ex.* 161, cited *infra*. A lessee, under covenant to deliver up certain fixtures at the end of his term on the 1st of April, remained in possession till the 10th, when possession was demanded by the lessor, and on the 13th he bought the title of a mortgagee of the lessor and refused to re-deliver: held, that the lessor was entitled only to damage for the detention of the fixtures between the 10th and 13th and not to the full value of them; *Watson v. Lane*, 25 *L. J. (Ex.)* 101.

Where the covenant is to keep in repair during the continuance of the term, an action for the breach of the covenant may be maintained before the term has expired; *Luxmore v. Robson*, 1 *B. & A.* 584. It has been questioned whether more than nominal damages can be recovered in such an action; *Marriott v. Cotton*, 2 *C. & Kir.* 553; *Doe v. Rowlands*, 9 *C. & P.* 734; for the lessor (as it is said) might pocket the damages and leave the premises unrepaired, and so oblige the lessee to repair them for his own convenience. This estimate of damage has however been denied, and it has been laid down by the Court of Exchequer in *Smith v. Peat*, 9 *Ex.* 161, 23 *L. J. (Ex.)* 84, that the saleable value of the reversion at the time of action is the right measure of damages. And see *Bell v. Hayden*, 9 *Ir. C. L. R.* 301. But such value is not the only test; for lessor may sue, though he has forfeited his reversion by the entry of the ground landlord for the breach; *Davies v. Underwood*, 27 *L. J. (Ex.)* 113; and the test is what will be the cost of repair. *Per. cur. ib.*; 2 *H. & N.* 570. Where an action was brought for non-repair of premises assigned by the plaintiff to the defendant, the defendant being bound to repair and insure, and the jury found that the premises would cost 1600*l.* to rebuild, and that this would exceed by 600*l.* the value of the old premises as assigned, the court held that 1000*l.* was the measure of damage. In this case it became necessary to find the expense of rebuilding, because the premises had been destroyed by fire; *Yates v. Dunster*, 24 *L. J. (Ex.)* 226; 11 *Ex.* 15. See further, on the measure of damages on repairing covenants, *Minshull v. Oakes*, 2 *H. & N.* 793; 27 *L. J. (Ex.)* 194; and *Mayne on Damages*, pp. 133-9.

Breaking a doorway through the wall of the demised house amounts to a breach of a covenant to keep in repair; *Doe v. Jackson*, 2 Stark. 293. A lessee covenanted to repair, uphold, support, sustain, maintain, &c., all the houses and brick walls. Pulling down a brick wall dividing the courtyard in front from another yard at the side was held a breach of the covenant; *Doe v. Bird*, 6 C. & P. 195. A covenant to deliver all "windows" then or thereafter affixed or belonging to the premises extends to a plate-glass shop window put up by the lessee so as to be moveable, without screws, nails, or glue, and fastened only by wedges; *Bart v. Haslett*, 25 L. J. (C. P.) 201; *Aff. in Error*, 18 C. B. 893. But a mere covenant to repair is not broken by alterations and improvements where they are evidently contemplated by the lease; as where a private dwelling-house is demised by lease containing a covenant to repair the premises and all such buildings "improvements, and additions," as should be made thereupon by the lessee; *Doe v. Jones*, 4 B. & Ad. 126. On a covenant to repair the breach alleged that defendant did not repair "but on the contrary permitted the premises to be ruinous for want of repair." Held that plaintiff must show permissive, and not voluntary waste; *Edge v. Pemberton*, 12 M. & W. 187.

Where the lessee is obliged to repair in consequence of his lessor's refusal to do so, he cannot recover the expense of finding other premises for use during the repairs; *Green v. Eales*, 2 Q. B. 22b. A lessee, who underlets with covenants to repair in the same terms as in his own lease, is not necessarily entitled to recover from the under-lessee the costs of an action for non-repair brought against himself; for though the covenants of the lessee and under-lessee may be in words the same, they are in substance different if entered into at different times; for a covenant to repair is construed with reference to the state of the premises when it began to operate; *Walker v. Hutton*, 10 M. & W. 249, *ante*, p. 435. But he may recover the amount of dilapidations recovered against himself and occasioned by the under-lessee's neglect; *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hutton*, 10 M. & W. 249. And he may recover the costs of such action if he has given notice of it to the under-lessee, and received his sanction for defending it; and his sanction may be inferred if he does not prohibit the defence. *Semb. Blythe v. Smith*, 5 M. & G. 405, 412-3. The lessee cannot recover from his under-lessee, as special damage, the value of a lease forfeited for non-repair, unless it appears that the forfeiture was solely owing to the under-lessee's non-repair; *Clow v. Brogden*, 2 M. & G. 39. Where A. demised to the plaintiff with special covenants to repair and insure, and the plaintiff under-let to the defendant with like covenants, and A. afterwards recovered possession for breach of the plaintiff's covenant, it was held that the plaintiff could not, in an action of covenant against the defendant, recover damages for the loss of his beneficial reversion in the term; for the term was forfeited for the breach, not of the defendant's covenants, but of the plaintiff's covenants, and there was no covenant by defendant to indemnify; *Logan v. Hall*, 4 C. B. 598. If a lease provides that the tenant shall not cut down or lop trees under a penalty of 20*l.* for each tree cut or lopped, the lessor, upon breach, may proceed either for the penalty, or for unliquidated damages. If he declares on the covenant not to lop and alleges a breach *per quod* the defendant became liable to pay 20*l.* being the penalty incurred for such lopping, and "so the defendant has not kept his covenant," &c.,

without alleging non-payment of the penalty, it must be taken that the plaintiff proceeds for the breach of covenant in lopping, and not for non-payment of the penalty; and the jury are not bound to give the whole penalty; *Hurst v. Hurst*, 4 *Ex.* 571. Where the covenant is to repair, the defendant being allowed rough timber by the lessor, the general averment by the plaintiff (lessor) of readiness to supply, &c., will not oblige him to show that he has cut down and prepared timber, defendant not having required him to do so. *Semb. Martyn v. Clue*, 18 *Q. B.* 661.

Breach of covenant for title.] The covenants for title on which remedies are sought in the Courts of Common Law are principally the covenant that the grantor is seised in fee, or has power to convey; and the covenant for quiet enjoyment express or implied, and freedom from incumbrances. The declaration alleges, by way of breach, that the defendant was not seised, or had not power, &c., at the time of the conveyance, or that some person entered and evicted the plaintiff, who before and at the time of the conveyance by the defendant had, and still has, lawful right to the premises, &c.; or that the entry or other disturbance was by or under the defendant himself.

Where the covenant was of seisin in fee, and the premises were, in fact, copyhold of inheritance, the jury ought to find as damage the difference in value between lands of each tenure; *Gray v. Briscoe*, *Noy*, 142.

On a covenant for quiet enjoyment generally, it will not support the breach to show a *tortious* disturbance by a stranger; for it is only a covenant against persons having lawful title; *Dudley v. Folliott*, 3 *T. R.* 587; 2 *Saund.* 178 (*n*); unless the covenant is against disturbance by a *particular person*, when it is sufficient to show any disturbance by him, whether by lawful title or otherwise; *Nash v. Palmer*, 5 *M. & S.* 374. So where the covenant is against disturbance by the lessor, his heirs or executors, it is sufficient to show any disturbance by him or them; *Forte v. Vine*, 2 *Roll. Rep.* 21; 2 *Saund.* 181 (*a*). Thus, where the lessor let a seam of coal with covenant for enjoyment without molestation, &c., and he afterwards works minerals in the stratum above the coal, so as to damage the coal mine, an action lies for breach of covenant; though a mere nuisance by lessor on his own land is not necessarily a breach of such a covenant; *Shaw v. Stenton*, 2 *H. & N.* 858; 27 *L. J. (Ex.)* 253. Where the covenant is for quiet enjoyment against A. and any other person by his means, title, or procurement, it is sufficient proof of the breach to show an entry by A.'s wife, in whose name A. purchased jointly with his own; *Butler v. Swinerton*, *Palm.* 339. So in the case of a covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is a breach of the covenant; *Godb.* 333; *Palm.* 340. So the appointee of A., by virtue of a power in the making of which A. concurred, is a person claiming under him; *Hurd v. Fletcher*, 1 *Doug.* 43; *Carpenter v. Parker*, 3 *C. B., N. S.* 206. So where A., seised in fee, settled his estate upon himself for life, remainder to his first and other sons in tail, and made a lease, and covenanted for quiet enjoyment without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest, by, from, or under him, the eldest son was held to be a person claiming under the lessor; *Erans v. Vaughan*, 4 *B. & C.* 261. Where the covenant is that the defendant has not done, permitted,

or suffered any act, &c., the assenting to an act which the covenantor could not prevent, is not a breach; *Hobson v. Middleton*, 6 B. & C. 295. A covenant for quiet enjoyment "acquitted of all grant, rents," &c., is broken by the existence of a quit rent incident to the tenure and due to the lord of the manor, though none was in arrear at the time of the conveyance; *Hammond v. Hill*, Comyn Rep. 180. A covenant against interruption by the vendor, or his act or defaults, extends to arrears of quit rent due while the vendor was in possession and unpaid by him, though it may have become due before he held the estate; *Howes v. Brushfield*, 3 East, 491. Entry on a lessee and distress for land-tax due from lessor before the demise is not a breach of covenant for quiet enjoyment without disturbance by the lessor or any one claiming by, from, and under him; for that is not a claim under him, but a claim against him. But *semb.* the plaintiff might have paid the tax and sued for money paid; *Stanley v. Hayes*, 3 Q. B. 105. The entry of the party claiming lawful title is not less a breach of covenant because the covenantee, who sues, may have instigated him to enforce the claim; *Young v. Raincock*, 7 C. B. 310. Merely forbidding the plaintiff's tenant to pay his rent is not a breach of the covenant for quiet enjoyment; *Witchot v. Linesey*, 1 Brownl. 81.

Where a breach is not assigned in the words of the covenant merely, but goes on to particularise the sort of breach, that alone must be proved; *Harris v. Mantle*, 3 T. R. 307; unless the judge shall authorise an amendment on the trial by striking out words of needless particularity, *ante*, p. 436. Where the breach of a covenant for enjoyment specifies an entry and expulsion by the defendant, it is not enough to prove a refusal by the defendant to let the plaintiff take possession; *Hawkes v. Horton*, 5 Ad. & E. 367. But where the first part of the breach contains the gist of the action, the plaintiff need not prove superfluous matter of aggravation; *Deffel v. Brocklebank*, 4 Price, 36.

The plaintiff may assign a breach on the implied covenant for quiet enjoyment contained in the word *demise*; *Com. Dig. Cov. (A. 4)*; *Shep. Touch.* 160; but that covenant ceases with the estate out of which the lease is granted; *Adams v. Gibney*, 6 Bing. 656; and is restrained by an express covenant for quiet enjoyment; *Line v. Stephenson*, 4 N. C. 678, *Aff. on Error*, 5 N. C. 183; *Stannard v. Forbes*, 6 Ad. & E. 572. A warranty of the demise by the lessor is not an implied covenant, but an express one, and extends to the whole term granted; therefore where a tenant for life made a lease under a power with such a warranty, and the lessee was evicted by the remainder-man in consequence of the nonconformity of the lease with the power, it was held that the lessee might recover from the executors of the lessor the value of the term, the costs of defending the action against the remainder-man, and the mesne profits recovered against him; *Williams v. Burrell*, 1 C. B. 402.

[*Plea of Statute of Limitations.*] See the statutes cited *post*, pp. 442, *et seq.*, *Action on Bond*; and p. 448, *Action for Rent on Indenture of Demise*.

ACTION ON BOND.

The declaration either states only the penal part of the bond, as in the case of common money bonds, or sets out also the special conditions and alleges breaches. The allegation of breaches is obligatory on the plaintiff by stat. 8 & 9 Wm. 3, c. 11, s. 8, either in the declaration or replication, by way of *assignment*, which is traversable; or, in certain cases, by way of *suggestion*, which is not traversable, but must be proved in order to obtain an assessment of damages. The above statute is unaffected by the Common Law Procedure Act, 1852, s. 96, "as to the assignment or suggestion of breaches," or "as to judgment for the penalty, as a security." The only difference will now be, that instead of setting out the conditions on *oyer* where breaches are not assigned in the declaration, the defendant must now set out the conditions as part of his plea if he intends to plead performance. Where issues are joined on the alleged breaches, the proof will of course depend on the allegations traversed. Where breaches are *suggested*, then the evidence will be as on a writ of inquiry, except that the truth of the breaches, as well as the damages, will then have to be inquired into, and thereupon the defendant may controvert the breaches or any of them; but he cannot show excuse of performance, for that might have been pleaded by him at first. See *Canterbury v. Robertson*, 1 C. & M. 690; *Webb v. James*, 8 M. & W. 645.

Where the breaches have been *suggested* on the roll after judgment for the plaintiff, it will be necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained; for this purpose it will be sufficient if the attorney for the plaintiff testifies that the bond produced is the instrument delivered to him to bring the action on, and that he knows of no other of the same date; and the attesting witnesses need not be called; *Hodgkinson v. Marsden, Peake, Ev.* 287, 5th ed.; 2 Camp. 122. Where the defendant on *oyer* set out the condition, which was for performance of covenants in an indenture of lease, and pleaded a plea of judgment recovered, on which there was judgment for the plaintiff; on the execution of the writ of inquiry, Lord Kenyon ruled that it was not necessary to prove the execution of the lease, as the defendant was estopped from denying it; *Collins v. Rybot*, 1 Esp. 157. If the defendant lets judgment go by default, and the plaintiff thereupon makes his *suggestion* of breaches in which he sets out the condition of the bond, which appears to be for the performance of an award, or of articles of agreement, or the like, the plaintiff must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested; *Edwards v. Stone, coram Lawrence, J.*, 1 Saund. 58 e (n). But where the breaches are *assigned*, and not denied, the truth of them is not in issue. On *non est factum* pleaded to a bond conditioned for performance of covenants, where breaches were assigned in the declaration, it was held that the jury might assess the damages on the *venire* to try the issue, without any award of a *venire* to assess damages; *Quin v. King*, 1 M. & W. 42.

Damages.] The jury are to find nominal damages and costs, as well as damages on the breaches, but the plaintiff cannot recover more

than the amount of the penalty and costs; *Wilde v. Clarkson*, 6 T. R. 303; *Brunscombe v. Scarborough*, 6 Q. B. 13.

Defence.

Non est factum.] This plea has the same effect as in actions on covenants, as to which see *ante*, p. 426.

The defendant may be sued by the name in which he executed the bond; but he may also, it seems, be sued by his real name; for where the writ was against W. B., and the declaration called him "W. F. B., sued by the name of W. B.," and the bond was executed by the defendant W. F. B. in the name of W. B. by which he was then known, it was held no variance; and it was also held that, if the wrong name had avoided the bond, it should have been specially pleaded; *Williams v. Bryant*, 5 M. & W. 447.

If a bond be sealed and delivered to a man's use, and he die before notice, his executors may sue upon it; *Dyer*, 167.

Alteration of the bond.] The law respecting the effect of alterations is the same as in the case of covenants or other deeds; *ante*, p. 427. If the alteration be such as to make it vary from the deed declared on, it is evidence on *non est factum*. So if it has been so altered as to require a fresh stamp. But if the alteration is one, whether made by consent or otherwise, which discharges or varies the liability of the parties to the bond, then it is matter which must be specially pleaded; see *Harden v. Clifton*, 1 Q. B. 522; *Mason v. Bradley*, 11 M. & W. 590; *Hemming v. Treney*, 9 Ad. & E. 926, *ante*, pp. 202-3. Obligees sued obligor on a bond conditioned for performance of covenants in a deed of sale to the defendant of certain trees which defendant was to cut down before August, 1684. Plaintiff afterwards altered the deed in his possession by erasing 1684, and writing 1685: Held no answer; for the erasure was in a place not material, and to the advantage of the defendant; *Darcy v. Sharpe*, 1 Leon. 282.

Payment.] Payment before the day fixed for it was always evidence of a plea of payment at the day; *B. N. P.* 174; though bad on [special] demurrer as a plea; *Anon.* 2 Wils. 150. But before stat. 4 & 5 Ann. c. 16, s. 12, payment after the day fixed, or at a different place from that fixed, was not pleadable in bar. By that act payment of principal and interest due on a mere money bond made before action is a bar, though not made exactly according to the condition. A tender, without acceptance, after the day is not within the statute, and therefore no bar; *Underhill v. Matthews*, *B. N. P.* 171. But see *dict.* per Abbott, C. J., in *Murray v. Stair*, 2 B. & C. 92. Though the statute of limitations, 21 Jac. 1, c. 16, did not apply to specialties, yet the defendant might, if the deed was twenty years old, and there had been no payment of interest or acknowledgment of liability within that period, have pleaded *solvit ad diem*, and relied upon the presumption of payment arising from lapse of time. But if there had been any such payment of interest or acknowledgment after the day appointed for the payment of the money, though upwards of twenty years had elapsed since the payment or acknowledgment, the defendant could not avail himself of this presumption of payment under the plea of *solvit ad diem*,

though he might under the plea of *solvit post diem*; *Moreland v. Bennett*, 1 *Str.* 652; *B. N. P.* 174; see further, on presumption of payment, *ante*, p. 35, and *Bostock v. Home*, 7 *M. & G.* 893.

Payment into Court.] By 23 & 24 Vict. c. 126, s. 25, the defendant in an action upon a defeasible bond may, by leave of the Court or a Judge, pay money into Court. .

Statutes of Limitations.] The first Statute of Limitations, 21 Jac. 1, c. 16, did not apply to actions on deeds or specialties; *ante*, p. 394. But by the statute 3 & 4 Wm. 4, c. 42, the period of limitation in actions of debt on specialty, and in some other actions, is defined. By section 3, it is enacted, that all actions of *debt for rent* upon an indenture of demise, all actions of *covenant or debt upon any bond*, or other *specialty*, and all actions of *debt or scire facias upon any recognisance*, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say—the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognisance, within *twenty years* after the cause of such actions or suits, but not after; provided, that nothing herein contained shall extend to any action given by any statute, when the time for bringing such action is or shall be by any statute specially limited.

By section 4, provision is made for persons who are, at the time such cause of action accrued, within the age of twenty-one years, covert, of unsound mind, or beyond the seas; such persons to be at liberty to bring the actions, so as they commence the same within such times after their coming to, or being of, full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of the act, have done; and if any person, *against* whom there shall be any such cause of action, shall be, at the time of cause of action accrued, beyond the seas, then the party entitled shall be at liberty to sue such person within the times before limited after the return of such person from beyond the seas. [See 19 & 20 Vict. c. 97, *infra*.]

Sect. 5. Provided that, if any *acknowledgment* shall have been made either by *writing signed by the party liable* by virtue of such indenture, specialty or recognisance, or his agent, or by *part payment*, or *part satisfaction* on account, of any principal or interest then due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment or part payment or part satisfaction; or in case the person entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making it, beyond the seas, then within twenty years after the disability shall have ceased, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff in such action may, by way of replication, state such acknowledgment, and that the action was brought within the time aforesaid, in answer to a plea of this statute.

Sect. 7. No part of Great Britain and Ireland, or the Channel Islands, or Isle of Man are to be deemed beyond seas within the meaning of this Act.

By 19 & 20 Vict. c. 97 (already cited, *ante*, p. 397), sect. 10, no

person or persons entitled to any action limited by the Act 3 & 4 Wm. 4, c. 42, sect. 3, shall be entitled to any further time to sue by reason only that he or some of them were beyond seas at the time of the cause accrued, or by reason that he or some of them were imprisoned at that time; and, by sect. 11, in case of joint debtors, no further time is to be allowed for suing, by reason only that some of them were beyond seas when the cause accrued; but a judgment recovered in such case will not, *per se*, be a bar to an action against the absent debtor or debtors after their return. Sect. 14 (cited *ante*, p. 400), also provides that part payment by one debtor shall not deprive his co-debtor of the benefit of the statute.

There is no general replication that will let in the subsequent promise, acknowledgment or payment, as in actions for simple contract debts; for proof of a promise, not under seal, does not support the declaration; and, if under seal, it is another and different cause of action. If there be a sufficient written acknowledgment within sect 5, it must be specially replied; *Kempe v. Gibbon*, 9 Q. B. 609. But it may be stated generally without setting it forth in the replication; for the sufficiency may depend on extrinsic facts, or there may be several acknowledgments; *Ib.* 12 Q. B. 662. It must, however, be shown which of the three sorts of acknowledgment,—viz.: writing, payment, or satisfaction in part,—is relied on; *Forsyth v. Bristow*, 8 Ex. 347. The acknowledgment need not imply a promise, or be in itself a cause of action; *Moodie v. Bannister*, 28 L. J. Chan. 881; and an admission by the executors of the obligor in their answer to a suit *inter alios* is enough; *Ib.*

In an action of covenant for 400*l.* due on a mortgage deed, to which the plea of Statute of Limitations was pleaded, plaintiff replied an acknowledgment within twenty years, and put in a deed of conveyance by defendant to trustees for payment of "all mortgages, debts, &c.," in which it was recited that the land was "subject to a mortgage to W. H. (plaintiff) for 400*l.* and interest:" Held insufficient, because it did not acknowledge an existing debt, but only an outstanding mortgage; *Houcutt v. Bonser*, 3 Ex. 491. In an action by mortgagee against mortgagor for principal and interest after the lapse of twenty years, defendant pleaded the statute, to which plaintiff replied an acknowledgment in writing, and also part payment, within twenty years: Within twenty years the defendant had assigned his equity of redemption by a deed reciting payment of interest "up to the date thereof:" Held that this was evidence of payment within twenty years: Held also that payment of interest by the assignee after assignment was payment by the "agent" of the defendant; *Forsyth v. Bristow*, 8 Ex. 716. It was there considered that the acknowledgment under sect. 5 need not be made to the creditor or agent, though that is required by the limitation clauses of stat. 3 & 4 Wm. 4, c. 27, cited *post*, 448, *Action for Rent on Indenture*, and *Action of Ejectment*.

Debt for arrears of an annuity, secured by bond, is barred after twenty years, and not after six years only; *Sims v. Thomas*, 12 Ad. & E. 536. On a plea that the "debt and cause of action" did not accrue *infra*, &c., pleaded to a bond declared upon without showing the condition, and issue thereon, it appeared at the trial to be a *post obit* bond, and that the *cestui que vie* died within twenty years: Held that the plaintiff was entitled to recover, for the real cause of action arises on the condition; *Tuckey v. Hawkins*, 4 C. B. 655. To

a declaration on a bond without stating the condition, which was for payment of an annuity, the defendant pleaded that the causes of action did not accrue within twenty years; on which plaintiff joined issue, and suggested breaches by non-payment of arrears within twenty years: On the trial it appeared that there had been *also* breaches of condition twenty years ago by payments of the annuities at irregular times, all of which, however, had been accepted by the plaintiff: Held that a new cause of action arose on each breach of condition; that the previous breaches had been waived by acceptance, and that the plaintiff was entitled to a verdict on the issue; *Amott v. Holden*, 18 Q. B. 593. A bond conditioned to replace stock is not within sect. 5 of the act, which relates only to conditions for payment of money; therefore an acknowledgment that it was not replaced, and a payment, within twenty years, of money conditioned to be paid in lieu of dividends if the stock should not be replaced, will not rebut the statute so far as relates to the breach of condition to replace; *Blair v. Ormond*, 17 Q. B. 423. But it was held that the condition to pay periodically the money due in lieu of dividends continued in force, and that plaintiff was entitled to damages for a breach for non-payment within twenty years, though he could recover none on the breach for not replacing; *Ib.*

If a suit brought within twenty years abates by death of the defendant, and no one administers to his estate till after that time has elapsed, the obligee may begin a fresh action within a reasonable time (*e.g.*, one year) after administration or probate taken out; *Sturgis v. Darrell*, 4 H. & N. 622. A special replication will be necessary.

Fraud.] Where the defendant pleaded that the bond was obtained by fraud and covin, it was held at Nisi Prius that it was not open to him to show on this plea that he executed it with full knowledge of its contents, but in consequence of a previous fraudulent representation of an intrinsic fact; *Mason v. Ditchbourne*, 1 Mood. & Rob. 460. The Court of Exchequer, however, ordered a new trial for the purpose of more distinctly raising the question of the admissibility of the evidence, and the evidence was received on the second trial; but a verdict being nevertheless found for the plaintiff, the question was not again raised; *Ib.* 2 C. M. & R. 720 (n); see also *D'Aranda v. Houston*, 6 C. & P. 511. In a subsequent case it was held that the fraud must be some concealment or deception with reference to the instrument itself, and not mere illegality or false representation as to some intrinsic matter; *Green v. Gosden*, 3 M. & G. 446; and see the cases cited, *ante*, pp. 383-4. Where a surety, being sued on his bond, pleads that it was procured by the fraud and collusion of the plaintiff and the principal, it is not enough to show fraud by the principal, unless the plaintiff was a party to it; *Spencer v. Handley*, 4 M. & G. 414.

ACTION ON BAIL BOND.

In an action by the assignee of a bail bond, the declaration states the *capias* against the principal debtor; the execution of the bond by

the defendants, or defendant; the default of the debtor to put in and perfect bail to the action; and the assignment by the sheriff to the plaintiff.

The defendant may deny the execution under a plea of *non est factum*; but since the new rules, he cannot show that it is void for non-compliance with 23 Hen. 6, c. 9, or otherwise illegal, without a special plea.

On a traverse of the assignment, the plaintiff must show it indorsed on the bond under the hand and seal of the sheriff in the presence of two or more credible witnesses; *Stat. 4 Anne, c. 16, s. 20*. This indorsement may be made in the sheriff's name by the under-sheriff, or his clerk acting for him at his office and using his seal of office; *Harris v. Ashley, 1 Selwyn N. Pri. 554*; *Doe v. Brawn, 5 B. & A. 243*; *Middleton v. Sandford, 4 Camp. 36*. "Credible" here means disinterested; therefore neither the sheriff, under-sheriff, nor plaintiff are competent; *White v. Barrack, 1 M. & W. 424*. They need not both be present at the same time; *Phillips v. Barlow, 1 N. C. 433*; and it may be a question whether, if their names are subscribed, it will be necessary to call either of them; for the statute does not require their signatures as attesting witnesses (as in case of wills), but only their presence.

The defendant may plead performance, viz., that the principal debtor put in and perfected bail to the action in due course. If in such plea he relies upon the record of the recognisance of bail, the plea must be proved on *nul tiel record*, by production of the recognisance; see *Whittle v. Oldaker, 7 B. & C. 478*, where the old plea of *comperuit ad diem* was held to be proved by production of the record of appearance. But if the plea merely alleges the perfecting bail above, without relying on the record, and issue is joined, it would seem that it may be proved by proof of the rule of court for allowance of bail.

The bail are liable only to the amount sworn to in the affidavit of debt and costs to the extent of the penalty; *R. H. 1853, r. 92*; that is,—the sum mentioned in the judge's order to hold to bail, and indorsed on the capias, with costs; *Jonas v. Tepper, 1 E. & E. 327*; 28 *L. J. (Q. B.) 85*.

ACTION ON REPLEVIN BOND.

This action was formerly brought by the assignee of the bond taken by the sheriff under 11 Geo. 2, c. 19, and the declaration stated the distress for rent, &c., the plaint and replevy by the sheriff, the bond and condition executed by the defendant, the breach of the condition, and the forfeiture and assignment of the bond to the plaintiff. A recent act, 19 & 20 Vict. c. 108 (29th July, 1856), has altered the procedure in replevying, and consequently to some extent varied this form of the declaration.

By sect. 63 of this act, the powers and responsibilities of sheriffs with respect to replevin bonds and replevins have ceased, and the County Court registrar of the district in which the distress was taken

is authorised to "approve of" replevin bonds, to grant replevins, and to issue all necessary process in relation to them, to be executed by the high bailiff. By sect. 64-65, the registrar, at the instance of the party, takes security (in a bond with sureties, sect. 70; or a pecuniary deposit, sect. 71) conditioned to commence an action in one of the superior courts therein named within a week after the date of the security, and to prosecute it with effect and without delay, and (unless judgment be by default) to prove to such court that the obligor had good ground for believing either that the title to some hereditament, toll, market, fair, or franchise was in question, or that the rent or damage exceeded 20*l.*, and to make return of the goods, if the return be adjudged.

Sect. 66 provides for prosecuting the suit in the County Court on a like security with a condition to prosecute it within one month with effect and without delay, and to make return, &c.

By sect. 67, the defendant may remove a replevin suit out of the County Court by certiorari on giving security, by like bond, approved of by the master of the court, to "defend with effect" and (except in case of discontinuance, non pros. or nonsuit) to prove that he had ground for believing either that the title to some hereditament, toll, &c., was in question, or that the rent or damage, in respect whereof the distress was taken, exceeded 20*l.*

The security required by the act is in the form of a bond with sureties "to the other party or intended party in the action or proceeding:" sect. 70. This is usually the distrainer. By 23 & 24 Vict. c. 126, ss. 23-4, the plaintiff in replevin may, in answer to an avowry, pay money into Court, and such payment is not to work a forfeiture of the bond.

The above provisions entirely extinguish the functions of the sheriff in replevin, and are much more extensive than the provisions of the former County Court Act, 9 & 10 Vict. c. 95, sect. 119-121. They have made many of the reported decisions on this head of little or no value.

Non est factum.] This plea only puts in issue the due execution of the bond by the defendants, or its conformity with the one set out in the count.

The form of bond prescribed by the general rules of the County Court (December, 1856) Sched. 96, shows an attesting witness annexed. Whether this will oblige the plaintiff to produce him is a question already noticed, *ante*, p. 78. The act requires no such attestation.

The approval of the security by the county clerk, or other officer, is recited in the bond, and is therefore, it seems, admitted by the obligors.

The bond requires no stamp. 5 Geo. 4, c. 41.

Forfeiture of the bond.] Where the bond is to prosecute in a superior court, the defendants may have to show, besides the due prosecution of the replevin suit, &c., that the plaintiff in replevin satisfied the court at the trial (if there was one) that he had good ground for belief that title was in question, or that the rent or damage exceeded 20*l.* For this purpose, it should seem that the plaintiff in the replevin suit should prove or produce some declaration or certificate to that effect by the judge who tried it; see *Tunncliffe v. Wil-*

mot, 2 C. & K. 626, where the certificate was refused by Patteson, J., on particular grounds; see *post*, *Action of Replevin, ad finem*.

With regard to the prosecution with effect and without delay, the old decisions appear to apply. Thus to prosecute "with effect" means to a "not unsuccessful termination;" *Jackson v. Hanson*, 8 M. & W. 477; *accord. Tummons v. Ogle*, 6 E. & B. 571; 25 L. J. (Q. B.) 403. The obligation to prosecute "without delay" is broken by not proceeding with due diligence, though the suit is not thereby determined; *Harrison v. Wardle*, 5 B. & Ad. 146. And it is no defence that the delay was justified by the practice of the court, or by successive orders for time to declare; but the jury may find delay notwithstanding; *Gent v. Cutts*, 11 Q. B. 288. The abatement of the suit by death of the distrainee is a sufficient excuse; *Morris v. Matthews*, 2 Q. B. 293.

Damages.] The verdict is taken for the amount of the penalty; and this, it seems, with costs of suit, still limits the amount that can be afterwards actually recovered from the defendants; *Branscombe v. Scarborough*, 6 Q. B. 13.

ACTION FOR RENT ON INDENTURE OF DEMISE OR SPECIAL CONTRACT.

In an action for rent, the declaration states a demise at a certain rent, the entry or holding of the defendant, and the accruing of rent during a certain period. Sometimes the lease by indenture is set out, which is then only inducement, and not the gist of the action.

Some of the proofs applicable to issues which occur in this action will be found under the previous heads of *Action for Use and Occupation* and *Action on Covenant*; and the heads of *Actions of Ejectment*, and *Replevin, post*.

Where the action is local (as where it is founded on privity of estate and not of contract), and the venue is ill laid, the objection cannot be taken at nisi prius unless it is raised by the pleadings or a variance is produced.

When the lease is in the pleadings stated to be under seal the contract is denied, and may be disproved under the plea of *non est factum*. The same defence may be raised under *non dimisit*, a plea denying the letting of the premises.

Defence.

Non Dimisit, &c.] Where the demise is denied, it may be proved by production and proof of a lease executed by the plaintiff and accepted by the defendant, or by proof of the execution of it by the defendant, just as if the plaintiff had declared on the deed, and the defendant had pleaded *non est factum*; see 1 *Wms. Saund.* 276 n. (1). The lease may be proved by producing the counterpart executed by the defendant; *Houghton v. Kœnig*, 18 C. B. 235; 25 L. J.

218. As to what amounts to a demise or lease, see *post*, *Action of Ejectment*, and *Action of Replevin*. The demise and rent proved must correspond with those alleged. Thus it is a variance where in the declaration the rent is stated to be 15*l.* per annum, and it appears in evidence to be 15*l.* and three fowls; *Sands v. Ledger*, 2 *Ld. Raym.* 793. But where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in evidence that the demise was of three rooms, and the use of the furniture, it was held to be rightly stated according to the legal effect; for the rent could not issue out of the chattels; *Walsh v. Pemberton*, *Selw. N. P.* 583; *Farewell v. Dickenson*, 6 *B. & C.* 251. But if the demise is of a messuage and of a licence to sport, reserving an entire rent, and is not under seal, it is void; the incorporeal right not passing except by deed; *Bird v. Higginson*, 6 *Ad. & E.* 824.

Payment.] As to proof of payment, see *ante*, pp. 406-35. The defendant may show payment to the plaintiff, or to another by his appointment; *Taylor v. Beal*, *Cro. Eliz.* 222; *Gillb. Ev.* 283; or that the plaintiff has agreed that a debt due by him to the defendant shall go in satisfaction of the rent; *Gillb. on Debt*, 443; but not that the plaintiff was bound by covenant to repair the premises, and that he (the defendant) expended the rent in necessary reparations; for this is only a cause of cross action. *Taylor v. Beal*, *Cro. Eliz.* 222; *B. N. P.* 177. But if the lessor directs the lessee to repair, and the lessee repairs accordingly, the money so laid out may be evidence of payment; *Gillb. on Debt*, 442. A compulsory payment of a charge upon the land may be recouped by the defendant out of his rent, and be given in evidence under a plea of *riens in arriere*. *Dyer v. Bowley*, 2 *Bing.* 94, and cases cited, *post. tit. Action of Replevin*.

Plea, riens in arriere.] It would seem that the plea of "nothing in arrear" is a good plea at common law; *Warner v. Theobald*, *Cowp.* 588.

Surrender.] The mere destruction of the sealed lease by consent of both parties is no surrender of the lease by operation of law; and debt lies for rent notwithstanding; for the estate is not devested. *Ward v. Lumley*, 5 *H. & N.* 87; 29 *L. J. (Ex.)* 322. A plea on equitable grounds might perhaps be supported.

Eviction.] An eviction (as to which see *ante*, pp. 169-428) must now, it seems, be specially pleaded.

Statute of Limitations.] Besides the stat. 3 & 4 Will. 4, c. 42, ss. 3 to 5, cited *supra*, p. 442, another act, 3 & 4 Will. 4, c. 27, passed during the same session, regulates the limitation of suits, &c., for rent, and other "periodical sums charged on land." It is partly set forth in *Action of Ejectment, Defence, post.* Sect. 42 is substantially as follows:—After the 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his

agent, signed by the person by whom the same was payable, or his agent.

It has been^a decided that, where the demise is by indenture, the action for rent is now limited by 3 & 4 Will. 4, c. 42, s. 3, to twenty years, and not, by 3 & 4 Will. 4, c. 27, s. 42, to six years only. *Paget v. Foley*, 2 N. C. 679; *Sims v. Thomas*, 12 Ad. & E. 536; *Grant v. Ellis*, 9 M. & W. 113; *Manning v. Phelps*, 10 Ex. 59; 24 L. J. (Ex.) 62.

ACTION FOR DOUBLE VALUE OF LAND DEMISED.

By statute 4 Geo. 2, c. 28, s. 1, in case any tenant for life, lives, or years, or other persons who shall come into possession of any lands, tenements or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, &c., after the determination of their term, and after demand made and notice in writing given for delivering the possession thereof by his or their landlord or lessor, or the person to whom the remainder or the reversions of such lands, &c., shall belong, his or their agents thereunto lawfully authorised, such persons so holding over shall, for the time he or they shall so hold over or keep the person or persons entitled out of the possession of the said lands, &c., pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of *double the yearly value* of the said lands, &c., for so long time as the same are detained, to be recovered by action of debt in one of the Queen's Courts of Record.

Proof of the demise.] Tenants in common cannot sue jointly in this action, where there was no joint demise by them; *Wilkinson v. Hall*, 1 N. C. 713. Husband and wife cannot sue jointly on a parol demise by the husband alone of land whereof he is seised in right of his wife, but the action must be brought by the husband alone; *Harcourt v. Wyman*, 3 Ex. 817. A., the lessor of defendant, required redelivery of the premises at Lady-day, when the lease ended, and then made a lease in reversion to B.; defendant held over and did not recognise B. as landlord: Held that A., and not B., was the proper person to sue; *Blatchford v. Cole*, 5 C. B., N. S. 514.

Proof of the determination of the term, and of the demand.] In general the determination of the term will be proved by evidence of the service of a notice to quit upon the defendant; and if such notice be proved, it will not be necessary to show a demand; for the notice includes a demand; *Wilkinson v. Colley*, 5 Burr. 2604. As to proof of the notice or demand, see *ante*, pp. 11-14, and cases cited *post*, *Action of Ejectment,—by Landlord*. A notice to quit, containing a threat of requiring double rent on refusal, is sufficient; *Ibid*. The statute requires it to be in writing. Where the defendant has held over after the determination of a term certain, a demand in writing of the possession must be proved; but it need not appear that the demand was made immediately upon the expiration of the tenancy; *Cobb v. Stokes*, 8 East, 361; though the plaintiff will only

be entitled to the double value from the time of the demand made. And where the rent is reserved quarterly, and the demand is made in the middle of the quarter after the expiration of the tenancy, the plaintiff cannot recover the single rent for the antecedent fraction of the quarter; *Ibid.* Where the notice was served upon a tenant, a feme sole, who married before the expiration of the year, it was held that the landlord might maintain debt against the husband without making a demand of the possession from him; and that in such action it was not necessary to join the wife for conformity; *Lake v. Smith*, 1 *New Rep.* 174. A person appointed by the Court of Chancery to receive the rents and profits of the estate, is a sufficient agent within the statute to make the demand in his own name; *Wilkinson v. Colley*, 5 *Burr.* 2694. Where a trustee joined with *cestui que trust* in a mortgage to the plaintiff, and all parties joined in appointing G. to be the agent and attorney of the *cestui que trust* to demand and collect rent, to give notice to quit, &c., and to do everything that *cestui que trust* could have done before the mortgage, it was held that G. was authorised to demand within the statute; *Poole v. Warren*, 8 *Ad. & E.* 582.

The value.] In estimating the value, only the land and its real easements and appurtenances can be included. Thus where the owner of a mill let part of it to the defendant, with the use of the revolving shaft of a steam-engine which passed through the part demised, at an entire rent, the value of the power was excluded; *Robinson v. Learoyd*, 7 *M. & W.* 48. Generally speaking, the rent, if a rack-rent, will represent the value; but the unwillingness of the tenant to quit may sometimes be evidence of a greater value. If lessee continues to hold over, lessor may sue for damages occasioned by having to compromise an action by a person (to whom he had let in reversion) for not giving possession, together with the costs of such action; and his acceptance of rent for the time held over is no answer; *Bramley v. Chesterden*, 27 *L. J. (C. P.)* 23; 2 *C. B., N. S.* 592.

Defence.

Spécial traverses have been usual in this action; but if this is to be considered a penal action, the general issue, or, perhaps, Not guilty, is still sufficient to put the plaintiff on proof of the whole declaration; see *Jones v. Williams*, 4 *M. & W.* 375, decided on 11 *Geo. 2, c. 19, s. 4*, for double value of goods removed to avoid a distress.

The defendant may show that the plaintiff has waived the notice to quit or demand of possession; and, where the plaintiff has accepted rent due from the defendant after the expiration of the notice to quit, it is a question for the jury whether such rent was received in part satisfaction of the double value, or as a waiver of it; *Ryall v. Rich*, 10 *East*, 52. Where the landlord declared in debt, first for the double value, and secondly for use and occupation, and the tenant pleaded *nil debet* to the first count, and a tender of the single rent, before action brought, to the second, and paid the money into court, which the plaintiff took out of court, and proceeded; it was held that this was no waiver of the plaintiff's right to the double value, so as to be ground of nonsuit; but that it was a case to go to the

jury; and that the plaintiff going on with the action after taking the single rent out of court was evidence to show that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto* only; *Ibid.* A recovery in ejectment is no waiver of the landlord's right to the double value for the time between the expiration of the notice to quit and the time of recovering possession under the ejectment; *Soulsby v. Neving*, 9 *East*, 310. A tenant who holds over under a fair claim of right will not be considered as wilfully holding over within the statute, though it may appear eventually that he had no right; *Wright v. Smith*, 5 *Exp.* 203. In *Swinfen v. Bacon*, 6 *H. & N.* 184; 30 *L. J. (Ex.)* 33, a tenant who during proceedings as to the validity of a devise made by the lessor held over after a notice to quit from the devisee to whom he had in the first instance attorned and paid rent, was held not to have made himself liable to a claim for double value after the validity of the devise had been established. Where the action is against co-tenants, a statement by one, on receipt of notice to quit, that "he has nothing to do with the land," is not evidence in his favour to show that his holding was not wilful; but if one offers to give up the land, and the other alone holds out, it is doubtful whether the action will lie against both; *Hirst v. Horn*, 6 *M. & W.* 393.

ACTION FOR DOUBLE RENT.

By stat. 11 Geo. 2, c. 19, s. 18, if any tenant shall give notice of his intention to quit the premises holden by him at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then such tenant, his executors, or administrators, shall thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered at the times and in the same manner as the single rent or sum, before the giving of such notice, could be levied, &c.; and such double rent or sum shall continue to be paid during the time such tenant shall continue in possession. The action has usually been in the form of debt.

The notice mentioned in this statute need not be in writing, at least where the tenant holds under a parol demise; *Timmins v. Rowlinson*, 3 *Burr.* 1603; but it must give a fixed time for quitting: thus a notice to quit, "as soon as the tenant can get another situation," does not render him liable on this statute, though he has got another situation; *Furrance v. Elkington*, 2 *Camp.* 591. The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and actually gives a valid notice sufficient to determine it; *Johnstone v. Huddleston*, 4 *B. & C.* 922.

ACTION FOR PENALTY.

Actions on statutes for penalties have been usually in the form of

actions of debt. In some cases that form is prescribed by the statute; in other cases, where no form is specified, the penalty has been treated as a statute debt when incurred, though not strictly referable to any contract.

In an action of debt on a penal statute the general evidence for the plaintiff is,—proof of the commission of the act upon which the penalty has accrued, and, if a time be limited by the statute for bringing the action, proof that the action was brought within the time; and, where the venue is local, that the action is brought in the right county.

In the statement of the offence it is sometimes necessary to allege a contract, and such contract must then be proved as laid. But variances in such actions are amendable, and will be amended where justice requires. In a penal action under an old act for exercising a trade without having served an apprenticeship, the plaintiff was not compelled to prove that the defendant used the trade all the time laid in the declaration; it being averred that he forfeited 40s. for each month; *Powell v. Farmer*, *Peake C.* 57. Where the penalty arises from the commission of an act without a legal qualification, the existence of which qualification is peculiarly within the knowledge of the defendant, it will not be necessary for the plaintiff to show the want of qualification; *Apothecaries' Co. v. Bentley, R. & Mood*, 159. In *Hodkinson v. Mayer*, 6 *Ad. & E.* 124, it was held that an attorney, who practises in a county court after having omitted for a year to take out his certificate, was not liable to penalties under statute 12 Geo. 2, c. 13, s. 7, as a person practising in the county court without having been legally admitted according to stat. 2 Geo. 2, c. 23. A person, being deputy clerk of the peace, and acting as attorney, is not liable to penalties under 22 Geo. 2, c. 46, if he abstains from the actual exercise of his office; *Faulkner v. Chevell*, 10 *Ad. & E.* 76.

Evidence of commencement of the action.] Since the Uniformity of Process Act the writ is, in all cases, the commencement of the action, and the Nisi Prius record will show the day on which it issued. The return of the writ need not be shown; *Parsons v. King*, 7 *T. R.* 6. See as to the process for the renewal of writs under the Common Law Procedure Act, 1852, *ante*, p. 393.

By 3 & 4 Wm. 4, c. 42, s. 3, all actions for penalties, damages, or sums given to parties grieved by existing or future acts, must be brought within two years after the cause of action.

Evidence of locality of the cause of action.] In general in an action upon a penal statute the plaintiff must prove that the cause of action arose in the county in which the venue is laid; see 31 Eliz. c. 5, s. 2; *Tidd Prac.* 431. And the objection arises on the general plea of *nil debet* or *not guilty "by statute."* But neither this act nor 21 Jac. 1, c. 4, s. 2, applies to actions by parties grieved who sue for a penalty given to them; but only to common informers; *Fife v. Bougfield*, 6 *Q. B.* 100. Therefore debt for extortion against a pound-keeper under 1 & 2 P. & M. c. 12, is not local; *Ib.* and *Pope v. Davis*, 2 *Taunt.* 252.

The offence of selling coals of a different description from those contracted for, upon statute 3 Geo. 2, c. 26, s. 4, is complete in the county where the coals are delivered, the contract not being for any specific parcel of coals, but for a quantity of a certain description;

Butterfield v. Windle, 4 East, 385. A penal action is a local action within the 3 & 4 Will. 4, c. 42, s. 22, and therefore the issue may be ordered to be tried in any other county than that in which the venue is laid; *Greenhow v. Parker*, 6 H. & N. 882; 31 L. J. (Ex.) 4.

Defence.

The new rules of pleading do not apply to penal actions which are within the 4th section of 21st Jac. 1, cap. 4; *Earl Spencer v. Swan-nell*, 3 M. & W. 154; and that section applies to actions on statutes subsequent as well as prior to that act; *Jones v. Williams*, 4 M. & W. 375. The plea of Not guilty is therefore proper; *Faulkner v. Chevell*, 5 Ad. & E. 213; 10 Ad. & E. 76. However, it is now necessary, pursuant to the rule of court, to insert the words "by statute" in the margin of the plea whereon the defendant intends to give the special matter in evidence under the general issue by virtue of any act of parliament. To an action for treble damages for pound breach on 2 W. & M., sess. 1, c. 5, s. 4, the defendant cannot plead "not guilty, by statute," for it is not a penal action within 21 Jac. 1, c. 4; *Castleman v. Hicks*, 2 Mood. & Rob. 422.

ACTIONS FOR WRONGS, INDEPENDENT OF CONTRACT.

ACTION FOR NUISANCE.

Under this head are inserted cases which apply to nuisances in general as affecting real property.

The plaintiff may, by proper pleas, be put to prove the inducement, if any; his possessory title; the nuisance; and the damages.

Proof of plaintiff's title. Injury to reversion.] If the plaintiff is in possession, whether as owner or otherwise, it is sufficient for the plaintiff to prove, as usually alleged in the declaration, that he was possessed of the premises injured by the nuisance. If the nuisance be of a permanent nature, or injurious to the reversion, an action may be brought by the reversioner, as well as by the tenant in possession; each being entitled to recover for his respective loss. *Beddingfield v. Onslow*, 3 *Lev.* 209; 1 *Saund.* 322 *e* (n). The reversioner may sue where the injury complained of is an injury to his right, though the nuisance is capable of being easily removed; as the obstruction of light by an alteration in the defendant's house; *Shadwell v. Hutchinson*, *Mood. & M.* 350. And the averment "*per quod* the plaintiff was injured in his reversionary estate," not being a mere inference of law, must be proved, and, after verdict, will be assumed to have been proved, if any such injury could possibly have been caused by the alleged act; *Kidgill v. Moor*, 9 *C. B.* 364; 19 *L. J. (C. P.)* 177. If anything is done to destroy the evidence of title, an action is maintainable by the landlord against his tenant. Thus, if the tenant opens a new door, the landlord may recover against him in this action pending the lease, though the house itself may not be the worse for it, provided the jury find that his reversionary interest is injured; for the mere alteration of the property may tend to the injury of the owner; *Young v. Spencer*, 10 *B. & C.* 145, 152. It is observable that an act of the nature here referred to seems to be actionable without regard to its effect on the evidence of title; for the alteration cannot be made without destroying at least some part of the freehold, which no tenant has a right to do, whatever compensating improvement in other respects may be supposed to result from it. The action lies by the reversioner against his own tenant, although the injury is caused by an act done, as working a mine, in breach of an express covenant by the defendant; *Marker v. Kenrick*, 13 *C. B.* 188. The erection of a roof, which throws rain-water in the yard of the plaintiff's tenant, is a ground of action to the plaintiff, if the jury think the reversion is [or will be] damaged; *Tucker v. Newman*, 11 *Ad. & E.* 40. But no action lies by the lessor against a stranger for a mere transient trespass, though it be in assertion of a claim of right of way, &c.; such an act not being injurious to the reversion; *Baxter v. Taylor*, 4 *B. & Ad.* 72; see, however, the judgment in *Dobson v. Blackmore*, 9 *Q. B.* 991, where it is observed by the court, that even an act, not permanent, if coupled

with an obvious denial of right, as by a public notice, might perhaps be actionable. And it seems that where the plaintiff claims a right of way for his tenants, an obstruction of the exercise of the right, coupled with a denial of it, is actionable, though the obstruction be of a temporary character, as by locking a gate; *Kidgell v. Moor*, *supra*. But where the act complained of cannot injure the reversion (as in case of a noisy occupant of the next premises), it ought not to be left to the jury; *Mumford v. Oxford, &c. Railway Co.*, 1 H. & N. 34; 26 L. J. (Ex.) 265. A nuisance occasioned by excessive smoke from a neighbour's chimney, is not generally a cause of action for the reversioner; *Simpson v. Savage*, 1 C. B., N. S. 347; 26 L. J. (C. P.) 50.

In an action for an injury to the reversion, the tenant holding under a written agreement, the Court of K. B. held, that it is necessary (where the tenancy is denied) to produce the agreement; *Cotterill v. Hobby*, 4 B. & C. 465. But the Court of C. P. were divided on this point in *Strother v. Barr*, 5 Bing. 136. See further, *ante*, p. 1. The power of amending the declaration, and converting an action for injury to the reversion into one to the possession, and *e converso*, makes this objection less likely to be taken hereafter. And according to later cases, the payment of rent to the plaintiff alone is evidence against the defendant that the plaintiff is sole reversioner; *Daintry v. Brocklehurst*, 3 Ex. 207; *Logan v. Hall*, 4 C. B. 598. In an action by the reversioner, a trustee, proof that the *cestui que trust* let the premises and received rent from the tenant was held to support an alleged occupation by the tenant, as tenant to the plaintiff; *Vallance v. Savage*, 7 Bing. 595. The plaintiff alleged possession of a wharf, and a nuisance to it by the defendant: Plea, not possessed: Held, that long user of the wharf would support a verdict for the plaintiff, though the defendant showed a grant to a lessee (under whom the plaintiff claimed) of the use of the land only for a certain purpose; *Page v. Hatchett*, 8 Q. B. 593. Possession of A. B., as tenant to the plaintiff, is proved by showing that A. B. continues legally interested as tenant, though he has given up actual possession to the defendant; *Hosking v. Phillips*, 3 Ex. 168. Where the defendants, corporators, had erected a building on the land of the corporation, which obstructed the market of L.; and L. afterwards demised the market to the plaintiff; an action on the case was held to lie for the plaintiff against the defendants for continuing the nuisance; *Thompson v. Gibson*, 7 M. & W. 456.

Proof of the nuisance.] To erect anything offensive so near the house of another as to make it useless; as a swine-sty, a forge, &c., is actionable; *Com. Dig. Action on the Case for Nuisance (A.)*; and it is enough that it renders the enjoyment of life and property uncomfortable; *per Lord Mansfield*, in *R. v. White*, 1 Burr. 337. It is a nuisance to build a cornice over a neighbour's land so as to throw rain-water on it; and no proof of damage is necessary; *Fay v. Prentice*, 1 C. B. 828; *Battishill v. Reed*, 18 C. B. 696; 25 L. J. (C. P.) 290. Where, indeed, the plaintiff sued the defendant for keeping his dogs so near the plaintiff's house that his family were prevented from sleeping at night, and were much disturbed during the day, and the jury found a verdict for the defendant, though no evidence was given by him, the court refused a new trial; *Street v. Tugwell*, Selw. N. P. 1047; and this has been sometimes represented as an authority, that to keep a kennel close to a neighbour's house is

not, in law, a nuisance. But the court would no doubt have upheld a verdict the other way, if the jury had found it to be a nuisance; for noise may be a nuisance even in a legal trade; see *Elliotson v. Feetham*, 2 N. C. 134. Although mere noise will not support an action by a reversioner as it does not inflict on the plaintiff an injury of a permanent character; *Mumford v. The Oxford Railway Co.*, 1 H. & N. 34; 20 L. J. (Ex) 265.

A public nuisance is a ground of action, if a special injury also be alleged and shown by the plaintiff beyond that which is common to the public at large; *Dimes v. Petley*, 15 Q. B. 276. In such cases the private injury or damage, as a ground of action, appears on the record. Where vitriol works were established by the defendant, which were complained of as injurious to the plaintiff's garden, evidence was admitted on both sides to show the effect of the works on other gardens in the same neighbourhood; but the plaintiff's counsel was not allowed to ask one of the defendant's witnesses "whether he knew of any money paid by the defendant to another person A., for alleged damage to his ground by the works;" although he had stated on his examination that he knew of no damage done to A. by them; for the inquiry as to such payment is collateral, and the answer would not be evidence, either to prove damage or to test the veracity of the witness; *Tennant v. Hamilton*, 7 Cl. & Fin. 122.

In the case of *Walter v. Selfe*, 4 De Gex & Sm. 315, Bruce, V. C., granted an injunction against the continuance of a brick-clamp near the plaintiff's house, although it was shown that other brick-clamps had been burning in the same neighbourhood. In *Hole v. Barlow*, 4 C. B., N. S. 334; 27 L. J. (C. P.) 207, the jury had been directed to find for the defendant if they thought that the burning of bricks, which was the alleged cause of action, had been carried on in a proper and convenient place, and was under the circumstances a reasonable use by the defendant of his own land, and this direction was upheld by the Court of Common Pleas. This decision, after having been more than once questioned, was at length reviewed in the case of *Bamford v. Turnley*, 3 B. & S. 62; 31 L. J. (Q. B.) 286. There the plaintiff and the defendant had purchased portions of some land which had been sold for building purposes. The defendant, in order to obtain bricks to build upon his own land, erected a clamp of bricks within 180 yards of the plaintiff's house. It was proved that the use of the clamp was temporary only, and that it was placed on that part of the defendant's land most distant from the plaintiff's house. The jury having been directed according to the principle laid down in *Hole v. Barlow*, found a verdict for the defendant, but this verdict was set aside upon appeal to the Exchequer Chamber. It was held by a majority of that Court, overruling the decision in *Hole v. Barlow*, that where any act is shown to interfere with the comfort of an individual so as to come within the legal definition of a nuisance, it cannot be justified by the finding of a jury that it is a reasonable use by the defendant of his land and premises. In *Cavey v. Lidbetter*, 13 C. B., N. S. 470; 32 L. J. (C. P.) 104, the defendant erected a kiln and burnt bricks opposite the plaintiff's cottage, at a distance of about thirty feet. The learned judge left to the jury the question whether the burning of the bricks rendered the enjoyment of the plaintiff's life and property substantially uncomfortable, and refused to leave to them the question whether the bricks were burnt in a convenient place. It was held that there was no misdirection. In the case of

The Wunstead Local Board of Health v. Hill, 13 C. B., N. S. 479; 32 L. J. (M. C.) 135, Willes, J., is reported to have said that the case of *Bamford v. Turnley* differs from *Hole v. Barlow* in this respect only, that it decides that it is not in every case to be left to the jury to say whether the act complained of was, under the circumstances, done in a reasonable place, and was a reasonable use of the land of the person who did it. It would seem therefore that where the presiding judge is of opinion that enough is proved to show a nuisance to the plaintiff, the case is removed from the consideration of the jury.

For such things as merely abridge the *pleasure* of the plaintiff in the enjoyment of his property, as shutting out the prospect from his windows, an action will not lie; *Aldred's case*, 9 Co. Rep. 58 b.

The nuisance occasioned by the defendant.] This action may be brought either against the person who originally occasioned the nuisance, or against his alienee who permits it to be continued; but a request to the alienee to remove or abate the nuisance must be proved; *Penruddock's case*, 5 Co. Rep. 101 a. The defendants, in the execution of a contract with the Lords of the Admiralty for the erection of docks, sunk piles in the channel of P. harbour. After the completion of the works they sold the piles (which were then so far visible as not to be dangerous) to J., who agreed to remove them within a certain time. J. afterwards cut the piles off on a level with the bed of the channel, and the plaintiff's ship struck against them, and was injured. It was held that the defendants were not liable; *Bartlett v. Baker*, 34 L. J. (Ex.) 8. Where a notice to remove the nuisance had been served upon the predecessor of the defendant, Abbot, C. J., ruled that, being delivered on the premises to the occupier for the time being, it bound a subsequent occupier; *Salmon v. Bensley, Ry. & M.* 189.

Where a contractor, employed to do a lawful act, causes a nuisance in the course of his work, the contractor alone, and not the employer, is responsible. In *Gray v. Pullen*, 32 L. J. (Q. B.) 169; where the defendant, in accordance with the Metropolis Local Management Act, had employed H. to carry a drain across the footway of the public road, and the soil was so carelessly replaced that it subsided, leaving a trench into which the plaintiff fell and was injured, it was held that the action should have been brought against H., and that the defendant was not liable. This decision was reversed in error, upon the construction of the statute. Where the nuisance directly results from the thing contracted to be done, the employer is liable. The defendants, a company without special powers for that purpose, directed W. to open trenches in the streets of Sheffield, and the servants of W., whilst engaged in the task, left a heap of stones on the footway over which the plaintiff fell, the defendant was held to be liable, as what he had ordered to be done was a public nuisance; *Ellis v. The Sheffield Gas Consumers' Company*, 2 E. & B. 767; 23 L. J. (Q. B.) 42. In *Hole v. The Sittingbourne Railway Co.*, 6 H. & N. 488; 30 L. J. (Ex.) 81, the defendants being authorised by act of parliament to make an opening bridge over a navigable river, employed a contractor to construct it: held, that they were liable for damage caused by the defect of the bridge. The statute had charged them with a duty and they could not excuse themselves by throwing the blame on their contractor; see also *Peachey v. Rowland*, 13 C. B. 182; *Scott v. Manchester, Mayor of*, 1 H. & N. 59 (Ex. Ch.) 2 H. & N.

204; 26 *L. J. (Ex.)* 406; *Sudler v. Henlock*, 4 *E. & B.* 570; 24 *L. J. (Q. B.)* 138; *Butler v. Hunter*, 7 *H. & N.* 826; 31 *L. J. (Ex.)* 214.

Although the owner of land after letting it is not liable for a nuisance erected by the tenant, yet if he lets or re-lets the land with a nuisance upon it, or retains control over the repairs, he is liable notwithstanding the tenancy. Where damage arose from the non-repair of a trap-door over a cellar, and it was shown to be the duty of the lessor to repair, as between him and the lessee, he was held to be rightly sued; *Payne v. Rogers*, 2 *H. Black.* 350. In *Rosewell v. Prior*, 2 *Salk.* 460, the lessor was held liable for the continuance of a wall upon land which he had leased, because the wall existed at the time of the demise. In *Rich v. Basterfield*, 4 *C. B.* 783, in an action against the owner of premises for a nuisance arising from smoke issuing out of a chimney which he had erected, the court decided in favour of the defendant, as the chimney was not in itself a nuisance, but only the user of it in such a way as to cause smoke to issue. In *Todd v. Flight*, 9 *C. B., N. S.* 377; 30 *L. J. (C. P.)* 21; the owner of a stack of chimneys having demised them while in a ruinous condition, was held liable to an action at the suit of a person upon whose house they fell. And in *Gandy v. Jubber*, 33 *L. J. (Q. B.)* 151, where an area-grating had fallen into a dangerous condition during a yearly tenancy, the reversioner was made responsible for damage caused by it, as he might have determined the tenancy before the mischief had happened.

Trustees or commissioners, acting for public purposes without salary or reward, are exempt from some of the responsibility which is incurred by private individuals. Where the vestry of a parish, to whom the powers of surveyor of highways were given by the Metropolitan Local Management Act, ordered certain paving work to be done, and the plaintiff was injured by a careless arrangement of the paving-stones, it was held that he could recover no damages from the vestry; *Holiday v. St. Leonard*, 11 *C. B., N. S.* 192; 30 *L. J. (C. P.)* 361; see *Duncan v. Findlater*, 6 *Cl. & F.* 894; *Hall v. Smith*, 2 *Bing.* 158; *Boulton v. Crouther*, 2 *B. & C.* 703; *Coe v. Wise*, 33 *L. J. (Q. B.)* 281.

But they have been held liable where their acts were of an arbitrary and oppressive character; *Leader v. Moxton*, 3 *Wils.* 461; *Boulton v. Crouther*, cited *supra*. So also where an injury arises from the neglect or careless discharge by the trustees of the duties personally imposed upon them; *Whitehouse v. Fellowes*, 10 *C. B., N. S.* 765; *Oterley v. The Ryde Commissioners*, 33 *L. J. (Q. B.)* 296; and where they have personally interfered in the carrying out of works authorised by the legislature; *Alston v. Scales*, 9 *Bing.* 3; *The Company of Proprietors of the Southampton and Itchin Floating Bridge v. The Local Board of Health of Southampton*, 8 *E. & B.* 801; 28 *L. J. (Q. B.)* 41. Where the works which they were authorised to construct were for trading and other profitable purposes; *Scott v. The Mayor, &c., of Manchester*, 2 *H. & N.* 204. Where the act, in the execution of which those whom they employed were guilty of negligence, was itself unauthorised by the special act; *Brownlow v. The Metropolitan Board of Works*, 13 *C. B., N. S.* 768; 33 *L. J., C. P. (Ex. Ch.)* 233. Trustees of docks receiving tolls from vessels who used them were held liable for damage caused by their keeping a dock open when they were aware of its dangerous condition; *Gibbs v. The Trustees of the Liverpool Docks*, 3 *H. & N.* 164; 27 *L. J. (Ex.)*

321. And where they had the means of knowing of its dangerous condition; *Penhallow v. The Mersey Docks*, 7 H. & N. 329; 30 L. J. (Ex.) 329; see *Ruck v. Williams*, 3 H. & N. 308; 27 L. J. (Ex.) 357. But where the injury to the plaintiff arose from long detention in a canal by reason of the fall of a lock from want of repair, the commissioners not being liable to repair, but having power to enforce repair by others, it was held that the commissioners were not liable, the cause of damage being too remote; *Walker v. Gee*, 4 H. & N. 350; 28 L. J. (Ex.) 184.

Damages.] Where the injury is by pulling down a house in the possession of the plaintiff's tenant, the measure of damage is the diminution in the saleable value of the premises in consequence of the act done; *Hosking v. Phillips*, 3 Ex. 168. But where the nuisance is a continuing one, so that successive actions may be brought, the measure of damages is the amount of injury sustained up to the time when the action is brought, and the jury may, upon a further action, give substantial damages; *Nicklin v. Williams*, 10 Ex. 259; *Battishill v. Reed*, 18 C. B. 696.

Defence.

The new rules Hil. T. 1853, rule 16, provide that the plea of "Not guilty" shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed, and not of the facts stated in the inducement; and no other defence shall be admitted under it. All other pleas in denial shall take issue on some particular fact alleged, and all matters in confession and avoidance shall be pleaded specially, as in actions on contract. Thus, in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of Not guilty denies only that defendant carried on the trade so as to be a nuisance, and not the plaintiff's occupation.

In an action for continuing a nuisance before erected by H., the plea of "Not guilty" only puts in issue the continuance by the defendant, and not the erection by H. *Grenfell v. Edgcote*, 7 Q. B. 661.

It is no defence that the nuisance was carried on for ten years [or for any number of years less than twenty] before the plaintiff was possessed of his house; *Elliotson v. Feetham*, 2 N. C. 134; and see *Bliss v. Hall*, 4 N. C. 183. Nor is it any defence that noises, complained of by the plaintiff, were not greater than were necessary and unavoidable in the defendant's business; *Elliotson v. Feetham*, *supra*.

Where the nuisance is by a single act, as by letting water into a mine through a hole made by the defendant, accord and satisfaction or recovery in a former action, is a bar, for only one action lies, notwithstanding the occurrence of subsequent consequential damage; *Clegg v. Dearden*, 12 Q. B. 576. So where the act is the undermining of a house; *Nicklin v. Williams*, 10 Ex. 259, cited *supra*. But where there has been not only a fresh damage but a continuance of the wrongful act which caused it, there is a new cause of action; *Whitthouse v. Fellowes*, 10 C. B., N. S. 765; 30 L. J. (C. P.) 305.

Statute of Limitations.] In actions on the case in which the gist

of the action is the consequential damage, the time of limitation begins to run from the occurring of the consequential damage, *Roberts v. Read*, 16 East, 215, *Gillon v. Boddington, Ry & Mood*, 101; *Howell v. Young*, 5 B. & C 268. Where a statute required an action to be brought within six months after the matter or act done, and the injury was caused by sinking a sewer whereby the walls of the plaintiff's house cracked, it was held that the action must be brought within six months from the time of the walls cracking *Lloyd v. Wigney*, 6 Bing 499, *Woodsuorth v. Harley*, 1 B & Ad 391. Where plaintiff's house was injured by the sinking of the subsoil within six years, in consequence of the working of an adjacent mine by a neighbour more than six years before the statute was held no bar. *Bonomi v. Backhouse*, 9 H L Cas 503

ACTION FOR NEGLIGENCE

The following are some of the most common causes of action included under this head

Negligent Driving of Carriages

An allegation that the defendant so negligently drove &c., is supported by evidence that his servant was the driver *Boulton v. Fromont*, 6 T. R 859. But a master is not answerable for the wilful and malicious act of his servant *W. Munus v. Crickett*, 1 East, 106. Thus, where the defendant's servant wantonly, and not for the purpose of executing his master's orders, strikes the plaintiff's horses and thereby produces the accident, the master is not liable but where the servant in the course of his employment, and in order to extricate himself from a difficulty, so strikes them, although injudiciously, his master is liable, *Croft v. Alison*, 4 B & A 590. In *Limpus v. The London General Omnibus Company*, 1 H & C 626, *ex error*, 32 L. J (Ex) 31, the defendants were held liable for the act of their driver, who pulled his horses across the road in front of the plaintiff's omnibus, and so overturned it, although the act of the driver was contrary to the regulations of the company. And see *Greenwood v. Seymour*, 7 H & N 355 30 L. J (Ex) 327. Where A. contracted with the postmaster-general for mail coaches, and B. contracted to supply horses and drivers, and hired the plaintiff to drive one of them, who met with an accident occasioned by a defect in the coach, it was held that he could not sue A, *Winterbottom v. Wright*, 10 H. & W. 109, and probably no one was legally liable in this case; for the postmaster-general could not be sued. It seems that the defence in such cases as the above is open under the plea Not guilty.

Where A. and B. were jointly interested in the profits of a common stage-waggon, but, by a private agreement between themselves, each undertook the management of the waggon with the driver and horses

for a specified distance, it was held by Gibbs, C. J., that they were, notwithstanding this private agreement, jointly responsible to third persons for the negligence of their drivers throughout the whole distance; and that an averment that the negligence was occasioned by the driver of A. (against whom alone the action was brought), was supported by proof that the driver was actually employed by B. in conducting the waggon for his own stages; *Waland v. Elkins*, 1 Stark. 272; *Fromont v. Coupland*, 2 Bing. 170. Where a stable-keeper let horses to a person to draw his carriage, and the horses were driven by the servant of the stable-keeper, Lord Ellenborough was of opinion that the latter was liable for any accidents occasioned by the post-boy's misconduct on the road; *Dean v. Brunthwaite*, 5 Esp. 35; *Sammell v. Wright*, ib. 263; *Houghton's case*, cited 6 B. & C. 550. And see a like decision where the owner of a boat and crew was held liable for carelessness of the crew, though they had been hired for the day by a ferryman, to whom plaintiff had paid the fare; *Dalyall v. Tyrer*, E. B. & E. 899; 28 L. J. (Q. B.) 52. And where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for the day, and the owner of the horses provided a driver, who received no wages but a gratuity from the owner of the carriage, and was guilty of negligent driving, it was held by Abbott, C. J., and Littledale, J. (Bayley and Holroyd, JJ., dissentientibus), that the owner of the carriage was not liable to be sued for such negligence; *Laugher v. Pointer*, 5 B. & C. 547; and the opinion of Abbott, C. J., and Littledale, J., was adopted and confirmed by the Court of Exchequer in *Quarman v. Burnett*, 6 M. & W. 199. Nor does it make any difference that the driver was provided, during the drive, with livery belonging to the owner of the carriage, and that the accident happened by the driver leaving the carriage while returning the livery; *Ibid.* Where the defendant, the owner of the carriage, sat on the box, and did not interpose to prevent the postilions from forcing their way among other carriages, whereby the injury was done, and he afterwards used expressions admitting his responsibility, this was held to be evidence of a joint act of trespass by the defendant and postilions; *McLaughlin v. Pryor*, 4 M. & G. 48. And where a servant uses his own horses and gig on his master's business and with his knowledge, the master is liable, though the servant may, on the same occasion, do business of his own; *Patten v. Rea*, 2 C. B., N. S. 606. In an action for damage done to the plaintiff's cabriolet from the negligence with which the defendant's cart was driven, the defendant was held liable, although it appeared that the defendant's servant was not driving at the time of the accident, but had entrusted the reins to a stranger who was riding with him and was not in the service of the defendant; *Booth v. Mister*, 7 C. & P. 66. In an action against the proprietors of a stage-coach, where it appeared that one of the defendants was driving when the accident happened, the jury having found that it happened through his negligent driving, it was held that the plaintiff might maintain case against all the proprietors, though he might have sued the one who drove in trespass; *Moreton v. Hardern*, 4 B. & C. 223. In this and other like cases the form of action was much discussed before the Common Law Procedure Act, 1852; see *Gordon v. Rolt*, 4 Ex. 385; *Sharrod v. London and North-Western Railway Co.*, Id. 580, &c.: but that act has, in effect, made the distinction between the two forms of case and trespass of little practical importance.

In order to prove the ownership of a stage-coach, it will be sufficient to produce a certified copy of the licence, which names the proprietors and other particulars, and is made evidence of the contents by 5 & 6 Vict. c. 79, s. 10, on proof of the handwriting of the Commissioner of Stamps or other officer authorised to sign it, without proving that he is, in fact, a Commissioner or authorised officer; and it seems that since 8 & 9 Vict. c. 113, s. 1, it will be unnecessary to prove the handwriting; *ante*, p. 70.

Evidence of negligence.] In the case of an accident on a railway by running off the line, negligence need not be proved with the same strictness as in the case of carriages drawn by horses; *Carpue v. London and Brighton Railway Co.*, 5 Q. B. 717. In *Burns v. The Cork and Brandon Railway Co.*, 13 Ir. C. L. R. 543, where an accident had happened, owing to the breaking of a crank pin, it was held that the railway company did not exonerate themselves by showing that they had duly and properly examined the pin, and had not at any time before the fracture any notice of the defect in the pin, as this was consistent with negligence in purchasing and procuring it. In *The Great Western Railway Company of Canada v. Braid*, 1 Moo. P. C. C., N. S. 103, where an embankment over which a railway was carried had given way, in consequence of a fall of rain of unusual severity, the company were held responsible, as they ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur. Where a railway was injured by an extraordinary flood, the state of the road being such that it was secure against ordinary floods, the company were held not liable for injury to a passenger from misplacement of the rails; *Withers v. The North Kent Railway Co.*, 27 L. J. (Ex.) 417. Negligence is disproved by showing another sufficient cause, as a stone wilfully put on the rail by a stranger; *Latch v. Rummer R. W. Co.*, 27 L. J. (Ex.) 155. So if the accident is consistent with due care, as where the carriage runs off the rail for some unexplained cause, this is not *prima facie* evidence of negligence; *Bird v. Great Northern R. W. Co.*, 28 L. J. (Ex.) 3. So a collision between trains of the same company is *prima facie* evidence of their negligence; *Skinner v. London & Brighton Railway Co.*, 5 Ex. 787. And a passenger may be alleged to be carried by the company, though he in fact bought his ticket of a society which had specially hired the train of the company and sold the tickets; *Id.* Where the collision is between two trains or carriages under independent control, as where different companies use the same line, the case would seem to fall within the ordinary rule, which requires special proof of negligence of the party sued. Proof that a stage-coach broke down raises a presumption that the accident arose either from the unskillfulness of the driver, or the insufficiency of the coach; *Christie v. Griggs*, 2 Camp. 79; *Curtis v. Drinkwater*, 2 B. & Ad. 169. And the owner is liable for the insufficiency of the coach, although the defect be out of sight, and not discoverable upon ordinary examination; *Sharp v. Grey*, 9 Bing. 457; see also *Grote v. Chester and Holyhead Railway Co.*, 2 Ex. 251. Where a coach, which is overloaded, breaks down, the excess in the number of passengers has been held to be evidence that the accident arose from the overloading; *Israel v. Clark*, 4 Esp. 259. But where the injury is the result of mere accident, no action lies: thus

where the coachman was driving in the middle of the road, and not on his own side, but there were no other coaches on the road, and the horses took fright and overturned the coach, it was held to afford no evidence of negligence; *Aston v. Heaven*, 2 Esp. 533; *Wakeman v. Robinson*, 1 Bing. 213. Where the evidence given is equally consistent with there having been no negligence on the part of the defendant as with there having been negligence, the judge is not warranted in leaving it to the jury to find either alternative: there is no case. Foot passengers in crossing a highway are bound to take due caution to avoid vehicles, and the drivers of vehicles are bound to take due caution to avoid foot passengers; *Cotton v. Wood*, 8 C. B., N. S. 568; 29 L. J. (C. P.) 333. So where the accident arises from foggy weather, or the removal of accustomed landmarks; *Crofts v. Waterhouse*, 3 Bing. 319, 321. Where an injury had been inflicted by a horse upon which the defendant was riding, and there was no proof that he omitted to do anything in his power to prevent the accident, the plaintiff was nonsuited; *Hammack v. White*, 11 C. B., N. S. 588; 31 L. J. (C. P.) 129. In *Wordsworth v. Willan*, 5 Esp. 273, the rule with regard to keeping the road is said to be, that if a carriage, coming in any direction, leaves sufficient room for any other carriage, horse, or passenger on its side of the way, it is enough; and in *Wayde v. Carr*, 2 D. & R. 256, the court said that the "law of the road," was not to be considered as inflexible; since, in crowded streets, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason crossed over to the side on which the defendant was driving, and, on endeavouring to pass, his horse was killed, Lord Kenyon held that it was putting himself voluntarily into danger, and that the injury was of his own seeking; but the jury found a verdict for the plaintiff, which the Court of King's Bench refused to disturb; *Cruden v. Fentham*, 2 Esp. 685. And although a person is not bound to confine himself to his proper side of the road, yet if he does not, he is bound to use a greater degree of caution than if he kept the proper side; *Pluckwell v. Wilson*, 5 C. & P. 375. And, generally, disobedience to the rule is evidence against the driver as between the two carriages; but in the case of an injury to a person crossing on foot, it is not evidence against the driver; *Lloyd v. Ogleby*, 5 C. B., N. S. 667.

In order to subject the master to damages, it must appear that there has been something to blame on the part of his servant; and he is blameable if he has not exercised the best and soundest judgment on the subject; per Lord Ellenborough, C. J., *Jackson v. Tollett*, 2 Stark. 39. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road on which he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength and properly made, and also with lights by night; per Best, C. J., *Crofts v. Waterhouse*, 3 Bing. 321. If the driver may adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues; *Mayhew v. Boyce*, 1 Stark. 423. If the driver of a stage-coach neglects to inform an outside passenger of his danger where the way passes through a low archway, the owner of the coach is liable for the

injury; *Dudley v. Smith*, 1 Camp. 167. A passenger being, in consequence of the negligence of the defendant, placed in a situation which obliges him to adopt the alternative of leaping from the coach or remaining at certain peril, leaps and is hurt; the defendant is liable, if it appears that the leaping was, on the whole, a prudent precaution for the purpose of self-preservation; *Jones v. Boyce*, 1 Stark. 493.

Where the plaintiff rests his case on the presumption of negligence arising from the fact of the coach breaking down, the defendant may show that the coach was examined a few days before the accident, and no flaw discovered; and that the coachman, a skilful driver, was driving in the usual track and at a moderate pace, though this, of course, is not conclusive evidence; *Christie v. Griggs*, 2 Camp. 81. Or he may, in this form of action, show that the immediate and proximate cause of the injury was the unskilfulness or negligence of the plaintiff; *Flower v. Adam*, 2 Taunt. 315; *Williams v. Holland*, 10 Bing. 112; *Fennell v. Garner*, 1 C. & M. 21. And this is evidence on not guilty; *Dakin v. Brown*, 8 C. B. 92; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 214. In the last case, Parke, B., states the rule to be that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: If by ordinary care he might have avoided this, he is the author of his own wrong; and this is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind. The same was held in *Holden v. Liverpool Gas Co.*, 3 C. B. 1. See also *Clayards v. Dethick*, 12 Q. B. 439. And negligence and want of care on the part of the person who drives the carriage or conducts the vessel in which the plaintiff is, is equivalent in this respect to the plaintiff's own negligence, although the carriage or vessel is a public one; *Thoroughgood v. Bryan*, and *Cutlin v. Hills*, 8 C. B. 115, 123. See, however, the comments on this decision in *Tuff v. Warman*, 2 C. B., N. S. 740, 750. In such a case the plaintiff's remedy is against his own driver or conductor. But misconduct on the plaintiff's part, or on that of his driver, will not necessarily deprive him of his remedy. Thus, if he drives furiously, yet if the jury find that the collision was owing to the defendant's default, the plaintiff ought to recover, although, if he had been driving slowly, the effect of the collision might have been avoided; *Rigby v. Hewitt*, 5 Ex. 240. Where the plaintiff had improperly left an ass on the high road, and the defendant, by negligently driving too fast, ran over and killed it, he was held liable to the owner of the ass; *Davies v. Mann*, 10 M. & W. 546.

A doubt has been expressed whether the negligence of the plaintiff be a defence except where the action is founded in tort, and not on contract. See *Martin v. Great Northern Railway Co.*, 16 C. B. 179; and *Webb v. Page*, 6 M. & G. 196, cited *ante*, p. 376.

Contributory negligence will deprive an infant of its right of action. In *Abbott v. Macfie*, 2 H. & C. 744; 33 L. J. (Ex.) 177, the defendants had placed the wooden lid of a cellar against the wall of a public street. The dress of one of the plaintiffs, who were children, caught the lid, with which one of them was playing, when it fell down and injured them. It was held that the defendants were not liable for the injury to the child playing with the lid, and their

liability for the injury to the other depended upon whether the children were playing together as joint actors.

In *Waite v. North-Eastern Railway Co.*, 27 L. J. (Q. B.) 417; in error, 28 L. J. (Q. B.) 258; *E. B. & E.* 719, a woman with a child five years old in her care, after taking tickets for herself and child, crossed the rail when a train was in sight, whereby she was killed and the child hurt. The jury found that there was negligence of the company's servants and also negligence of the deceased. It was held that the child was so identified with the deceased that it could not recover compensation.

The obligation of railway companies to carry mails and post-office servants, in charge of them, is founded on statute and not on contract, though the terms are settled by contract between the postmaster-general and the companies; and they are bound to carry the servants safely, and if an injury happens to one by negligence of the company, the servant may sue them; and if the accident happens by the plaintiff's negligence, it is a defence; *Collett v. London and North-Western Railway Co.*, 16 Q. B. 984.

Where the declaration alleges, by way of inducement, that the defendant was possessed of a carriage, and then states the negligent driving, &c., the plea of not guilty does not put in issue the property of the carriage; and *quære* whether it would have done so, even if the plaintiff had omitted the inducement, and only stated the driving of the "defendant's carriage?" *Taverner v. Little*, 5 N. C. 678; *Hart v. Crowley*, 12 Ad. & E. 378.

As to the effect of payment of money into court on a declaration for negligent driving, see *Perrin v. Monmouthshire Railway Co.*, 11 C.B. 861.

The obligations of carriers of goods or passengers, as founded on contract, have been already considered under a former head.

Negligent Navigation of Ships.

Many cases have been decided on collision of ships both in the Admiralty Court and courts of common law, and several acts for regulating the navigation of British shipping have from time to time been passed. Most of these last, if not all, are now repealed by 17 & 18 Vict. c. 120; and provisions similar to, or slightly varying from, those of preceding statutes are contained in the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 63.

Part IV. of 17 & 18 Vict. c. 104, (in which are incorporated the regulations contained in 25 & 26 Vict. c. 63, Table C.,) provides for safety and prevention of accidents, and applies to all British ships and to foreign steam ships carrying passengers between places in the United Kingdom; and the word "ship" meaning all vessels not propelled by oars.

By 25 & 26 Vict. c. 63, s. 27, the regulations contained in Table C. are binding upon all owners and masters of ships. By s. 28, in case of damage arising from the non-observance of any of these regulations, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of the ship at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulation neces-

sary. By s. 29, if in any case of collision it appears to the Court that such collision was occasioned by the non-observance of any regulation made by or in pursuance of the Act, the ship infringing the regulation shall be deemed to be in fault unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary.

The regulations in Table C. are numerous, and relate to different coloured lights which different vessels are directed to carry in all weathers, to fog signals, and sailing and steering rules. Power is given to the Crown, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, to annul or modify these regulations, and to substitute new ones in their place. By ss. 31, 32, in the case of any harbour, river, or other inland navigation, local rules concerning lights, signals, and the steps for avoiding collision, are allowed, and are to have the same effect as the regulations in Table C. By s. 33, in cases of collision, the person in charge of each ship is to render to the other such assistance as may be practicable and necessary; and if he, without excuse, fails to do so, the collision, in the absence of proof to the contrary, shall be deemed to have been caused by his fault.

By 17 & 18 Vict. c. 104, s. 507, and following sections, where *loss of life or personal injury* has happened by reason of any wrongful act, neglect, or default, an inquiry may be instituted by the Board of Trade and a jury, and no person shall be entitled to bring an action against the shipowner until the completion of the inquiry, or until the refusal of the Board to institute one; and if the Board does not institute an inquiry for one month after service of notice on the Board of the party's desire to bring an action, this shall be deemed a refusal.

By 17 & 18 Vict. c. 104, s. 503 (which applies to the whole of the Queen's dominions), the liability of "sea-going ships" is limited, so far as relates to loss of or damage to goods, in the manner already specified, *ante*, p. 250. See also sections 506 and 516, already noticed, *ante*, p. 251, as to the valuation of freight, the liability of the owner for distinct losses or injuries, and the reserved liability of a master or seaman, as such, though he may also be an owner. By 25 & 26 Vict. c. 63, s. 54, where loss of life or personal injury is caused to any person, or damage to any merchandise on board any ship, British or foreign, or where, from the improper navigation of such ship, the same injury or damage is caused to any other vessel, the owner, where these events occur without his actual fault or privity, is not to be liable in damages, where there is loss of life, to an aggregate amount exceeding 15*l.* for each ton of the ship's tonnage, or 8*l.* per ton where there is damage to ships, goods, or merchandise.

The common law liability of the master, as such, for the negligence of himself or his crew, is unaffected by the above provisions, except in case of the compulsory employment of a pilot. See *ante*, p. 251; *Story on Agency*, ss. 315, 317.

The following reported cases were decided before the above acts, and are founded on the common law:—

Where the plaintiff has, by his own culpable negligence, substantially contributed to the accident, he cannot recover; *Vennall v. Garner*, 1 C. & M. 21; *Smith v. Dobson*, 3 M. & G. 59. See the cases cited *supra*, pp. 464-5. But though the plaintiff might have

avoided collision, yet he may recover, if, under the circumstances, the plaintiff had a right to presume that the defendant would have given way, and so prevented the accident; *Vennall v. Garner*, *supra*. The question is, whether the accident is entirely owing to defendant's negligence, or whether the plaintiff has not so far contributed to the accident by his own negligence or want of common care, that but for such negligence or carelessness the accident could not have happened; *Tuff v. Warman*, 2 C. B., N. S. 740; affirmed in error, 5 C. B., N. S. 573; 27 L. J. (C. P.) 222. See also *Chadwick v. Dublin Packet Co.*, 6 Ad. & E. 771. It is no defence that the vessel of the defendant became unmanageable by reason of a previous accident occasioned in it by the neglect of his crew; *Secombe v. Wood*, 2 Mood. & Rob. 290. The rule, that if the plaintiff contributes to the accident he cannot recover, will not extend to relieve the defendant from liability merely because the plaintiff might have avoided it by certain precautions. Thus, where the plaintiff, in a steamboat, was injured by the fall of an anchor on it, caused by collision with another boat, it is no defence that the anchor may have been improperly stowed in the steamboat, or that the plaintiff was standing on a part of the deck where he ought not to be; *Greenland v. Chaplin*, 5 Ex. 243. The defendant in such cases is not entitled to expect that the plaintiff shall be constantly on his guard against the consequences of another person's misconduct. The master is not liable for the wilful act of the crew, though he was on board at the time; *Bowcher v. Noidstrom*, 1 Taunt. 568. Where a ship is accidentally sunk in a public navigable river, there is no common law obligation of the owner to mark the spot with a buoy or otherwise, so as to prevent damage to other ships; *Broen v. Mallett*, 5 C. B. 599. As to injury to submarine cables, see *The Submarine Telegraph Co. v. Dickson*, 15 C. B., N. S. 759; 33 L. J. (C. P.) 139.

The Merchant Shipping Acts, and regulations of the Admiralty made thereon, have not altered the law as above stated; therefore, where the plaintiff's vessel shows no lights, as required by the regulations, and a collision takes place, which is occasioned by the mere negligence of the defendant, and not by the absence of lights, the plaintiff may recover; but not if the want of them contributed to the accident; *Morrison v. Steam Navigation Co.*, 8 Ex. 733. See also *Same v. Same*, 13 C. B. 581. In a suit by a collier against a steamer for injury by collision, it was proved that the collier showed a light for a short time, but not long enough to be seen in time to prevent the accident. Held, that it should be shown for a reasonable time, otherwise the regulations were not duly observed; and if this directly contributed to the accident, the owner of the collier could not recover; and this was a defence both under the statute and at common law under Not guilty; *Dowell v. General Steam Navigation Co.*, 5 E. & B. 195. It would seem that no action lies against the owner of a transport in the employment of the Crown for a collision happening in the execution of the orders of an officer of the royal navy in command of the ship; *Hodgkinson v. Fernie*, 3 C. B., N. S. 189.

A defendant in a collision case is not entitled to deduct from the damages money paid to the plaintiff by insurers for the same damage; *Yates v. Whyte*, 4 N. C. 272.

Negligent keeping of Animals.

The owner of an animal which is ordinarily vicious, as a lion or a bear, is liable generally for its acts of ferocity; but the owner of a domestic animal, as an ox or a dog, is only liable if he knows that the animal is accustomed to do mischief; *R. v. Huggins*, 2 *Ld. Raym.* 1583; *B. N. P.* 76; *Jenkins v. Turner*, 1 *Ld. Raym.* 110. The gist of the action is not the negligent keeping, but the keeping with knowledge of the mischievous propensity; *Jackson v. Smithson*, 15 *M. & W.* 563; *May v. Burdett*, 9 *Q. B.* 101; *Cox v. Burbidge*, 13 *C. B., N. S.* 430; 32 *L. J. (C. P.)* 89. If the vicious propensity of the animal be stated with particularity in the declaration, it seems that it must be proved as laid; *Hartley v. Halliwell*, 2 *Stark.* 214; 1 *B. & A.* 620. In an action for keeping a dog which bit the plaintiff, Lord Ellenborough held it not to be sufficient to show that the dog was of a fierce and savage disposition and usually tied up by the defendant, and that the defendant had promised to make a pecuniary satisfaction to the plaintiff; *Beck v. Dyson*, 4 *Camp.* 198. But the form of the count in this case is not stated; and in the later case of *Thomas v. Morgan*, 2 *C., M. & R.* 496, such an offer to make satisfaction was held to be evidence, though slight, of the defendant's knowledge of the habits of the animal. See also 2 *Stark.* 211 (*n.*). Where a dog has once bitten a man, and the owner, having notice thereof, lets him go about, or lie at his door, an action will lie against him by a person who is bit, though it happened by his treading on the dog's toes; for it was "owing to the defendant not hanging the dog;" *Smith v. Pelah*, 2 *Stra.* 1264. This reason is not very satisfactory, for any domestic animal might be expected to bite under provocation, and on this point the decision was questioned by Cresswell, J., in *Charwood v. Greig*, 3 *C. & K.* 46. Where the defendant's dog was reported to be mad, and the defendant tied him up, but he broke loose and bit the plaintiff's child, who died in consequence, it was held that the defendant was liable; *Jones v. Perry*, 2 *Exp.* 482, differently reported in *Peake Ex.* 292, 5th ed. Where the plaintiff was injured by a bull driven in a highway, and there was evidence that the owner knew this bull would run at anything red, and the plaintiff wore a red handkerchief, this was held evidence that the owner knew of the bull's mischievous nature. In *Cox v. Burbidge*, 13 *C. B., N. S.* 430; 32 *L. J. (C. P.)* 89, a horse straying on the high road kicked a child. There was no proof that the horse was of a vicious temper, or how he came to get loose; it was held that the evidence was not sufficient to support an action for the injury to the child. The court seemed to think that whether the horse strayed on to the road by reason of the negligence of the owner or not was immaterial, because even supposing that there was negligence in this respect, the owner would only be liable for the ordinary consequences of his neglect, and that the horse kicking the child was not a consequence of that nature; *Hudson v. Roberts*, 6 *Ex.* 697.

If a dog, accustomed to bite, be let loose at night for the protection of the defendant's yard, and the injury arise from the plaintiff incautiously going into the yard after it has been shut up, no action will lie; *Brook v. Copeland*, 1 *Exp.* 203; *Deane v. Clayton*, 1 *B. Moo.* 225, 245. But though a person has a right to keep a fierce dog to protect his property, he must not place it in the open approaches to

his house, so as to injure persons lawfully coming to the house; *per* Tindal, C. J., *Sarch v. Blackburn*, *Mood. & M.* 505; see also *Blackman v. Simmons*, 3 C. & P. 138. The principle of these cases was discussed in *Bird v. Holbrook*, 4 Bing. 628, where it was held that the defendant, who, for the protection of his property, had set a spring-gun without notice in a walled garden, was answerable in damages to a person who, having climbed over the wall in search of a stray fowl, was injured by the gun. But this case has been doubted: see *Jordin v. Crump*, 8 M. & W. 782; *Barnes v. Ward*, *post*, p. 471; *Degg v. Midland Railway Co.*, 1 H. & N. 773. In *Stiles v. The Steam Navigation Co.*, 33 L. J. (Q. B.) 310, where the plaintiff entered a stable yard belonging to the defendants to make inquiries from their servants about his luggage which was in the custody of the defendants, and was bitten by a dog chained up in a corner of the yard, it was held that there was evidence of negligence. In *Line v. Taylor*, 3 F. & F. 731, the dog was allowed to be brought into Court and inspected by the jury, that they might judge of its disposition.

Under the plea of Not guilty the defendant may dispute not only the biting, or other injury, but also the knowledge of the defendant; *Thomas v. Morgan*, 2 C. M. & R. 496. Where the action is for knowingly keeping a ferocious animal, whereby, &c., this plea denies both the ferocity and the knowledge of it; but not any alleged negligence; for this is surplusage; *Card v. Case*, 5 C. B. 622.

Negligent user of Land.

It has been laid down in several cases that, apart from any question of negligence, no one has a right to deprive the soil of his neighbour, while in its original condition, of lateral support; *Wilde v. Minsterley*, 2 Roll. Abridg. 564; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Hunt v. Peake*, *John*. 705. But where the plaintiff has placed a house or other additional weight upon his ground, he cannot independently of any acquired right insist upon its being supported by the adjoining land of the defendant. In *Wyatt v. Harrison*, *ubi sup.*, the facts were taken to be that the defendant, digging in his own land near the foundation of a newly-built house of the plaintiff, caused it to fall, and that beyond this there was no proof of negligence: held, that the plaintiff had no remedy; see *Guyford v. Nicholls*, 9 Ex. 702; *The Caledonian Railway Company v. Sprot*, 2 Macq. 449. But the plaintiff may acquire a right to the support of the defendant's soil. This right may be proved by showing that the houses of the plaintiff and of the defendant were originally built so as to depend upon one another, while the land where they stand was in the possession of the same owner; *Richards v. Rose*, 9 Ex. 218; *Solomon v. The Vintners' Company*, 4 H. & N. 585. Or by the lapse of time during which it has been enjoyed; *Smith v. Martin*, 2 Wms. Saund. 400; *Partridge v. Scott*, 3 M. & W. 220. But the defendant even where he is subject to no peculiar right acquired by the plaintiff, can neither dig in his own ground nor take down his house in a negligent or careless manner. In *Peyton v. The Mayor of London*, 9 B. & C. 725, it was held that the fact that the defendant in removing his house had neglected to shore up that of the defendant was no evidence of negligence. In *Chudwick v. Trower*, 6 N. C. 1, it was laid down that there was no obligation upon the defendant under

similar circumstances to give notice to the plaintiff of what he was about to do. See *Kempston v. Butler*, 12 Ir. C. L. Rep. 516. In *Dodd v. Holme*, 1 Ad. & E. 493, it was said that the question was, whether the damage complained of was owing to the improper acts of the defendant, and that the jury, on inquiring into the alleged neglect, should consider the state of the building before it was injured; *Walters v. Pfeil*, Mood. & M. 365; *Brown v. Windsor*, 1 C. & J. 20. Where mines are held by one person, and the soil lying over them by another, the owner of the surface, while it is in its natural state, has a right to have it supported from beneath.

It was held, in *Humphries v. Brogden*, 12 Q. B. 739, that when the surface and the underground minerals are vested in different owners, and nothing appears to show how they became separated, the superficial owner is entitled to adequate underground support, and the mine owner must so work the mines as to sustain the surface in its natural state. In the very instructive judgment of the court in this case, all the cases in the above text are reviewed, and it is there laid down that the *prima facie* right of the owner of land to support from his next neighbour's land, whether the support be lateral or underground, is of common right, and is not a mere easement to be gained only by lapse of time or by grant, reservation, or covenant, but is a restraint on the enjoyment of the adjacent property in accordance with the maxim, "sic utere tuo ut alienum non ledas." This ruling was upheld in the Exchequer Chamber on error upon a judgment in the Queen's Bench in *Rowbotham v. Wilson*, 6 E. & B. 593; and in *Rogers v. Taylor*, 27 L. J. (Ex.) 173; 2 H. & N. 828. The owner of land upon which a building has been erected may maintain an action for an injury arising from underground workings, if the jury are of opinion that the weight of the building did not cause the injury; *Brown v. Robins*, 4 H. & N. 186; *Stroyan v. Knowles*, 6 H. & N. 464; 30 L. J. (Ex.) 102. In *Haynes v. Roberts*, 7 E. & B. 625, in error, an inclosure act had reserved the right of the lord of the manor to work mines in the private allotments, making compensation for damage; yet it was held that the common right of the surface owner to support was untouched. In *Rowbotham v. Wilson*, *supra*, an inclosure act had expressly taken away this protection from the allottees of the surface. The common law right to support is independent of the question whether the working has been careful or careless; *Humphries v. Brogden*, *supra*; *Jeffries v. Williams*, 5 Ex. 792.

The right of working mines reserved to the vendor of lands to a railway company, depends upon the construction put upon the special provisions of the act; see *Fletcher v. Great Western Railway Co.*, 4 H. & N. 242; *The Caledonian Railway Co. v. Sprot*, 2 Macq. 449; *North-Eastern Railway Co. v. Elliott*, 1 John. & H. 145; *Reg. v. Aire & Calder Navigation*, 30 L. J. (Q. B.) 337; *The Stourbridge Canal Company v. Dudley*, *Ib.* 108. As to the liability of contiguous mine owners, it has been held that the owner of a colliery lying above another belonging to the plaintiff may, so long as he does not work in an unusual and negligent manner, remove coal from his mine, so that water flows into that of the plaintiff; *Smith v. Kenrick*, 7 C. B. 515. And in *Baird v. Williamson*, 15 C. B., N. S. 376; 33 L. J. (C. P.) 101, it was held that the owner of the upper of two adjoining mines is not liable for injury by water flowing by gravitation into the lower mine from works conducted by him in the usual and proper manner, but that he had no right to take

active measures to discharge water from the upper into the lower mine.

If after a highway has been established anything be newly made so near to it as to be dangerous to those using the highway, this will be unlawful and a nuisance.

A declaration stated the defendant's possession of a house and area adjoining a public footway, and an obligation to fence the area *by reason of such possession*, so as to prevent damage to passengers. Pleas, Not guilty and a denial of the obligation *modo et forma*. It was proved that the footway was immemorial, and the house and area newly erected and incomplete, and that the party injured had fallen into the area while passing along the way with ordinary care in the night: Held, that the defendant was liable and that the obligation was rightly alleged, and that it was immaterial that the party injured had fallen in consequence of his accidentally deviating from the path, and so inadvertently becoming a trespasser; *Barnes v. Ward*, 9 C. B. 392. If indeed the area had been distant from the path, so as not to be dangerous to passengers using it, there would have been no liability; *Ib.*, and the cases there cited; *Coupland v. Hardingham*, 3 Camp. 398; *Jarris v. Dean*, 3 Bing. 447. In *Hardeastle v. South Yorkshire Railway Co.*, 4 H. & N. 67; 28 L. J. (Ex.) 139, where a foot passenger missed his way along a public path, and strayed into a reservoir made by the defendants near to, but not "substantially adjoining" the path, the defendants were held not liable, though the jury found the reservoir dangerous, and that the foot-passenger had used ordinary care. In *Williams v. Groucott*, 4 B. & S. 149; 32 L. J. (Q. B.) 237, the occupier of mines was held liable to an action at the suit of the occupier of the soil above for leaving a shaft insufficiently covered so that a horse fell in and was injured.

But a way may be dedicated to the public subject to the inconvenience or risk arising from its peculiar condition. In *Fisher v. Prowse*, 2 B. & S. 771; 31 L. J. (Q. B.) 212; the defendant was occupier of a house adjoining the public street. The mouth of the cellar opened into the street by a trap-door which was closed at night by a flap which slightly projected over the footway. The plaintiff fell over the flap which, as far back as memory went, had been in the same condition: held, that there was no evidence to go to the jury. The principle of this case was followed in *Robbins v. Jones*, 15 C. B., N. S. 221; 33 L. J. (C. P.) 1.

Where the obstruction is lawful it may give rise to an action upon proof, that it was concealed, and the plaintiff invited to pass near it. In *Seymour v. Maddox*, 16 Q. B. 326, the owner of a theatre was held not liable for an injury sustained by one of the players who fell through an aperture in the floor of the stage, which was not sufficiently lighted. In *Southcote v. Stanley*, 1 H. & N. 247; 25 L. J. (Ex.) 339, the plaintiff, a visitor at the defendant's house, was stated to have been injured by the falling of a glass door through the negligence of the defendant. It was held that as the negligence might have been that of the defendant's servant, the action would not lie. In *Chapman v. Rothwell*, E. B. & E. 168; 27 L. J. (Q. B.) 315, the plaintiff's wife was returning as a customer from the defendant's brewery, through the regular passage, when she fell through a trap-door improperly guarded and lighted. Held, that defendant was liable. In *Corby v. Hill*, 4 C. B., N. S. 556; 27 L. J. (C. P.) 318, permission was given to the defendant to place a stack

of slates on a private road, with the consent of the owners and occupiers of the road. The slates were left at night with no light to mark the spot where they were, and the plaintiff (while using the road) drove over them and was injured: Held, that the defendant was liable. But in *Bolch v. Smith*, 7 H. & N. 736; 31 L. J. (Ex.) 201, where one of the workmen of a contractor employed in a dock-yard was hurt by unfenced machinery whilst crossing the yard, which, for his own convenience, he was allowed to do, this was said to give no right of action, as the danger was open and visible; see *Hounsell v. Smyth*, 7 C. B., N. S. 731; 29 L. J. (C. P.) 203.

B., while walking in a street in front of the house of a flour dealer, was injured by a barrel of flour falling upon him from an upper window. It was held that the mere fact of the accident was evidence to go to the jury in an action against the flour dealer; *Byrne v. Boadle*, 2 H. & C. 722; 33 L. J. (Ex.) 13. So where a custom-house officer was struck by a bag of sugar lowered by a crane overhead, while he was lawfully in the docks; *Scott v. The London Docks Company*, 34 L. J. (Ex.) 17; Accord. *per* Bramwell, J., in *Cornman v. Eastern Counties Railway Co.*, 29 L. J. (Ex.) 94.

Where A. employed B. to repair his (A.'s) house for a stipulated sum; and B. contracted with C. to do the work, and C. with D. to furnish the materials, and the servants of D. brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned, it was held that A. was liable for this damage; *Bush v. Steinman*, 1 B. & P. 404.

The principle of *Bush v. Steinman*, and of some of the above cases, if it be understood to mean that the occupier of fixed property must take care so to use and manage it as not to injure others, whether by his own servants or by other persons whom he brings on the premises, has not of late years been followed; see the judgment of Littledale, J., in *Laugher v. Pointer*, 5 B. & C. 547, and *Quarman v. Burnett*, 6 M. & W. 499. In *Reedie v. London and North-Western Railway Co.*, 4 Ex. 214, where the defendants employed a contractor to build a bridge, whose workmen were so negligent as to cause a stone to fall upon the plaintiff, it was held that the defendants were not liable, although they had reserved a power to dismiss incompetent workmen. In such cases the action lies only against the person who, by himself or his servant, committed the injury; and a sub-contractor, or other person exercising an independent employment, is not a servant within the meaning of the rule, so as to render his employer liable; *Rapson v. Cubitt*, 9 M. & W. 710; *Milligan v. Wedge*, 12 Ad. & E. 737; *Allen v. Hayward*, 7 Q. B. 960, 975. Thus a contractor, employed by navigation commissioners, in the course of executing the works flooded the plaintiff's land by improperly and without authority introducing water into a drain *insufficiently made by himself*, the contractor and not the commissioners were held liable; *Allen v. Hayward*, 7 Q. B. 960. Though, it liable, they might have been sued in the name of their clerk, as for a thing "done in pursuance of the local act," under which they acted; *Ib.* So where a person employs a contractor to build on his land, and the workmen excavate the ground so negligently as to cause injury to the next house, the contractor, and not the person who employs him, is liable; *Gayford v. Nicholls*, 9 Ex. 702. But, where the employer retains his control over the contractor, and personally interferes, and makes himself a party to the act that has occasioned the damage, he becomes liable. Thus, where defendant employed a contractor to

make a drain, whose men left some of the rubbish in the highway, whereby an accident happened; and it further appeared that the defendant, on complaint made, had promised to remove the rubbish and had paid for carting part of it away, and it did *not* appear that the contractor had undertaken to remove it, held, that there was evidence to fix the defendant; *Burgess v. Gray*, 1 C. B. 578; see also *Wiggett v. Fox*, and other cases mentioned, *post*, p. 476, and the cases cited under *Action for Nuisance*, *ante*, p. 458.

The plaintiff's sheep escaped into the field of A. from defect of fences, which the plaintiff was bound to repair, and thence into a railway by reason of a defect in the railway fences; held, that the plaintiff could not sue the railway company for injury to his sheep by a train; *Ricketts v. East and West India Railway Co.*, 12 C. B. 160; 21 L. J. 201. So, where the plaintiff's cattle strayed from his own field into the highway, and thence through a defective fence of the company into the railway, and were there killed by a train, it was held that sect. 68 of the Railway Consolidation Act did not oblige the company to fence against any but persons *lawfully* on the highway, and that they were not liable; *Manchester, &c., Railway Co. v. Wallis*, 14 C. B. 213; 23 L. J. 85. So if the owner of lands adjacent to a railway has a key of a gate to a private crossing over it, and the gate is left open by him, the company is not liable for injury to his cattle straying on the rail, even if there be some negligence in the company; and the owner cannot, under such circumstances, set up the objection that the defendants ought to have made a bridge and not a level crossing; *Ellis v. London and South-Western Railway Co.*, 2 H. & N. 424. In a former case, where the Act 5 & 6 Vict. c. 55, s. 10, required the company to keep certain gates across the road "constantly closed," except when carriages, &c., were passing across the road, the company were held liable for injury even to stray cattle on the road that had got upon the railway through gates improperly left open; *Fawcett v. York, &c., Railway Co.*, 16 Q. B. 610.

Where a water company was bound to supply water to a house by a main and certain apparatus, and part of the apparatus became inoperative by reason of a frost of unusual severity, whereby the water overflowed into the lower part of the house, no action was held to lie by the occupier, the apparatus having been found sufficient in ordinary winters; *Blyth v. Birmingham Waterworks*, 11 Ex. 781; 25 L. J. (Ex.) 212.

Negligent keeping of Fire.

If a fire is negligently lighted or kept by a person or his servant on his premises, so that it sets fire to his neighbour's premises, he is liable to his neighbour; and he is not protected by 6 Anne, c. 3, or the late Building Acts, 14 Geo. 3, c. 78, &c., which do not apply to cases of negligence, or of fires intentionally lighted; *Filliter v. Phippard*, 11 Q. B. 347, commenting on 1 Black. Com. 431, and *Canterbury v. Atty.-Gen.*, 1 Phill. 306.

In *Vaughan v. Menlore*, 7 C. & P. 525, where the defendant was held liable for damage occasioned to plaintiff's property from the defendant's hay-rick having ignited by reason of its being carelessly put together, Patteson, J., directed the jury to consider whether the defendant had acted as a man of ordinary skill and prudence would.

have acted, or whether, through his negligence and carelessness, the plaintiff's property had been consumed. It was not enough that the defendant had acted *bona fide*: for if, by want of judgment or care, the injury had been occasioned, he was liable to the action; *Ib.*, 3 N. C. 468. In an action against a railway company for so negligently managing an engine that the plaintiff's premises were burnt by the sparks emitted from it, it appeared in evidence that the danger from emission of sparks might be diminished, but it was not shown that the company had taken any precautions for that purpose. It was held that there was a *prima facie* case of negligence; *Piggot v. Eastern Counties Railway Co.*, 3 C. B. 229. In such case, where it is a question whether the sparks could have reached premises at a distance from the rail, evidence is admissible to show that sparks had been in fact thrown as far by other engines; *Ib.* It was also there held, that the mere act of ignition by the sparks was *prima facie* evidence of negligence, and called for proof of reasonable precautions; *Ibid.* In one case it was said, that the defendants might show that the plaintiff negligently placed his stack or rick so as to expose it to danger; *semb. per Tindal, C. J.*, in *Aldridge v. Great Western Railway Co.*, 3 M. & G. 515. But in *Vaughan v. Taff Vale Railway Co.*, 3 H. & N. 743; 28 L. J. (Ex.) 4, it was held that, although the plaintiff had allowed combustible vegetation to collect near the line, and although the defendants had done all in their power to make the engines safe, yet they were liable, the jury finding negligence. In *Fremantle v. The London and North-Western Railway Co.*, 10 C. B., N. S. 89, an action was brought for damage caused by fire from a locomotive. There was evidence on the part of the plaintiff to show that the engine was not provided with the ordinary appliances for preventing sparks issuing from the fire-box. But the defendants called scientific witnesses to show that the engine was so constructed as to make it unnecessary to provide any of these safeguards. The question left to the jury was, whether there had been negligence in the condition of the engine, or in the conduct of the driver in working it. In a case where an accident occurred, by the escape of gas in a private house, supplied by a gas company, and the only means of shutting off the gas was by a key to a stop-cock in the house, kept by the tenant; held, first, that there was no common law obligation on the company to prevent the gas from escaping by attaching an external stop-cock, even after the tenant had left the premises, and given notice that no farther supply was wanted. Secondly, that the negligence of the plaintiff, the owner of the house, in not shutting off the gas, was an answer (under Not guilty) to an action against the company; *Holden v. Liverpool Gas Co.*, 3 C. B. 1.

Miscellaneous Cases of Negligence.

The defendant sold a gun to A. "for the use of himself and his sons," and "falsely and fraudulently" warranted its soundness, knowing it to be unsound; the defendant was held liable to an action by A.'s son, for an injury done to him by its bursting, though the contract of sale was between A. and the defendant only; *Langridge v. Levy*, 2 M. & W. 519, aff. on error, 4 M. & W. 337. This case is singular in its circumstances; but the principle which it seems to involve is important, viz., that a fraud committed by one

party to a contract, on the other party, may be the subject of an action of tort by a third person, for damage resulting to him in consequence of the fraud. In this view, it belongs rather to the head of deceit, than of negligence, for without fraud no such action would lie. See *Longmeid v. Holliday*, 6 Ex. 761. *Langridge v. Levy* was observed upon in *Winterbottom v. Wright*, 10 M. & W. 109, and is not to be extended. Where the defendants gratuitously let the consignee of heavy goods use a crane, which broke, and let a stone fall on B., who had voluntarily assisted the consignee to unload, it was held that B. could not sue defendants, although they knew of the defective state of the crane; for there was no fraud; nor was B. a party to any contract with defendant. *Semb.* the consignee might have sued defendant, if he had been injured by it; *Blackmore v. Bristol and Exeter Railway Co.*, 8 E. & B. 1035. In *McCarthy v. Young*, 6 H. & N. 329; 30 L. J. (Ex.) 227, the defendant having erected a scaffold in order to pull down a house, employed a carpenter to do some part of the work, and for that purpose allowed him the use of the scaffold. The scaffold, owing to some defect, of which it was not shown that the defendant knew, fell, and the plaintiff, one of the carpenter's workmen, was injured: Held that he had no remedy against the defendants. In *Farrant v. Barnes*, 11 C. B., N. S. 553; 31 L. J. (C. P.) 137, the defendant sent a carboy of nitric acid to a railway carrier, to be taken to Croydon. The carboy, after passing through different hands, burst, and injured the plaintiff, who was carrying it. Proof being given that the defendant had not taken reasonable care to make the carrier's servants aware of the dangerous character of the acid, it was held that the defendant was responsible. Where the defendant negligently left a cart and horse in a public street, and one of two children improperly playing with the cart met with an accident by falling from it whilst the other was driving the horse on, it was held that the injured child might sue the defendant for the negligence; *Lynch v. Nurdin*, 1 Q. B. 29. But the liability here seems to have turned on the tender age of the plaintiff; for, if he had been a grown up person, the injury would have been ascribed to his own act, and the action would have failed; *Lygo v. Newbold*, 9 Ex. 302. Where a warehouseman employed a porter to remove a barrel from the warehouse, and the porter's man dropped it on the plaintiff in the course of removal, the warehouseman was held liable for the injury; *Randleson v. Murray*, 8 Ad. & E. 109. See also *Abraham v. Reynolds*, 5 H. & N. 143. So where a company contracted with A. to construct a railway, and A. sub-contracted with B. to construct a bridge on it, and B. employed C. to erect the scaffold under a special contract between him and C., a passenger injured by the negligent construction of the scaffold must sue C. and not B.; *Knight v. Fox*, 5 Ex. 721. On the same principle, the subsequent cases of *Overton v. Freeman*, 11 C. B. 867; 21 L. J. (C. P.) 52, and *Cuthbertson v. Parsons*, 12 C. B. 304; 21 L. J. (C. P.) 165, were decided.

Negligence of Fellow Servants.

A master, although liable for the negligence of a servant acting in the course of his employment, is not always responsible for an injury sustained by that servant owing to the negligence of another servant

engaged in a common employment. Thus, where one servant overloaded a cart, whereby it broke down, and injured the plaintiff, another servant, it was held that no action lay against the master; *Priestley v. Fowler*, 3 M. & W. 1. So, where a bricklayer's labourer fell from a scaffold insufficiently erected by his fellow labourers in the same employment; *Wigmore v. Jay*, 5 Ex. 354. The defendant, a contractor for a building, employed M. to do piece-work under him, and M., in the course of his work, dropped a heavy instrument on another workman, N., and thereby killed him. It was held that no action lay by N.'s executors against the defendant; *Wiggett v. Fox*, 25 L. J. (Ex.) 188; 11 Ex. 832. So, if a stranger volunteers his services to assist such servants or labourers, and thereby suffers injury from their negligence, the master cannot be sued; *Degg v. Midland Railway Co.*, 26 L. J. (Ex.) 171; 1 H. & N. 773. Nor is the master liable to his servant for an accident happening in his service in consequence of the alleged inadequacy of the number of servants to assist him in his work; *Skipp v. Eastern Counties Railway Co.*, 9 Ex. 223; 23 L. J. 23. To make him liable to his servant or workman, there must be personal negligence, or interference of the master, or a special contract; *Osmond v. Holland*, 1 E. B. & E. 102. If he provides bad timber for a scaffold, he may be liable; *Roberts v. Smith*, 2 H. & N. 213.

In *Senior v. Wurd*, 28 L. J. (Q. B.) 139, one of the defendant's colliers carelessly used a damaged rope to go down a mine after being warned to try it first; it was held that defendant, the owner, was not liable for injury caused by the breaking of the rope, although defendant had neglected to try it daily, as he was bound to do by the rules of the mine; see also observations in *Abraham v. Reynolds*, 5 H. & N. 143. In consequence of the erection of a hoarding by a contractor, which projected too far, and was consequently knocked down by a passing carriage, one of the contractor's labourers was injured inside the hoard. It was held that no action lay by him against his master, the cause of injury being too remote, and the plaintiff being a voluntary workman with a full knowledge of the circumstance; *Assop v. Yates*, 2 H. & N. 768; *Searle v. Lindsay*, 11 C. B., N. S. 429. Two railway companies, X. and Y., had the common use of a station. A., a servant of the X. Co., was crushed while working at the station, by a train of the Y. Co. The jury found no negligence on the part of A., but only negligence of the Y. Co. by reason of a want of better rules for the direction of their servants. Both companies used the same rules. It was held that a verdict for the plaintiff was right; *Vose v. Lancaster and Yorkshire Railway Co.*, 2 H. & N. 728. See also, on the rule as to injury by fellow servants, *Dynen v. Leach*, 26 L. J. (Ex.) 221; *Williams v. Clough*, 3 H. & N. 258; *Griffiths v. Gidlow*, 3 H. & N. 648; and the judgments in the House of Lords in *Patterson v. Wallace*, 1 Macq. 748; *Barton's Hill Coal Co. v. Reid*, 3 Macq. 266. In *Abraham v. Reynolds*, 5 H. & N. 143, the plaintiff, who was a servant in the employment of a carter, was sent by the defendant to fetch cotton from a warehouse, and while loading his cart, was injured by the carelessness of men in the defendant's service. It was held that the defendant was liable on the ground that the person injured was not a fellow servant of those who injured him. In *Hutchinson v. The York, Newcastle, and Berwick Railway Co.*, 5 Ex. 343, it was held that a servant of a railway company travelling on their business in one of their trains, was the fellow servant of those

who had charge of the train. And in *Waller v. The South-Eastern Railway Co.*, 2 H. & C. 102; 32 L. J. (Ex.) 205, that the ganger of the plate layers, whose business it was to keep the permanent way in repair, and the guard of a train were fellow labourers, so as to exempt the company from liability for hurt received by one owing to the negligence of the other. See *Lovegrove v. The London and Brighton Railway Co.*, 16 C. B., N. S. 669; 33 L. J. (C. P.) 329.

But the master is bound to exercise due care and caution in the choice of his servants, otherwise he may become liable in respect of his own negligence in this respect; *Tarrant v. Webb*, 18 C. B. 787.

In *Mellors v. Shaw*, 3 B. & S. 437; 30 L. J. (Q. B.) 333, the plaintiff was injured by the negligence of one of two defendants, who was the manager of a mine, and personally superintended it. The Court decided that the other defendant was liable also. In *Ashworth v. Stanwix*, 30 L. J. (Q. B.) 183, one of two co-proprietors of a mine was held liable for the negligence of the other.

Wrongful Act, Default, or Neglect causing Death.

By 9 & 10 Vict. c. 93, ss. 1 and 2, whenever the death of a person is caused by some wrongful act, neglect, or default which would (if death had not ensued) have entitled the injured party to an action, then the person, who would have been liable if death had ensued, shall be liable for damages, though the death was caused by an act amounting to felony; and the action shall lie for the benefit of the wife, husband, parent, and child of the deceased, and in the name of the executor or administrator, "and the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom, and for whose benefit, such action shall be brought," and the amount, after deducting costs not recovered from the defendant, shall be divided amongst the above parties "in such shares as the jury by their verdict shall find and direct." By sect. 3, only one action will lie for the same subject of complaint, and it must be brought within twelve calendar months after the death. Sect. 4 requires the delivery of a full particular of the persons for whom, and on whose behalf, the action is brought, and the nature of the claim. By sect. 5, the word "person" is explained to include corporations; the word "parents" includes father, mother, grandfather, grandmother, stepfather, and stepmother; and the word "child" includes son, daughter, grandson, granddaughter, stepson, and stepdaughter. But it does not include an illegitimate child; *Dickenson v. The North-Eastern Railway Company*, 2 H. & C. 735; 33 L. J. (Ex.) 91.

It has been decided that the jury, in estimating the damages to be recovered under this act, cannot take into consideration the mental suffering of the survivors, or loss of society which they have sustained, but are to award them compensation for pecuniary loss alone; *Blake v. Midland Railway Co.*, 18 Q. B. 93; accord. *Patterson v. Wallace*, 1 Macq. H. L. C. 748. Therefore mere proof of death and negligence will give no right even to nominal damages. But a reasonable expectation of pecuniary advantage to the surviving relative who sues, may be considered by the jury; as where a surviving parent (who sues as administrator) received habitual assistance from his son, who was killed by the accident; *Dalton v. South-Eastern Railway Co.*, 4 C. B., N. S. 296; 27 L. J. 227; *Franklin v. South-Eastern*

Railway Co., 3 H. & N. 211. But the plaintiff cannot recover the expenses of the funeral or mourning; *Id.* In *Pym v. The Great Northern Railway Co.*, 4 B. & S. 396; 32 L. J. (Q. B.) 377, where a gentleman of fortune was killed upon a railway, and the only effect of his death was to cause his property to be distributed according to the terms of a settlement, the bulk of it passing to his eldest son, it was held that though the estate survived for the benefit of the family as a whole, yet that if the death occasioned to any one of them the loss of future pecuniary benefit which might reasonably have been expected, the jury might award compensation in respect of such loss. Proof that the small weekly wages of the deceased were contributed towards the expenses of his parent's house is evidence for the jury, though it is not shown whether the sum did more than cover the expense of the child's maintenance; *Duckworth v. Johnson*, 4 H. & N. 633; 29 L. J. (Ex.) 25.

By 27 & 28 Vict. c. 95, sect. 1, where no action is brought within six months by the executor of the person killed, the action may be brought by persons beneficially interested in the result of the action. By sect. 2 money paid into court by the defendants may be paid in one sum, without regard to its division into shares, and if this sum is not accepted, and the jury think it sufficient, the defendant is entitled to a verdict. It is worthy of remark that no provision seems to be made for apportioning the amount paid into court, where it is accepted in full satisfaction of the claim.

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Defence to Actions for Negligence.

The head of defence under actions of nuisance, *supra*, p. 459, is in some respects applicable also to this head of actions for negligence. Several defences have already been noticed under the foregoing heads of negligence.

The defence, where it exists, that the injury or accident was owing to the plaintiff's own default, is available under the plea of Not guilty, as appears in many of the cases already cited.

ACTION FOR OBSTRUCTION OF LIGHT AND AIR.

The declaration usually states the possession of a house, in which are certain windows through which light and air ought of right to enter; the obstruction of the light by the defendant; and the consequent injury to the house. The action may be brought by a reversioner, in which case the declaration will involve further statements; *Turner v. Sheffield Railway Co.*, 10 M. & W. 425; *Shadwell v. Hutchinson*, *Mood. & M.* 350, *ante*, p. 454.

The right to the light and air.] The right to light and air is analogous to the right to use running water, and is enjoyed *jure naturæ*; see *post*, p. 495. It is not strictly the subject of *grant*, because it is not in the power of any one to grant it; but the privilege to have the use of light or air in a particular place, or on certain premises, free from the right of obstructing them by another person in the like lawful enjoyment of his own property, is a right which must depend

on some covenant or contract between the parties, express or implied, or upon some prescription which presupposes such contract; or by some other adequate authority binding on both parties, as a local custom, &c.; see observations of Littledale, J., in *Moore v. Rawson*, 3 B. & C. 338.

For the purpose of facilitating the acquisition and protection of such a right as this, where it is claimed by virtue only of long enjoyment, the legislature has interfered by an act, 2 & 3 Wm. 4, c. 71 (passed in August, 1832), which enacts (sect. 3), that when the access or use of light to or for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of *twenty years* without interruption, the right thereto shall be deemed absolute and indefeasible, any local custom to the contrary notwithstanding, unless it shall appear that it was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By sect. 4, the period shall be taken to be the period next before some suit wherein the claim or matter shall have been or shall be brought into question; and no act shall be deemed to be an interruption unless it shall be submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof and of the person making or authorising it to be made.

By sect. 6, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period or number of years than the period or number mentioned in the act as applicable to the case.

By sect. 5, if the right, as alleged generally in an action on the case, is denied, all matters in the act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation.

Sect. 7, which relates to the computation of time in cases of disability, is inapplicable to sect. 3.

Before the above act, an enjoyment for twenty years and upwards was the usual mode of establishing a right alleged in the declaration to be prescriptive, or to be derived from a lost grant. And where the windows were alleged to be "ancient," proof of enjoyment for twenty years was held to satisfy the allegation; *Trotter v. Harris*, 2 Y. & J. 285, 288. But the right could not generally be established by mere user where the premises against which the right was sought to be established, *i.e.*, the servient tenement, were under lease, or in possession of the tenant of a particular estate; *Daniel v. North*, 11 East, 372. The right may now be acquired indefeasibly in such case under sect. 3. Hence the easement or servitude *altius non tollendi* and *ne luminibus officiaur* may now, it seems, be established over the land even as against the landlord, if the tenant chooses to submit to it, and the landlord does not sue the wrong-doer for the injury to the reversion.

In *Frewen v. Phillips*, 11 C. B., N. S. 449; 30 L. J. (C. P.) 356, in error, where the plaintiff and the defendant held as lessees under the same landlord, it was held that twenty years' user gave one a right to the access of light as against the other. As it is a principle of law "that no man shall derogate from his own grant," a right to the access of light may be implied from a simple conveyance of real property. It has therefore been held that the owner of a house and of land adjoining cannot after selling the house obstruct its lights by building on the land; *Palmer v. Fletcher*, 1 Lev. 122. This re-

striktion extends to those who claim under the grantor; *Coutts v. Gorham*, *Mood. & M.* 396; *Swansborough v. Coventry*, 9 *Bing.* 309. Where a house and land belong to the same owner, there is some uncertainty as to the rights of a purchaser of the house when there has previously been an unqualified sale of the land. Where the house is absolutely incapable of being enjoyed without a continuance of the light which it had formerly received, the land may be held to have been conveyed upon condition that the rights of the adjacent building should be respected; see *Richards v. Rose*, 9 *Ex.* 218, *per Parke, B.*; *Pinnington v. Galland*, 9 *Ex.* 1; *Suffield v. Brown*, 33 *L. J. (Ch.)* 249.

The use of an open area, as a timber-yard or sawpit, for twenty years, does not prevent the adjoining owner from building on his land so as to obstruct the light and air; *Roberts v. Macord*, 1 *Mood. & Rob.* 230.

An enjoyment for nineteen years and three hundred and thirty days, followed by an interruption of thirty-five days just before the commencement of the suit, has been held sufficient to establish the right; *Flight v. Thomas*, 11 *Ad. & E.* 688. Affirm. on error in the *Lords*, 8 *Cl. & Fin.* 231. The effect of this decision is, that an enjoyment for nineteen years and a fraction, and then an interruption, acquiesced in for the rest of the year, makes up together twenty years' enjoyment, and that when an easement has been once enjoyed as of right, such enjoyment must be taken, for the purposes of the act, to continue, though interrupted, if the interruption be not acquiesced in for a year; *per Erle, J.*, and Lord Campbell, *C. J.*, in *Eaton v. Swansea Waterworks*, 17 *Q. B.* 267, 272.

In *Cooper v. Hubbuck*, 12 *C. B.*, *N. S.* 456; 31 *L. J. (C. P.)* 323, the lights claimed by the plaintiff were stated to have been enjoyed for the period of twenty years next before a chancery suit between the same parties and upon the same question, and also for the period of twenty years next before an action at common law relating to the same question. It was held (*Williams, J.*, dissenting) that this enjoyment was sufficient, and that s. 4 of the schedule did not require that the twenty years should be those immediately preceding the pending suit. It is observable that the words "claiming right thereto," used in sects. 1 and 2, are, perhaps designedly, omitted in sect. 3; see 11 *Ad. & E.* 695. An absolute right may be gained by the enjoyment of lights for twenty years under permission orally granted, and an agreement to pay an annual acknowledgment; *Mayor of London v. Pewterers' Co.*, 2 *Mood. & Rob.* 409. The use of light is put by the act on the footing of other easements as to the effect of unity of possession, and is not established by twenty years' enjoyment, unless enjoyed as an easement; the right therefore is not gained where the owner of the house has also held the adjoining land, which it overlooks, under a yearly tenancy; *Harbidge v. Warwick*, 3 *Ex.* 552. Payment of rent under a parol agreement for the enjoyment of the lights by the occupier is not an "interruption" within sect. 3; there must be a discontinuance of the enjoyment by reason of some obstruction; *Plasterers' Co. v. Parish Clerks' Co.*, 6 *Ex.* 630, in *Cam. Seacc.* But this case does not decide that an enjoyment on those terms would be sufficient to confer a right, or that such payment is inadmissible to defeat the claim, for no such point was raised on the bill of exceptions. As to this, see *Tickle v. Brown*, 4 *Ad. & E.* 369, *post*, *Action for disturbance of way*, p. 490.

In *White v. Bass*, 7 H. & N. 722; 31 L. J. (Ex.) 283, certain windows belonging to the plaintiff had received light for more than twenty years. His premises together with those of the defendant had been owned in fee by the same persons until within six years of the action. A building lease of the defendant's land was then granted, and the reversion was afterwards conveyed to the lessees (under whom the defendant claimed) in general terms. Still later the plaintiff's land was conveyed to him in fee. It was held that there was no obligation upon the defendant to respect the light enjoyed by the plaintiff during the unity of possession.

Where the owner of a house let part of it to a tenant, it was held that the tenant could not erect an addition to the front of his house so as to obscure the window of his landlord existing at the time of the lease; *Riviere v. Bower*, Ry. & Mood. 24. In *Compton v. Richards*, 1 Price, 27, where a row of unfinished buildings was put up for sale by auction in lots, and a plan of the buildings was produced at the sale, which each purchaser was bound by written conditions to conform to in completing them, it was held that the purchaser of one could not afterwards make an addition to his house so as to obstruct the windows of an adjoining one; and this without reference to priority of completion. See also *Glave v. Harding*, 27 L. J. (Ex.) 286.

It has been held that under 2 & 3 Will. 4, c. 71, s. 2, the owner of a windmill cannot prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill, although it has been worked by this air for more than twenty years; *Webb v. Bird*, 13 C. B., N. S. 841; in error, 31 L. J. (C. P.) 335.

The Building Act, 14 Geo. 3. c. 78 (repealed by 7 & 8 Vict. c. 84), did not enable a person to build a party-wall so as to darken ancient lights; *Wells v. Ody*, 1 M. & W. 452. And the custom of London respecting the heightening of walls is controlled by the act 2 & 3 Wm. 4, c. 71; *Merchant Tailors' Co. v. Truscot*, 11 Ex. 855; 25 L. J. (Ex.) 173.

Right to light and air, how lost.] An ancient window, bricked up for twenty years, loses its privilege; *Lawrence v. Obee*, 3 Camp. 514. And the privilege may be released by disuse for even a less time; nor is it so much length of time, as the nature of the act done, or the acquiescence by the grantee of the easement and his intention, that is material in considering whether the right has been abandoned; *R. v. Chorley*, 12 Q. B. 515. Thus, where the plaintiff pulled down a wall with an ancient window in it, and rebuilt a blank wall, and seventeen years afterwards re-opened a window in the old place, it was held that the window had lost its privilege, there being no apparent intention of resuming the old right when the wall was rebuilt; *Moore v. Rawson*, 3 B. & C. 332. In this case the defendant had, in the mean time, erected a building which would have been an obstruction of the old light; but it does not appear that any such act was necessary in order to prevent a resumption of the old right; see *Gale on Easements*, 3rd ed. 477. In *Stokoe v. Singers*, 8 E. & B. 31, A.'s house had ancient windows, which A.'s predecessor had kept blocked up for twenty years. B. bought the next land for building. A. thereupon re-opened his windows, and B. obstructed them. In an action by A. against B., the jury were directed that the right to the light once gained continued till lost, and that they should find for the plaintiff unless they thought his predecessor had shown

an intention of permanently abandoning his lights, or they had been so kept closed as to lead the defendant to alter his position in the reasonable belief that the right had been abandoned. If a wall with ancient windows is rebuilt in advance of its former site, although the windows are placed looking in the same direction as in the old wall, the new windows are not privileged; *Blanchard v. Bridges*, 4 *Ad. & E.* 176. But if an old window is merely enlarged, no part of the space occupied by the old one can be obstructed; *Chandler v. Thompson*, 3 *Camp.* 80. In *Turner v. Spooner*, 30 *L. J. (Ch.)* 801, two ancient windows having been modernised by removing the old casements and substituting new ones of a lighter construction without extending the aperture occupied by their frames; this was held to give the defendant no right to obstruct them. In *Binckes v. Pash*, 11 *C. B., N. S.* 324; 31 *L. J. (C. P.)* 121, where the plaintiff had a range of ancient windows which were obstructed by the defendant, and it was proved that the plaintiff had some time previously opened additional windows over those obstructed, it was held, that as the privileged windows remained unchanged, the defendant was not justified. In *Jones v. Taping*, 13 *Weekl. Rep.* 617, the plaintiff opened several new windows, and enlarged ancient ones. The defendant built a wall which obstructed both the old and new lights. The plaintiff then restored his windows to their original state. It was held by the House of Lords, reversing the cases of *Renshaw v. Beam*, 18 *Q. B.*, 112; and *Hutchinson v. Copestake*, 9 *C. B., N. S.* 863; 31 *L. J. (C. P.)* 191; that the obstruction was illegal, as the right created by the statute could not be affected by an attempt to extend it.

Proof of obstruction.] Under the plea of Not guilty, which denies the obstruction, but not the right, it is sufficient to prove that the plaintiff cannot enjoy his lights in so free and ample a manner as he ought; *Cotterell v. Griffiths*, 4 *Esp.* 69. And where the plaintiff had only a qualified right, viz., to a window with a blind attached to it to prevent his neighbour from being overlooked, if he removes the blind, yet his neighbour cannot so build as to exclude more light from the plaintiff than before; *ibid.* The diminution of light must be such as to render the premises sensibly less fit for occupation; *Parker v. Smith*, 5 *C. & P.* 438; *Wells v. Ody*, 7 *C. & P.* 410; and the judgment in *Embrey v. Owen*, 6 *Ex.* 372-3, cited hereafter, p. 495.

ACTION FOR DISTURBANCE OF COMMON.

In an action for disturbance of common, the declaration states the plaintiff's right of common over the locus, either as appurtenant to a messuage of which the plaintiff is possessed, or in gross; the disturbance by the defendant; and the damage.

Proof of right of common.] With regard to the evidence allowed by statute it is enacted by 2 & 3 Will. 4, c. 71 (sect. 1), that no claim which may be lawfully made at common law by custom,

prescription, or grant, to a right of common, or other profit or benefit from or upon the land of another, except tithes, &c., shall, where such right shall have been actually enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated by showing only that such right, &c. was first enjoyed at any time prior to such period; but such claim may be defeated in any other way by which it is now liable to be defeated: and where such right shall have been so enjoyed for sixty years, it shall be deemed absolute and indefeasible, unless it shall appear that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

The plaintiff may prove his claim either at common law or under the statute 2 & 3 Will. 4, c. 71. At common law the proof is by express grant, custom, or prescription. An ancient grant is, of course, admissible, if produced from the proper custody. A customary or prescriptive title is generally proved by usage. And instances of such an usage, although comparatively modern, are, if unopposed by other evidence, conclusive; *Rex v. Heyte*, 6 T. R. 430. Where this evidence cannot be procured a right of common appurtenant may be proved by reputation. See *ante*, p. 40.

In *Carr v. Foster*, 3 Q. B. 581, proof that the tenant of a farm had exercised commonable rights for nearly forty years was given. But it appeared that about eighteen years back the owner had occupied the farm for two years, and having no cattle, made no use of the common; held, that there was good evidence of the thirty years' enjoyment required by the act. In *Cuve v. Lambert*, 34 L. J. (Ex.) 66, a right of common of pasture for cattle levant and couchant upon a certain close as appurtenant thereto, was held to have been proved by evidence that cattle housed on the close had for thirty years been turned on the common, though they had not actually been fed from the produce of the close.

Sects. 4, 5, and 6 have been already in part recited, *ante*, p. 479.

By sect. 7, the time during which a person, otherwise capable of resisting a claim, shall have been an infant, idiot, non compos, covert, or tenant for life, or during which any suit shall have been pending and shall have been diligently prosecuted until abatement by death, shall be excluded in the computation of the above periods, except where the right is declared to be absolute and indefeasible; *Post*, p. 491.

In order to prove an user under the statute, it is not necessary to show that it was exercised without any intermission whatever. The plaintiff need not prove his title to the same extent as set out in his declaration; for the disturbance is the gist of the action, and the title is only inducement; *B. N. P.* 75, 76; 1 *Saund.* 346 a. (n). Thus, if he states that he was possessed of a messuage and so many acres of land with the appurtenances, and by reason thereof ought to have common, &c., this allegation is divisible, and he may prove that he was possessed of the land only, and entitled to the common in respect of such land; *Ricketts v. Salwey*, 2 B. & A. 360. But though the right proved may be larger than the right alleged, it ought to be a right which includes the one alleged; *Bailey v. Appleyard*, 8 Ad. & E. 161. An allegation of right of common for all the plaintiff's cattle, levant and couchant, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time; *Willis v. Ward*, 2 Chitty's Rep. 297. And an allegation of a right of common "for all commonable cattle, levant

and couchant," is proved by a grant of reasonable common of pasture; *Doidge v. Carpenter*, 6 M. & S. 47. See also *Chessman v. Hardham*, 1 B. & A. 706. Any variances of this kind, not material to the question really at issue, are now little regarded, and, if necessary, will be amended at, or even after, trial. Where the plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but had never kept any sheep, it was held that this was evidence of a right for all commonable cattle to be left to the consideration of the jury; *Manifold v. Pennington*, 4 B. & C. 161. Where, in an action for disturbance by cattle, the defendant pleaded a right of common for cattle levant and couchant, to which the plaintiff replied that "all" the cattle mentioned in the declaration were not levant and couchant, it was held enough for the defendant to show that some were levant and couchant; for the plaintiff ought to have new assigned a surcharge, or have replied that the "said cattle" were not levant, &c., omitting the word "all"; *Bowen v. Jenkin*, 6 Ad. & E. 911. Where the declaration alleged a right for all the freemen inhabiting within the borough of A., and it appeared that the limits of the borough were enlarged by the Municipal Amendment Act, 5 & 6 Wm. 4, c. 76, this was held a variance; for the right being prescriptive was confined to the ancient limits; and it was immaterial that the plaintiff in fact inhabited the old limits; *Beadsworth v. Torkington*, 1 Q. B. 782. This, however, would now be amended at the trial. A liberty to hunt, hawk, fish, and fowl is within sect. 1 of the Prescription Act, and may be exercised by servants; *Wickham v. Hawker*, 7 M. & W. 63. See *Blund v. Lipscombe*, 4 E. & B. 713 n. (c); *Ewart v. Graham*, 29 L. J. (Ex.) 88.

Proof of disturbance by the defendant.] This evidence is proper on a plea of Not guilty, which denies the wrongful act, and not the right. The action is maintainable against another commoner, as well as against a stranger; *Atkinson v. Teasdale*, 2 W. Bl. 817; although the plaintiff himself has been guilty of a surcharge; *Hobson v. Todd*, 4 T. R. 71. But in an action against the lord, the plaintiff must allege a surcharge, and (if denied) prove it by showing that there is not a sufficiency of common left for him; *Smith v. Feverel*, 2 Mod. 6; 1 Saund. 346 b. (n). Where the lord has licensed a third person to put cattle on the common, the plaintiff may declare against him as a stranger for a disturbance generally; *Ibid.*; *Hobson v. Todd*, 4 T. R. 73; and it will, it seems, lie upon the defendant to prove the licence, and that he has not exceeded it, and has left sufficient common for the plaintiff; 1 Saund. 346 b. (in notis). But this defence must be pleaded specially.

Damage.] In an action against a stranger, the smallest damage, as carrying away the dung from the common, is sufficient to maintain the action; *Pindar v. Wudsworth*, 2 East, 154. And in an action against another commoner for surcharging, it is sufficient to prove that the defendant put on the common more cattle than he had a right to do, without proving any specific damage; *Hobson v. Todd*, 4 T. R. 71.

Defence.

This being a possessory action, the defendant may show, under a traverse of the right in the *locus in quo*, that the common has been enclosed and held in severalty, adversely, for upwards of twenty years, which is a bar to the entry of the commoner; *Hawke v. Bdcon*, 2 *Taunt.* 156. Or he may, it should seem, show an extinction by unity of possession, by approvement, leaving sufficient common to those entitled to it, under a traverse of the right, &c.; *post*, p. 493, and *Arlett v. Ellis*, 7 *B. & C.* 346, cited *post*, *Action for Trespass to land—Plea, right of common*. But such matters are sometimes pleaded specially; *Patrick v. Stubbs*, 9 *M. & W.* 830; *Jones v. Robin*, 10 *Q. B.* 580. Where the claim is founded on thirty years' user, the defendant may show that the dominant tenement was land allotted and enclosed 40 years ago under an Inclosure Act, that the land over which the right was claimed was and is part of the crown demesne, and that at that time, and ever since, the crown was disabled by statute from making any such grant of common. And *quare* whether the Prescription Act applies to land over which there was, during the time of enjoyment, a statutable prohibition to make any such grant? *Mill v. Commissioners of the New Forest*, 18 *C. B.* 60; 25 *L. J. (C. P.)* 212; and see *Wingrove Cooke on Inclosures and Rights of Common*, 4th ed., 92.

Action for Disturbance of Way.

In an action for the disturbance of a private way, the declaration usually alleges the possession of certain premises, a right of way appurtenant thereto, and the disturbance of it by the defendant. It cannot, in general, be brought by a reversioner, unless the disturbance be of a permanent character, such as an obstruction of the way by a wall, posts, &c., so as to threaten an injury to the freehold. See *Kidgell v. Moor*, 9 *C. B.* 364; 19 *L. J. (C. P.)* 177, and the cases there cited; *Palk v. Skinner*, 18 *Q. B.* 568.

Right of way, how proved.] The modes of proving a right of way are (1) by express grant, (2) by user, (3) by necessity, (4) by the act of Inclosure Commissioners.

When the user has not continued down to the commencement of the suit, then the right must be claimed by prescription at common law, or by a grant alleged to have existed, but now to be lost; for in such a case the claim under the Prescription Act, 2 & 3 *Wm.* 4, c. 71, could not be supported. See *Bullen and Leake on Pleading*, 2nd ed., p. 684.

The *termini* of the way, as stated in the declaration, must be proved. Thus the claim of a prescriptive right of way from A. over the defendant's close unto D. is not supported, if it appears that a close called C., over which the way once led and which adjoins to D., was formerly possessed by the owner of close A., and was by him conveyed in fee to another, without reserving the right of way; for thereby it appears that the prescriptive right of way does not as claimed extend unto D., but stops short of it; *Wright v. Rattray*, 1 *East*, 377. See *Simpson v. Lethwaite*, 3 *B. & Ad.* 226. The words

"towards and unto" do not necessarily imply a straight road, but admit of angular deviations; *R. v. Marchioness of Devonshire*, 4 *Ad. & E.* 232; *Jackson v. Shillito*, cited 1 *East*, 381. Variances of this kind are now of little importance, since the act for the amendment of them, already noticed.

If the declaration alleges the way to be enjoyed "by reason" of a message, it will not be supported by proof of a right independent of it; *Fentiman v. Smith*, 4 *East*, 107; *Barnes v. Ward*, *ante*, p. 471. The allegation may generally be struck out, or otherwise amended. Hearsay evidence is not admissible to prove a private way. See *ante*, p. 43.

Right of way how proved—by express grant.] The proof of a right of way by express grant, is, of course, a question more of construction than of evidence. It is to be observed that a grant of a right of way in gross may be made good against subsequent assignees of the servient tenement, although covenants to keep it in repair, &c. cannot, as not running with the land; *Spencer's case*, 1 *Smith, L. C.* 66. The grantee of a private way must repair it if necessary himself, and the owner of the servient tenement is not bound to do so, unless he has expressly so bound himself; *Pomfret v. Rycroft*, 1 *Wms. Saund.* 322 *b.* (in *notis*); *Ingram v. Morcroft*, 33 *Beav.* 49. But the grantee is not compellable to repair it; *Duncan v. Touch*, 6 *Q. B.* 904, 910.

Right of way how proved—by necessity.] A right of way by necessity, as it is sometimes called, is really a way by implied grant. If A. grants a tenement surrounded by his own land to B., B. is entitled to a right of way to it through the land of the grantor, if such way be absolutely necessary to the enjoyment of what is granted; *Palmer v. Fletcher*, 1 *Lev.* 122; *Staple v. Heydon*, 6 *Mod.* 8. And, after considerable doubt, it was laid down in *Pennington v. Galland*, 9 *Ex.* 1; that where the reserved land is enclosed by the land conveyed, there is an implied reservation to the grantor of a way through it. The tendency of late decisions has been to restrict the doctrine of the last cited case. See *Daniel v. Anderson*, 31 *L. J. (Ch.)* 610; *Dodd v. Burchell*, 1 *H. & C.* 113; 31 *L. J. (Ex.)* 364. As to the mode of ascertaining the way, see *Pearson v. Spencer*, 1 *B. & S.* 571.

Right of way how proved—by prescription at common law, or non-existing grant.] Formerly a right of way not claimed by express grant must have been shown to have existed from time immemorial, that is, from the time of Richard the First. This is called a claim by prescription at common law, to distinguish it from a different kind of prescription created by statute.

But as it would, in almost all cases, be impossible to show the existence of the right for so long a period, evidence of user for a much shorter period has been long considered sufficient to support a claim by prescription at common law, if not negatived by showing, as is sometimes possible, that the right came into existence at a later date. This period has been fixed, by analogy to the limitation contained in the 21 Jac. 1, c. 16, at twenty years.

And although the evidence fail to support a claim by pre-

scription at common law, by reason of its appearing that the right originated at a date later than the reign of Richard the First, it will be sufficient to support a claim of the same right by lost or non-existing grant. This means a modern express grant, of the existence of which enjoyment for a period of twenty years is held to be evidence.

The only reason for claiming a right of this kind by prescription at common law, and also by lost grant, would seem to be a doubt as to the conclusiveness of the presumption in the latter case, *i. e.*, a doubt how far a jury would be at liberty to disregard the evidence of enjoyment in the latter case, and negative the grant. It is probable, however, that if they did so, the Court would grant a new trial *toties quoties*. See *Jenkins v. Harvey*, 1 C., M. & R. 894.

In order to establish the presumption of a grant of an easement, it must appear that the enjoyment was with the acquiescence, forced or willing, of him who was seised of an estate of inheritance; *Bright v. Walker*, 1 C., M. & R. 219; *Daniel v. North*, 11 East, 372; *Barker v. Richardson*, 4 B. & A. 579. And in order to make the enjoyment evidence as against a reversioner, there must be evidence against him of acquiescence, distinct from the mere enjoyment of the easement. But where the easement is shown to have existed previously to the commencement of a tenancy, the tenancy does not necessarily defeat the presumption of a grant; *Cross v. Lewis*, 2 B. & C. 686.

Charters and grants from the Crown may be presumed from length of possession (as for instance 100 years), not merely in suits between private parties, but even against the Crown itself, if the Crown be capable of making the grant; *Mayor of Kingston v. Horner*, Cowp. 102; *Jenkins v. Harvey*, 1 C., M. & R. 877. In one case, where land appeared to have been made inalienable by royal grant, the jury were directed that they might presume a statute granting the land; *Lopez v. Andrew*, 3 M. & R. 329. But it has been said that no judge could venture to direct a jury that they could affirm the passing of an act of parliament within the last 250 years on an important subject of general interest of which no vestige can be found on the parliament rolls or other records, or in the history of the country; and the Court accordingly refused to presume any act sanctioning a mode of nominating to a deanery which was shown to have continued for 250 years, strong evidence being given against the existence of any positive right in the Crown; *R. v. St. Peter's, Exeter*, 12 Ad. & E. 512; and *Attorney-General v. Ewelme Hospital*, 17 Beav. 366; 22 L. J. (Ch.) 846. See also cases of presumption from long possession mentioned *arguendo* in *Tenny v. Jones*, 10 Bing. 78; *Doe v. Millett*, 11 Q. B. 1036; *Lyon v. Reed*, 13 M. & W. 285.

Where the original enjoyment is consistent with the fact of there having been no conveyance, it requires stronger evidence than what is usually held to be sufficient to warrant a jury in saying that any conveyance has been executed; *Doe v. Reed*, 5 B. & A. 232. And where there is no evidence of the right to an easement except *mere user*, without any trace of the commencement of it, it is evidence of a title by prescription rather than by grant; *Blewett v. Tregonning*, 3 Ad. & E. 554. And it seems that a jury ought not to be encouraged to presume a Crown grant, from mere user, in favour of a party who might if he pleased have produced an authentic enrolment

of it, which was shown by his own witnesses to be in existence at the Tower; *Brune v. Thompson*, 4 Q. B. 543.

Right of way how proved—2 & 3 Will. 4, c. 71.] By the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2, “no claim which may be lawfully made at the common law by custom, prescription, or grant to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed, or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.” By s. 4, “Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action, wherein the claim or matter to which such period may relate shall have been, or shall be brought in question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been, or shall be submitted to, or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.”

In addition to the provisions in sects. 4, 5, 6, 7 (recited *ante*, pp. 479-83), and which apply to ways and other easements, sect. 8 also provides that when land or water, upon over or from which any way or other *convenient** watercourse or use of water shall have been enjoyed or derived, has been held under any term of life, or years, exceeding three years, the time of enjoyment during such term shall be excluded in the computation of the period of forty years, in case the claim shall within three years next after the end or determination of the term be resisted by a person entitled to any reversion expectant in it. So much of sect. 5 as prescribes the form of pleading the enjoyment “as of right,” will be found under the head of *Action for Trespass to Land—Plea—Right of Way*.

Upon the construction of this statute, the following decisions have occurred:—In order to establish a right of way by enjoyment for twenty years, it must be proved that the claimant has enjoyed it for the full period required, and that he has done so “as of right.” Therefore if the way shall appear to have been enjoyed by the claimant not openly but by stealth, as a trespasser would have done, or if he shall have occasionally asked the permission of the occupier of the land, no title will be so acquired. So if there has been unity of possession during all or part of the time, for then the claimant

* This word is supposed to have been accidentally substituted in the statute roll for the word “easement.”

will not have enjoyed as of right the easement but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which a similar claim by custom, prescription, or grant, may be defeasible; and therefore it may be answered by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or by proof of the absence or ignorance of the parties interested in opposing the claims, or their agents, during the whole time that it was exercised. See the judgment in *Bright v. Walker*, 1 C., M. & R. 219, where, in an action of trespass, the defendants pleaded that they had for twenty years as of right and without interruption used a right of way, Parke, B., observed: "The issue is, whether the occupiers of the closes of right and without interruption have had the use and enjoyment as they insist under this issue; therefore they must show an uninterrupted rightful enjoyment for twenty years." If they had enjoyed it for one week, and not for the next, and so on alternately, their plea would not have been proved. In the present case, the permission asked for and given shows that the occupiers of the closes did not enjoy the way "as of right; and therefore also that they did not enjoy it uninterruptedly." Lord Lyndhurst, C. B., also said: "The simple issue is, whether there has been a continued enjoyment of the way for twenty years; and any evidence negating the continuance is admissible. Every time that the occupiers ask for leave, they admit that the former licence is expired, and that the continuance of the enjoyment is broken;" *Monmouth Canal Company v. Harford*, 1 C., M. & R. 631.

The enjoyment meant by the statute is an open notorious one, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription, or adverse user, or by deed conferring the right; or, though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea of forty years, or by such writing, or parol consent, or agreement, contract, or licence, in case of a plea of twenty years. See the judgment of the Court in *Tickle v. Brown*, 4 Ad. & E. 369-382. Therefore, an annual payment for the use of the way will defeat an enjoyment for even forty years; *Ib.* So will proof of leave and licence; *Beasley v. Clarke*, 2 N. C. 705. The acts of enjoyment must not be *aut vi*, *aut clam*, *aut precario*; *Eaton v. Swansea Waterworks*, 17 Q. B. 275, *per* Erle, J. Proof that the plaintiff, before the commencement of the period, held the right under a lease, is evidence from which the jury may, if they think proper, infer a permissive enjoyment after its expiration; *Clay v. Shackeray*, 2 Mood. & Rob. 244. Unity of possession disproves the enjoyment of the easement as such; *Onley v. Gardiner*, 4 M. & W. 496; *Clayton v. Corby*, 2 Q. B. 813. Where the easement has been enjoyed *without the knowledge of either party*, the user will not establish the right; as where the owner of a house built twenty years ago on land excavated by a mine, claimed the easement of preventing his neighbour from mining so as to injure the house, it was held that the period did not begin to run until his neighbour was aware of the excavation under the house; *Partridge v. Scott*, 3 M. & W. 220.

An enjoyment for fifty years down to within a few years before action brought, when it ceased, will not establish a right of way under this statute; *Parker v. Mitchell*, 11 Ad. & E. 788. Some act

of user should be shown at least in the first year and in the last year during the period required by statute; but it does not appear to be necessary to show some act done in every year; *Lowe v. Carpenter*, 6 *Ex.* 825, and the judgment of the Court there. Whether such act of user must be an actual one, or whether a constructive user, as in *Payne v. Shedden*, *infra*, will suffice, would seem to be an open question. Even an actual non-user may perhaps be explained by the circumstance of the claimant not having any necessity for the enjoyment. It has been ruled, that if there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under the statute; for the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with the right. Thus if instead of a direct path from A. to B., another track over the plaintiff's land from A. to C. and thence to B. had been substituted by parol agreement of the parties for an indefinite time, yet the user of the substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it; *per Patteson, J.*, *Payne v. Shedden*, 1 *Mood. & Rob.* 383; and see *Hale v. Oldroyd*, 14 *M. & W.* 789; *Hall v. Swift*, 4 *N. C.* 381. An interruption under this act must be by the owner of the *locus in quo* (i. e. of the servient land); *per Parke, B.*, *Onley v. Gardiner*, 4 *M. & W.* 497. Where, pending negotiations for a compromise, there has been an interruption of the enjoyment for more than one year before action brought, it is for the jury to say whether the interruption has been acquiesced in or not; *Bennison v. Cartwright*, 33 *L. J. (Q. B.)* 137. Where non-user of a way for a year is proved by the defendant, he may also prove payment of an acknowledgment for the user just before the non-user, in order to rebut the inference of a mere voluntary forbearance on the part of the claimant; *Tickle v. Brown*, 4 *Ad. & E.* 369. A claim of way for cattle and carts may be proved by showing constant use for cattle, and a user for less than twenty years for carts, the claimant not having possessed carts for part of the period; *Dave v. Heathcote*, 25 *L. J. (Ex.)* 245; *Carr v. Foster*, 3 *Q. B.* 581.

A consent in writing by a party who could have objected during any part of the period, will prevent the operation of the statute; *Toynbee v. Brown*, 3 *Ex.* 117 (decided on the Tithe Prescription Act, 2 & 3 Will. 4, c. 100). *Quare*, whether a consent contained in an answer in Chancery would be sufficient; *Ib.*

By sect. 7, where the person who ought to remit the claim of right is under certain disabilities, or is tenant for life, the period of disability or of the life estate is to be excluded from the period of twenty or thirty years, as the case may be. If, therefore, any such disability occurs during the twenty or thirty years next before the suit, the claimant must make up the full period by proof of user before it began; and the whole period of twenty or thirty years so made up will be deemed to be "next before the suit" within the meaning of the act. Thus, where defendant pleaded enjoyment of a profit in *alieno solo* for thirty years, to which the plaintiff replied a tenancy for life for twenty-five years out of the thirty, to which defendant rejoined, that the life estate did not continue during the thirty years, and defendant proved an enjoyment for twenty-four years next before and six years next after the life estate till action brought, the defendant was held entitled to a verdict; *Clayton v.*

Corby, 2 Q. B. 813. But *semb.* such disability will not prevent a legal interruption, submitted to while it lasted, from defeating the claim; *Ib.*

Under sect. 8 (*ante*, p. 488), a tenancy for term of life, or of years exceeding three, will be excluded from the computation of forty years (applicable to ways and watercourses) only on condition that the claim is resisted by the reversioner within three years after the determination of the term; *Wright v. Williams*, 1 M. & W. 77. But such tenancy for more than three years is not excluded from the computation where the claim is in respect of twenty years' enjoyment; *Palk v. Skinner*, 18 Q. B. 568.

In *Bright v. Walker*, 1 C., M. & R. 219, a way had been used adversely for twenty years over land in possession of a lessee who held under a lease for lives granted by a bishop, and it was held that this user gave no right as against the bishop, and did not affect the see. It was also held that no right was gained under the statute as against the bishop's lessee. The grounds of this decision are thus explained by Parke, B.:—"If the enjoyment takes place with the acquiescence or by the laches of one who is tenant for life only, will it be good to give a right against the see and those claiming under it by a new lease, or only against the termor and his assigns during the continuance of the term? or will it be altogether invalid? It is quite clear that no right is gained against the bishop. The important question is, whether this enjoyment, as it cannot give a title against *all* persons having estates in the *locus in quo*, gives a title against the lessee and defendants claiming under him or not at all? We think that no title at all is gained by an user which does not give a valid title against all and permanently affect the see. Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But since the statute, such a qualified right is not given by an enjoyment for twenty years. For in the first place the statute is for shortening the time of *prescription*; and if the periods mentioned in it are to be deemed new times of prescription it must have been intended that the enjoyment for three periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the land in fee. And in the next place, the statute nowhere contains any intimation that there may be different classes of rights qualified and absolute, valid as to some persons and invalid as to others. From hence we conclude that an enjoyment of twenty years, if it give not a good title against all gives no title at all; and as this enjoyment, while the land was held by a tenant for life, cannot affect the reversion in the bishop, and is not therefore good against every one, it is not good against *any one*."

Public right of way.] In an action for the disturbance of a public right of way the declaration usually states the existence of a public highway, the plaintiff's possession of adjoining premises, and his disturbance in the use of the way. For an obstruction of a permanent character it would seem that an action may be brought by a reversioner; *Kidgill v. Moore*, 5 C. B. 364; *Simpson v. Savage*, 26 L. J. (C. P.) 50. It must be shown that the plaintiff has sustained

an inconvenience beyond that which is common to the public at large.

Proof of public way.] Public ways, when not created and regulated by acts of parliament, are usually proved by notorious and uninterrupted user, from which a dedication to the public by the owner of the land over which the way extends may be implied. Where the plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street, after twenty-one years (during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways and half the horse-way cleansed at the expense of the inhabitants), it was held that this street was not to be presumed to be so dedicated to the public, as that the defendant, pulling down his own wall, might enter in at the end adjoining his land, and use it as a highway; *Woodyer v. Hadden*, 5 Taunt. 125; *Poole v. Huskinson*, 11 M. & W. 827. If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public; per Lord Ellenborough, *R. v. Lloyd*, 1 Camp. 260; *Trustees of British Museum v. Finnis*, 5 C. & P. 460. But proof of a bar having been placed across the street soon after the houses which form the street were finished, will (for some time, at least) rebut the presumption of dedication, though the bar was soon afterwards knocked down and the way used as a thoroughfare; *Roberts v. Karr*, 1 Camp. 262 (n). It has been held in one case that six years' user may be sufficient to found the presumption of dedication; *Trustees of Rugby Charity v. Merryweather*, 11 East, 375 (n.); and where the *locus in quo* had been on lease for a long term down to the year 1780, and from that year till the year 1788, the public were permitted to have the free use of it as a way, this was held sufficient time for proving a dedication. If the land is in the possession of a tenant, such tenant cannot dedicate it to the public so as to bind the owner of the fee; *Wood v. Veal*, 5 B. & A. 454. But after a long lapse of time and frequent change of tenants Lord Ellenborough held, that from the notorious and uninterrupted use of a way by the public, it might be presumed that the landlord had notice of the user and that it was with his concurrence; *R. v. Barr*, 4 Camp. 16. And where public user alone for six or seven years was shown, the presumption was held not to be rebutted by proof that the land had been a short time before in strict settlement, but had been sold in fee under a power before the user began, and that it was for those who denied the dedication to show that there was no one *in esse* at the time who was competent to dedicate; *R. v. Petrie*, 4 E. & B. 738. Where a public footway over Crown land was extinguished by an inclosure act, but for twenty years after the inclosure took place the public had continued to use the way, but the land during eight of these years had been in the occupation of a licensee from the Crown, it was ruled that this user was no evidence of a dedication to the public, as it did not appear to have been with the knowledge of the Crown; *Harper v. Charlesworth*, 4 B. & C. 574. Yet there may be a dedication by the Crown, and where the user has been uninterrupted for forty or fifty years, and the land not under lease, the dedication ought to be presumed, whether the free-

hold be in the Crown or an unknown party; *Reg. v. East Mark*, 11 Q. B. 877.

The Highway Acts, 5 & 6 Will. 4, c. 50, and 27 & 28 Vict. c. 101; do not affect the mode by which a highway may be dedicated to the public, except where it is sought to make the parish liable to repairs; *R. v. West Mark*, 2 Mood. & Rob. 305; *Surrey Canal Company v. Hall*, 1 M. & G. 392, 401; *Roberts v. Hunt*, 15 Q. B. 17.

Where a highway is bounded upon both sides by a fence, the public are entitled *primâ facie* to make use of the whole space, and are not confined to that part which is metalled or kept in order for traffic, and any practical obstruction which hinders any one from using the way in this manner may give rise to a cause of action; *Reg. v. The United Kingdom Telegraph Company*, 31 L. J. (M. C.) 166; *Reg. v. Train*, *Ib.* 169; 2 B. & S. 647. But a highway may be dedicated with an obstruction upon it, such as a flap-door opening into a vault, a stile, &c.; *Fisher v. Prowse*, 2 B. & S. 770; 31 L. J. (Q. B.) 212; *Cooper v. Walker*, *Ib.*; *Robbins v. Jones*, 15 C. B., N. S. 221; 33 L. J. (C. P.) 1.

Disturbance by the defendant—special damage.] The plaintiff must prove on a plea of Not guilty some disturbance by the defendant, and where the action is for a nuisance in a public highway, he must prove the special damage if put in issue by the plea; *Wilkes v. The Hungerford Market Co.*, 2 N. C. 281. The expense of conveying goods, &c., by a longer and less convenient way is sufficient damage to support an action for obstructing a public highway; *Dobson v. Blackmore*, 9 Q. B. 991. So the injury done to the public by the obstruction of customers who would otherwise have come to him; *Rose v. Groves*, 6 Scott New R. 645.

Proof of way—by order of Inclosure Commissioners.] Under the 41 Geo. 3, c. 109, s. 8, the Inclosure Commissioners have power to "set out and appoint the public carriage roads and highways" over the lands to be inclosed. And by s. 10 the same power is given to set out private roads; and by s. 11 all private rights of way not set out by the commissioners are extinguished.

Defence.

Not guilty.] By the rules of H. T. 1853, in an action for obstructing a right of way, the plea of the general issue will operate as a denial of the obstruction only and not of the plaintiff's right of way. The disturbance may be by ploughing up the way, &c.; *Com. Dig. Case for Disturbance (A. 2.)*. For though the grantor is not generally bound to repair it, he cannot lawfully impair it by his own act.

Traverse of the right.] The defendant may show that the way has ceased to exist, as that the way has been extinguished by an inclosure act, &c.; or if claimed by presumed grant, that during the adverse user the land was in the possession of a tenant. If the way is claimed as a way of necessity, it has been held that the defendant may show that the plaintiff can approach the place to which it leads over his own land, and that consequently the way of necessity has ceased; *Holmes v. Goring*, 2 Bing. 76. But see *Procter v. Hodgson*,

10 *Ex.* 824; 24 *L. J. (Ex.)* 195. He may prove that the way was only a way by sufferance during the pleasure of himself and the plaintiff; *Reignolds v. Edwards, Willes*, 282; as evidence of which he may show that he has kept a gate across the road, or that the plaintiff has paid him a compensation for the use of the way. And though these cases were before the Prescription Act, they seem to be still law, for they show a precarious enjoyment. See *ante*, pp. 488-9. He may also show that the right of way has been renounced and abandoned by acquiescing in an obstruction for more than twenty years; *Bower v. Hill*, 1 *N. C.* 555. Or where it is claimed under Lord Tenterden's Act the defendant may show acquiescence in an interruption for one year of the twenty or forty years relied on by the plaintiff. See sect. 4, *ante*, p. 479. But where a party was entitled to pass along a navigable drain from his land to the river, and the owner of the land lower down erected a permanent obstruction across the drain, it was held that the circumstance of part of the drain having been impassable for sixteen years from an accumulation of mud did not deprive the party of his right to sue for such obstruction; *Bower v. Hill*, *suprà*. A temporary user of another way by reason of its greater convenience, is not evidence of the abandonment of an immemorial way; *Ward v. Ward*, 7 *Ex.* 839. But where the alleged right appears to have been enjoyed over every part of a close, and not in any defined or visible path, the defendant is entitled to a verdict; *Schwinge v. Dowell*, 2 *F. & F.* 845.

The defendant may also prove an extinguishment of the right by a substantial alteration in the original object of the grant of the way: thus where a way is granted to an open piece of ground "now used as a wood-house," the grantee, though not bound to continue to use it as a wood-house, cannot use the way for a dwelling-house built thereupon; *Allan v. Gomme*, 11 *Ad. & E.* 759. Or he may show a use of the way for purposes not contemplated by the grant, as the misuse for merely agricultural purposes of a way to a coach-house and stable; *Henning v. Burnet*, 8 *Ex.* 187; *Skull v. Glenister*, 16 *C. B., N. S.* 87; 33 *L. J. (C. P.)* 185. But a way is not necessarily lost by an alteration, improvement, or enlargement of the premises to which it is annexed, nor by every change in the use or destination of them. The nature of the way depends upon the terms of the grant and expressed object of it, or on the prejudice arising to the grantor by the altered user. See the two last cases, and *Luttrell's Case*, 4 *Rep.* 86. Unity of possession is also an extinguishment of an easement; but where the party has different estates in the two pieces of land, as an estate in fee in the land over which, and a term of years in the land in respect of which, the easement exists, the easement is suspended only, and not extinguished; *Thomas v. Thomas*, 2 *C., M. & R.* 34.

As to the effect of admissions by previous occupiers or tenants of the dominant tenement, see *ante*, *Admissions*, p. 62.

Action for Disturbance of Watercourse.

The principal allegations in the declaration are usually, 1. The possession of a mill, water-meadow, or other tenement in respect of which the right of water is enjoyed; 2. The right to the water; 3. The disturbance; 4. The damage.

Proof of the right to the water.] The right to the use of water

flowing in a natural stream upon the surface of the earth belongs of right to the proprietors of the adjoining land, and is not enjoyed by virtue of acquiescence or a presumed grant; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Wood v. Waud*, 3 Ex. 748, 775. A riparian proprietor has a right to a reasonable use of the water for his domestic purposes and for his cattle, without regard, in case of a deficiency, to the interests of proprietors lower down the stream; *Miner v. Gilmour*, 12 Moo. P. C. C. 156. But the right to use it to the prejudice of any proprietor of land above or below, by throwing back, diverting or polluting it, is a right for which the claimant must show a title by contract, prescription, or other adequate authority; *Mason v. Hill*, 5 B. & Ad. 1; *Embrey v. Owen*, 6 Ex. 353. The provisions of the Prescription Act, 2 & 3 Will. 4, c. 71, which apply to ways or watercourses, have been already referred to, *ante*, p. 488; and the decisions on the statute upon rights of way are generally also applicable to rights of water. It has been held that a right to take water from a well for domestic purposes is an easement and not a profit à prendre; *Race v. Ward*, 4 E. & B. 702. Whether a precarious licensee of the use of the water of a stream can sue a stranger for disturbing it, is open to question; but if the stranger fouls water when actually withdrawn and appropriated under such a licence to the licensee's own use, he is liable; *Whalley v. Laing*, 2 H. & N. 476.

In *The Stockport Waterworks Company v. Potter*, 3 H. & C. 300, it was held that the grantee of that portion of the estate of a riparian proprietor which did not abut on the river could maintain no action, except in the name of the grantor, for a pollution of the water; for that the rights of the occupier of the river bank could not be severed and conveyed in gross. Where the plaintiff claimed a watercourse by reason of a mill, and the jury found a disturbance of the right as enjoyed before the erection of the mill, the finding was held not to support the claim; *Frankum v. Falmouth*, 2 Ad. & E. 452. It would seem, however, that if the allegations in the count and the evidence permit it, there may be a distributive finding in such a case, or there may be an amendment. See *Wood v. Waud*, 3 Ex. 773, 774. A grant by the higher landowner to the lower landowner "and his assigns" will justify an assignee in suing for disturbance of his use of the water, claiming it "by reason" of his possession of his land; *Northam v. Hurley*, 1 E. & B. 665.

Such rights as those previously mentioned may be acquired, though the channel for the water be wholly artificial, and made for a different purpose; as where the owners of a brewery had enjoyed the use of water issuing for twenty years out of the mouth of a disused adit made to drain mines, it was held that the mine owners could not afterwards resume the working of the mines so as to infect the water; *Magor v. Chadwick*, 11 Ad. & E. 571. If, however, the adit water had been used with notice of the intention to resume the workings, or under circumstances from which such notice must necessarily be inferred, or if there had been a local custom to resume them at any time, it seems that the Court was prepared to hold, that no right would have been thereby gained; and such notice or custom may be shown on a traverse of the right. In the above case natural and artificial streams are treated as undistinguishable in point of law, so far as respects the acquisition of rights over them. But in *Arkwright v. Gell*, 5 M. & W. 231, and *Wood v. Waud*, 3 Ex. 748, the Court of

Exchequer held that those came under a different rule, and that long enjoyment would not give a right to the unobstructed use of a sough or stream obviously made for temporary purposes, as to drain a mine, at least as against any one claiming under the makers; and the Court further distinguished *pollution* from *diversion*, holding that the latter might be lawful in cases where the former was not. So where neighbouring land is benefited by the water flowing through artificial drains made by a farmer for draining his own land, it was held that the farmer for the purposes of cultivation might deepen the drain, and thereby draw off the water, though the plaintiff had enjoyed it for the full period of fifty years; *Greatrex v. Hayward*, 8 *Ex.* 291. But these cases are not to be taken as establishing a rule that rights cannot be gained to water flowing through an artificial cut, though such cuts are not to be treated on the same footing as natural streams, so far as regards ordinary riparian rights. Thus a right may exist by user to divert water from a stream from time to time by an old artificial cut, to supply cattle with water when required; *Beeston v. Weate*, 6 *E. & B.* 986. And in *Sutcliffe v. Booth*, 32 *L. J. (Q. B.)* 136, it is laid down by Wightman, J., in plain terms, that an artificial watercourse may have been originally made under such circumstances, and have been so used as to give all the rights which the riparian proprietors would have had if it had been a natural stream. Where a natural stream is partly fed by surface drainage, as by an overflow of ponds formed by land springs, and of wells and watering-places for cattle in wet seasons (such overflow not running in a fixed and defined watercourse), the owner of a mill on the stream cannot sue the landowner for a diversion or stoppage of such sources of supply; *Broadbent v. Ramsbotham*, 11 *Ex.* 602; 25 *L. J. (Ex.)* 115; *Rawstron v. Taylor*, 25 *L. J. (Ex.)* 33; 11 *Ex.* 369. But where a stream flows in a defined channel from a spring head, a diversion and detention of the water by pipes and tanks at the head is actionable; *Dudden v. Clutton Union*, 1 *H. & N.* 627. So where a natural river was supplied by underground water, which was withdrawn from, or prevented from flowing into, the river, by the digging of a well, it was in one case held that a mill-owner on the river might sue for injury by such obstruction; *Dickinson v. Grand Junc. Can. Co.*, 7 *Ex.* 282. But this case has been regarded as unsatisfactory, and it has been since held in the House of Lords, that unseen underground waters are distinguishable from open streams, and that the doctrine of presumed grants is inapplicable to them. Hence, a mill-owner cannot complain if a neighbouring landowner digs a deep well in his land, and thereby sensibly diminishes the waters of the mill-stream, and the latter may apply or distribute the waters of the well as he pleases. But *ut semble* if the well be dug merely *animo vicino nocendi*, and not for *bonâ fide* use, the obstruction may become actionable; *Chasemore v. Richards*, 2 *H. & N.* 168; 7 *H. L. Cas.* 349. See also *Acton v. Blundell*, 12 *M. & W.* 324; *Hammond v. Hall*, 10 *Sim.* 551; and *South Shields Waterworks Co. v. Cookson*, 15 *L. J. (Ex.)* 315. In *R. v. The Metropolitan Board of Works*, 3 *B. & S.* 710; 32 *L. J. (Q. B.)* 105, the plaintiff's land contained a small pond supplied from beneath by several powerful springs. This pond was diverted by the plaintiff into several ornamental streams or rivulets, but the whole supply of water was suddenly withdrawn by a sewer constructed by the defendants upon adjoining land, and which drained the springs from which water had been supplied. Held, that the plaintiffs had no remedy. It

has, however, been recently held, in the case of *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J. (Q. B.) 231, that to discharge muddy water (created by works newly erected on the defendant's land) through underground passages into the plaintiff's pond is a good cause of action.

A right to cast into a river or stream the rubble and refuse of mine works may be claimed by prescription, and therefore by stat. 2 & 3 Will. 4, c. 71; or it may exist by local custom; and it seems that this is a claim of a "watercourse" under sect. 2 of the act; *Carlyon v. Lovering*, 26 L. J. (Ex.) 251; 1 H. & N. 784; *Wright v. Williams*, 1 M. & W. 77. See the arguments in *Murgatroyd v. Robinson*, 26 L. J. (Q. B.) 233; *Bastard v. Smith*, 2 Mood. & Rob. 129.

Proof of disturbance.] In an action for contaminating a well by erecting a cesspool near it, the plea of Not guilty puts in issue as well the fact of the erection as that of the consequent contamination; *Norton v. Scholefield*, 9 M. & W. 665. When the plaintiff complained of a diversion of the water of his pond by cutting and continuing a sewer near it, and it appeared that the defendant had drained the pond before the sewer was made in order to make it; but that the sewer, when made, did in fact prevent the pond from re-filling, it was held that the alleged disturbance was proved; *Dukes v. Gostling*, 1 N. C. 588. If the plaintiff takes water out of a stream running through his land to the pond of B., whereby B.'s pond is not so full, this is not actionable, unless there be a permanent diversion of the stream; *Smart v. Stisted*, Com. Dig., *Action for Nuisance* (C); *Embrey v. Owen*, 6 Ex. 253. But any abstraction or detention of water, so as to produce sensible inconvenience, is actionable; *Wood v. Waud*, 3 Ex. 748. And if the defendant has caused the water to be foul, there is a damage in law, although the existence of other causes of foulness, occasioned by other riparian landowners, may make the particular damage done by the defendant undistinguishable. As to the mode in which water may be diverted and removed by the owners of adjoining mines, see *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B., N. S. 376; 33 L. J. (C. P.) 101.

Damages.] Actual damage or loss occasioned by the disturbance need not be shown if it be against the right; *Embrey v. Owen*, 6 Ex. 353; *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282; *Northam v. Hurley*, 1 E. & B. 665; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; 26 L. J. (C. P.) 148.

Defence.

The plea of *Not guilty*, as in other cases of tort, only denies the wrongful act, and not the inducement, right, or other facts alleged. It does not put in issue the wrongfulness of the act done; *Frankum v. Falmouth*, 2 Ad. & E. 453. It is no defence that the plaintiff may have contributed to the fouling of the water, where a wrongful fouling by the defendant is complained of; for this rule is inapplicable to wrongful and wilful acts on the part of the defendant; *Whalley v. Laing*, 2 H. & N. 476.

Traverse of the right claimed.] This traverse does not put in

issue the possession of the dominant tenement by reason whereof the right is claimed; *Dukes v. Gosling*, 1 N. C. 588. Interruptions not acquiesced in for a year are evidence, as where the claimant of the use of water for irrigation had drawn it off from the defendant's watercourse for twenty years, but had always been resisted, and had once been fined and paid the fine on a conviction for wilfully taking it, the conviction was held admissible to prove a contentious enjoyment throughout, insufficient to gain a right under the statute; *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267.

An alteration destructive of the plaintiff's right may be shown under this traverse, *ante*, p. 494. But a right to water is not destroyed by a partial alteration in the direction of the stream by the claimant; *Hall v. Swift*, 4 N. C. 381; nor by an interruption occasioned by a dry season; nor by an alteration in the machinery of the mill turned by it, if not prejudicial to others entitled to the same water; *Saunders v. Newman*, 1 B. & A. 258. Where the plaintiff has, by oral licence, permitted the defendant to erect a permanent work which has necessarily lessened the supply of water, he cannot afterwards revoke the licence or sue for the injury; *Liggins v. Inge*, 7 Bing. 682. The declaration stated an immemorial right to a flow of water out of the defendant's well for supplying three ponds in three closes of the plaintiff: the plea traversed the right. It appeared that thirty years ago the plaintiff had diverted the flow of water from an ancient pond in one of the closes, and had carried it into three other ponds, and discontinued the use of the old pond, which had since become filled with rubbish: Held, that he had not thereby lost his old right, but might recover for such a diversion of the water as prevented it from flowing out of the well into the old pond; and this, although the case opened and attempted to be proved at the trial was that of a right to the supply of the *three* new ponds. And *per Cur. ib.*, if the claim had been under Lord Tenterden's Act, the right would have been equally unaffected by the substitution of the new mode of distributing the overflow from the well; *Hale v. Oldroyd*, 14 M. & W. 789. Where the plaintiff states a right to keep water flowing to a mill by a weir of a certain height, the defendant may show a grant or prescription enabling him to reduce its height, under a traverse of the right; but *semble*, he cannot, on such a traverse, show a right to lower it, gained under Lord Tenterden's Act by twenty years' user before the commencement of the suit; *Ward v. Robins*, 15 M. & W. 237.

Action for Disturbance of Pews.

This action is now seldom brought. The declaration states that the plaintiff was possessed of a dwelling house, that by reason thereof he was entitled to the use of a pew in the parish church during service, and the disturbance of the right by the defendant. Where the right to a pew is not annexed to a house, but is simply allotted to an individual parishioner by the churchwardens, no action will lie for a disturbance of the right; *Mainwaring v. Giles*, 5 B. & A. 356. But a disturbance of the right as appurtenant to a house may be the subject of an action. This right is proved by faculty or grant from the ordinary, or from those acting under his commission or authority, or by prescription from which a faculty is presumed; *Hawkins v. Compeigne*, 3 Phil. Rep. 15. Those who reside out of the parish

cannot become entitled to a pew by faculty, nor, it would seem, by prescription; *Byerley v. Windus*, 5 B. & C. 1. In *Griffith v. Matthews*, 5 T. R. 296, the Court expressed an opinion that thirty-five years' continued possession, without proof of the origin, was good evidence in support of a claim to a pew. It was said, also, that against a wrongdoer the same strength of evidence was not required as would be in an action against the ordinary. And see *Kenrick v. Taylor*, 1 Wils. 326; *Morgan v. Curtis*, 3 M. & R. 389. Proof that the pew has always been repaired by the claimant is strong evidence in support of his title, but it may also be shown that no other has repaired the pew; *Pettman v. Bridger*, 1 Phil. 325. It may happen from the subdivision of a house that three or four families may become entitled to a single pew; *Harris v. Drewe*, 2 B. & Ad. 167.

It has not yet been decided whether the provisions of the Prescription Act, 2 & 3 Will. 4, c. 71, apply to pews.

It must be borne in mind that the cases above cited refer to pews in parish churches built before the year 1818. Seats and pews in churches built after that year are let and assigned according to the provisions of 58 Geo. 3, c. 45, ss. 75, 76; 3 Geo. 4, c. 72, s. 24; and 1 & 2 Will. 4, c. 38.

Action for Infringing Patents.

The declaration usually alleges, 1. That the plaintiff was the first inventor; 2. The grant of the letters patent; 3. The specification and enrolment or filing thereof; 4. The several breaches of the patent right complained of; 5. The damage. Since the Common Law Procedure Act, 1852, the declaration may, it seems, allege performance generally of all conditions precedent without stating expressly that a specification was filed or enrolled; and it lies on the defendant to plead the non-observance of this condition. See form 31, Sched. B. *Common Law Procedure Act*, 1852.

Stat. 15 & 16 Vict. c. 83.] By the act 15 & 16 Vict. c. 83, it is provided (sect. 2), that all courts and judges shall take notice of the seal of the commissioners of patents, and also receive as evidence all copies and extracts of documents deposited in the office, certified under their seal, without further proof or production of the originals.

By sect. 17, all letters patent are to be made void on non-payment, within the times therein limited, of the sums and stamp duties required by the schedule of the act; and the certificate of payment issued under the seal of the commission, and duly stamped, shall be evidence of payment.

By sect. 33, copies printed by the Queen's printers, of specifications, disclaimers, and memoranda of alterations, shall be admissible in evidence, and deemed to be *prima facie* evidence of the existence and contents of the documents to which they purport to relate; but *semb.* proof must be given that they come from the Queen's printers, for this is not expressly dispensed with.

Sect. 41 enacts that in actions in the superior courts of record at Westminster for infringement the plaintiff shall deliver with his declaration particulars of the *breaches* complained of, and defendant shall deliver with his pleas particulars of any *objections* on which he means to rely at the trial; and at the trial no evidence shall be

allowed to be given in support of any infringement or objection impeaching the validity of the patent, which is not contained in the particulars so delivered: provided that the place or places, at or in which, and in what manner, the invention is alleged to have been used or published prior to the date of the patent shall be stated in such particulars: provided it shall be lawful for any "judge at chambers" to allow an amendment of the particulars on such terms as he thinks fit. The same section applies to particulars of objections delivered in proceedings on *scire facias*, and provides that on the trial on such proceedings the defendant shall be entitled to begin.

The last section repeats, with some variation, a provision of 5 & 6 Will. 4, c. 83, s. 5, which required defendants to deliver a notice of the objections on which they rely. It seems to be now settled (notwithstanding *Palmer v. Cooper*, 9 Ex. 231, *contra*) that if the particulars delivered are too vague or too large, the opposite party ought to apply for an amended particular, and cannot take this objection at the trial in order to exclude the evidence; *Neilson v. Harford*, 8 M. & W. 806; *Hull v. Bollard*, 25 L. J. (Ex.) 304; and *per Martin, B.*, the defendant may amend his particulars at the trial; *Id.* It is presumed that this would be under the powers of the Common Law Procedure Act, 1852, which, however, passed just before the above statute for the amendment of the Patent Law.

Not guilty.] This plea only puts in issue the alleged breaches. Under this issue the question of fraudulent intention to infringe is not material; the acts are alone material; *Stead v. Anderson*, 4 C. B. 806. Where the breach was that the defendant had directly and indirectly used the plaintiff's invention, and it appeared that the defendant had got other manufacturers to use the plaintiff's process, and then received and sold the goods so manufactured, the breach was held to be proved; *Gibson v. Brand*, 4 M. & G. 179. In *Walton v. Lavater*, 8 C. B. (N. S.) 162; 29 L. J. (C. P.) 275, it was held that proof that a party had sold the patented article, without proof of his having made it or procured it to be made, would be good evidence to warrant a jury in finding that he had been guilty of an infringement.

A slight deviation from the process described in the specification, for the purpose of evading the patent, is a fraud. The question is, whether the defendant's mode is substantially different; *per Dallas, C. J.*, in *Hill v. Thompson*, 8 Taunt. 391. If a well-known equivalent, chemical or mechanical, is substituted by the defendant for a part of the patented invention, it is a mere colourable variation, and therefore an infringement; *Heath v. Unwin*, 13 M. & W. 583; see *Barber v. Grace*, 1 Ex. 339. A patent for a combination of several things old and new is infringed by an imitation of that part which is new; *Sellers v. Dickinson*, 5 Ex. 312; *Newton v. The Grand Junction Rail. Co.*, *ib.* 331. But where the plaintiff claimed the use of carburet of manganese for the manufacture of steel, and the defendant used oxide of manganese and coal tar with exactly the same effect, which combination was before unknown, and was cheaper than the carburet, this was held no infringement; *Unwin v. Heath*, 5 H. L. Cas. 505. In *Hills v. The Liverpool United Gaslight Company*, 32 L. J. (Chanc.) 28, a patent had been granted to an invention for the purification of gas by means of precipitated or hydrated oxides of iron artificially prepared. The defendants applied to the purifying of gas a natural substance called bog ochre, which appeared to be by itself a

naturally-formed oxide. It was held that this was no infringement of the patent. In *Seed v. Higgins*, 8 H. L. Cas. 550; 30 L. J. (Q. B.) 314, where the plaintiff claimed the application of centrifugal force by means of a weight acting upon a presser, and it appeared that the centrifugal force acted on a higher plane in the plaintiff's than in the defendant's machine, it was held that there was no evidence to go to the jury of an infringement; *dubitante* Lord Campbell. Where the invention is a combination of old and new things, the specification must distinguish what is new; *Tetley v. Easton*, 2 C. B. N. S. 706; 26 L. J. (C. P.) 269. In a case in which the patent was for making ropes in a particular way and the rope made by the defendant and produced by the plaintiff appeared, on inspection, to agree in its peculiarities with those made by the plaintiff's machinery, and the defendant had refused to permit the plaintiff to see his mode of making them, Lord Ellenborough held that this was presumptive proof that he made them by the plaintiff's process; *Huddart v. Grimshaw*, *Davis's Pat. Ca.* 288, cited in *Godson on Patents*, p. 180.

That plaintiff is not the first inventor, or that the invention is not new.] The plaintiff must, in the first instance, give slight evidence of the nature and novelty of the invention; *Turner v. Winter*, 1 T. R. 606. It is sufficient to call an experienced person who will say that he never heard of the invention before; *Manton v. Manton*, *Dav. Pat. Ca.* 350. A manufacture newly imported into this kingdom is new within the patent, though openly published abroad; *Beard v. Egerton*, 3 C. B. 97. To invalidate the claim of novelty it is not enough to show that such an article had been made before by another person if never brought into public use, nor seen by the plaintiff; *Lewis v. Marling*, 10 B. & C. 22; *Jones v. Pearce*, *Godson on Patents*, Suppl. p. 10. But the prior use may avoid it, though not general, if the use was not secret; *Carpenter v. Smith*, 9 M. & W. 300, and *per Lord Abinger*, C. B., *ibid.* "The cases of *Lewis v. Marling* and *Jones v. Pearce* proceeded on the ground of the former machines being, in truth, mere experiments which failed;" *Galloway v. Bleaden*, *Webst. Pat.* 525, 529, and *semble*, if the prior use was public, it does not matter that the user made a secret of the process; *Heath v. Smith*, 3 E. & B. 256. Abandonment of an invention is a presumption that it was imperfect, and a mere experiment; *Household Co. v. Neillson*, 9 Cl. & Fin. 788. But mere discontinuance of user *per se* will not make good a subsequent patent for the same thing; *Ib.* Where the claim is for a new process it is not supported by proof of an improvement in an old process; *Gibson v. Brand*, 4 M. & G. 179, 198. Where the invention claimed was an improved construction of chairs, and the defendant both denied the invention and that the specification described it, and the jury found that another person, B., had before invented and sold chairs on the same principle, but that the plaintiff had discovered "the practical purpose to which it is now applied:" Held, that the plaintiff was not entitled to a verdict, the description in the specification being one which in fact included the prior invention of B.; *Minter v. Mower*, 6 Ad. & E. 735. The application of an old contrivance in the old way to an analogous subject, without any novelty or invention in the mode of application, is not the subject of a patent. In *Horton v. Mabon*, 12 C. B., N. S. 437; 31 L. J. (C. P.) 255, the plaintiff claimed by his invention the application of double-angle iron to the trough of a telescopic gas-holder. Telescopic gas-holders had previously been well known, but

it was found by the jury that double-angle iron had not been applied to the purpose of gasholders before the date of the patent, though it had been applied to several purposes in the form in which the plaintiff claimed to use it. The patent was held to be invalid. So where the improvement claimed was that of casting the rings and tubes of a boiler in one piece (instead of casting them separately according to the common usage), and there was nothing peculiar in the method of casting employed; *Ormson v. Clarke*, 14 C. B., N. S. 475; 32 L. J. (C. P.) 8; see also *Harwood v. The Great Northern Railway Company*, 2 B. & S. 194; 31 L. J. (Q. B.) 198. Prior publication in a book publicly circulated in this country is a sufficient answer to the claim of novelty, even without user; *Stead v. Williams*, 7 M. & G. 818; *Stead v. Anderson*, 4 C. B. 806. In *Lang v. Gisborne*, 31 Beav. 133; 31 L. J. (Chanc.) 769, where the invention in respect of which a patent had been obtained had been described in a book written by a foreigner, three or four copies of which appeared to have been sold in England, it was held that the patent was void. But the published statement must not be by way of mere suggestion or speculation, but as a complete and successful invention, *per* Lord Lyndhurst, C., in *Househill Co. v. Neillson*, *ubi supra*, *Webster's Pat. Ca.* 718. The fact that since the grant of the patent, and before the enrolment of the specification, another has enrolled a patent for the same discovery is not of itself proof of want of novelty; *Cornish v. Keene*, 3 N. C. 570, 588.

The plea that the invention is not a "new manufacture," &c., involves the question whether it is a manufacture at all within 21 Jas. c. 3; *Walton v. Bateman*, 3 M. & G. 773. But a plea averring that it is not a new invention admits that it is such a manufacture; *Walton v. Potter*, *Id.* 411; and see *McCormick v. Gray*, 7 H. & N. 25; 31 L. J. (Ex.) 42.

A disclaimer under 5 & 6 Will. 4, c. 83, is to be taken as part of the original patent or specification, and from the time of the enrolment of the disclaimer, except in actions pending at the time of the enrolment. *Semble*, *Reg. v. Mill*, 10 C. B. 379.

Public user before patent granted.] This is a good plea, and is not necessarily equivalent to a denial of the invention by the plaintiff; for if the invention was publicly put in use by the inventor before the grant, it will avoid it; though mere knowledge and publication of it after invention, but before grant, will not; *semb.* *Stead v. Anderson*, 4 C. B. 806, 835. A plea that the invention was publicly known, used, and published before the grant is, in substance, a plea of user before the grant, and is therefore not supported by proof of knowledge and publication only, and see *Oxley v. Holden*, 8 C. B., N. S. 666; 30 L. J. (C. P.) 68.

Non concessit.] At common law this plea put in issue the validity and circumstances of the grant; *Co. Lit.* 260 (a.). It is said to put in issue, not the existence, but the effect and operation of the grant; *Bedells v. Massey*, 7 M. & G. 630. But the plea does not put the plaintiff to prove the power of the Crown to grant such a patent, until something is shown to impeach it; *Nickels v. Ross*, 8 C. B. 679. The effect of this plea since the new rules seems to be not well settled.

That the specification does not truly describe the invention or how

it is to be performed.] The objection to the specification, if any, is to be pleaded specially; the want of one, where none is stated in the declaration, must also be pleaded specially; *semb.* Common Law Procedure Act, 1852, s. 57.

The specification stated the use of bituminous schistus, and that before it is used, the sulphuret of iron should be separated from it. On the trial it appeared that all such schistus in the country was found combined with that sulphuret: Held, that as the plaintiff had not stated in his specification the mode of separation, he must show by evidence either that the presence of the sulphuret was immaterial, or that the process of separation was simple and well known in trade; *Derosne v. Fairie*, 2 C., M. & R. 476. When the specification stated the use of "gunpowder or other proper combustible" in making a patent-safety fuse, it was held enough for the plaintiff to show that some other such combustible might be used, though it had never in fact been used, for the fuse; but it would seem that if nothing but gunpowder could be used, then the defendant would be entitled to a verdict; *Bickford v. Skewes*, 1 Q. B. 938. The construction of a specification is for the Court, but the explanation of the words or technical terms of art, the phrases used in commerce, and the proof and results of the processes which are described (and in a chemical patent the ascertainment of chemical equivalents) are matters of fact upon which evidence may be given, and which it is the right of a jury to decide; *per* Westbury, L.C., *Hills v. Evans*, 31 L. J. (Chanc.) 457, and see *Neilson v. Harford*, 8 M. & W. 806. A variance between the title of the patent and the specification cannot be shown on pleas denying a true specification, or the enrolment of such specification; *semb.* *Derosne v. Fairie*, *ubi supra*. A specification is bad if it professes to effect the object by either of two ways indifferently, and it is proved that it can be done only by one; *Reg. v. Cutler*, 14 Q. B. 372 n. (a.).

A disclaimer of part when filed is conclusive, and the authority of the Attorney-General cannot be questioned at the trial; *Wallington v. Dale*, 7 Ex. 888. See 7 & 8 Vict. c. 69, s. 5.

Illegality or inutility of the invention.] These defences must be shown by special pleas, and it is enough to show the fact as to part of the alleged invention; *Morgan v. Seaward*, 2 M. & W. 544. When a plea alleged that the patent was "inconvenient to the king's subjects in general," Buller, J., thought that there was no distinct issue which the plaintiff could be prepared to answer, and therefore refused to hear evidence on it; *R. v. Arkwright*, B. N. P. 77. And where the plea sets out the specification in terms by way of inducement, and then alleges a fact which is traversed, and issue is joined, the judge ought not to express his opinion to the jury, that the invention, as described in the specification, is not legally the subject of a patent, the issue being raised on a matter independent of that question; *Walton v. Potter*, 3 M. & G. 411. See *Betts v. Walker*, 14 Q. B. 363. Where the defendant pleaded that the patent was one for which by law a patent could not be granted: Held, that a process for extracting gas directly from certain vegetables, instead of the older way of extracting oil from them, and then extricating the gas from the oil, is a fit subject for a patent; *Booth v. Kennard*, 1 H. & N. 527.

Certificate.] By 5 & 6 Will. 4, c. 83, s. 3, if a verdict passes for

the patentee or his assigns, it shall be lawful for the judge who tried the cause to certify on the record that the validity of the patent came in question before him, and this record being given in evidence in any future action touching the same patent, shall entitle the patentee or his assigns to treble the taxed costs if he recovers a second time, unless the judge who tries the second action certifies that he ought not to have them.

By sect. 6, in taxing costs, regard shall be had to the part of the case proved at the trial, which shall be certified by the judge who tried the action, regard being had to the notice of objections as well as the counts, and without regard to the general result of the trial.

The certificate should be upon each of the objections mentioned in the notice, and not merely upon the issues, as to which the statute has made no difference in the law; *Losh v. Hugue*, 5 M. & W. 387. If the patentee recovers nominal damages in a second action, he must have a certificate under 3 & 4 Vict. c. 24, in order to obtain the treble costs; *Gillett v. Green*, 7 M. & W. 347.

Action for Deceit.

The causes of action under this head are various. The cases which most commonly occur in practice are misrepresentation of solvency or character, and misrepresentation of the value of property.

Misrepresentation of solvency, &c.] An action lies for making a false and fraudulent representation of the character or solvency of another (under circumstances from which it may be assumed that the party making the representation intended it to be acted upon) whereby the plaintiff has been induced to give credit to him and has suffered loss; *Pasley v. Freeman*, 3 T. R. 51; *Pontifex v. Bignold*, 3 M. & G. 63. The fraud as well as falsehood must be proved, and as it seems on the general issue; therefore where the representation was made *bona fide* under a belief of its truth, the plaintiff cannot (in this form of action) recover; *Shrewsbury v. Blount*, 2 M. & G. 475. And a statement is fraudulent if made dishonestly, or with a reckless ignorance of whether it is true or untrue; *Behn v. Burness*, 3 B. & S. 751; 32 L. J. Q. B. (Ex.) 204.

By stat. 9, Geo. 4, c. 14, s. 6, no action lies to charge a person upon, or by reason of, any representation or assurance made or given relating to the character, conduct, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit, money, or goods upon [thereupon?], unless such representation, &c., be made in writing, signed by the party to be charged therewith.

Where the defendant stated that the plaintiff might safely trust A. B., because the defendant had the title-deeds of an estate of A. B., this was held to be within 9 Geo. 4, c. 14, s. 6; *Swann v. Phillips*, 8 Ad. & E. 457. A representation made respecting the credit of a firm of which the defendant is a partner, is within the act; *Devaux v. Steinkeller*, 6 N. C. 84. In *Lyde v. Barnard*, 1 M. & W. 101, the Court were divided on the point whether a representation that the life estate of A. B. was charged with only three annuities was a representation relating to the credit and ability of A. B. within the act. If the false representation substantially conduced to the obtaining of

the credit, the defendant is liable, although the plaintiff might possibly have been influenced by other representations which are inadmissible through not being in writing; *Tatton v. Wade*, 18 C. B. 371.

The want of a writing is inadmissible evidence under "Not guilty;" *Turnley v. Macgregor*, 6 M. & G. 46. Where the declaration was in tort for a fraudulent warranty on a sale, Parke, B., held that Not guilty put in issue the warranty and unsoundness, but not the sale, which was inducement; *Spencer v. Dawson*, 1 Mood. & Rob. 552.

Misrepresentation of the value of property.] Where the vendor of a public-house fraudulently misrepresents the amount of business done in it, whereby the plaintiff is induced to buy the house, an action will lie, although such statement was not contained in the conveyance or memorandum of the bargain. A statement merely untrue is not sufficient evidence of fraud; there must be wilful deceit with the object of inducing the plaintiff to act upon it; *Ormrod v. Huth*, 14 M. & W. 651. In *Cornfoot v. Fowke*, 6 M. & W. 358, the proprietor of a house instructed an agent to obtain a tenant for it without telling him of a nuisance which lowered the value of the premises. The agent, in answer to a question from the person to whom the house was let, said there were no objections to it. It was held by a majority of the Court, that there was no evidence of fraud on the part either of the landlord or his agent. And in the recent case of *Udell v. Atherton*, 7 H. & N. 172; 30 L. J. (Ex.) 337; where a timber-merchant's traveller represented to a purchaser that a log of mahogany was sound, although he knew that it was otherwise, the Court of Exchequer were divided in opinion as to whether an action lay at the suit of the purchaser against the merchant, who was not aware of the defect, and had not authorised his traveller to make any false representation. In *Wright v. Leonard and Wife*, 11 C. B., N. S. 258; 30 L. J. (C. P.) 365, the Court were divided in opinion as to whether a husband was liable for false representations made by his wife, that certain bills of exchange had been accepted by him. It is not always necessary to show privity between the parties to support an action for false representations; *Gerhard v. Bates*, 2 E. & B. 476. A tradesman who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person, is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article; *Longmeid v. Holliday*, 6 Ex. 761.

Misrepresentations made to third persons, whereby the plaintiff is deceived, may support an action. Thus a false report by managers, addressed to shareholders, in order to influence the market value of shares, is actionable, at the suit of persons induced thereby to become shareholders; *Scott v. Dixon*, Q. B., cited 29 L. J. (Ex.) 62. Where the directors of a mining company caused a prospectus to be circulated grossly misrepresenting the real purchase-money paid for the sett, so as to convey an impression of great value, they were held liable to a shareholder who had bought on the faith of the false statements, although he might have also had other inducements to buy; *Clarke v. Dickson*, 28 L. J. (C. P.) 225; 6 C. B., N. S. 453.

In *Cullen v. Thomson's Trustees*, 4 Macq. H. L. Cas. 424, the manager and assistant manager of a joint stock banking company

were held liable to shareholders for fraudulent statements contained in reports presented by the directors at the annual meetings.

It is not sufficient, to render a company liable for the false representations of the secretary and certain of the directors, to show that the company has profited by those representations; *Barry v. Croskey*, 2 Johns. & H. 1; and see *Bedford v. Bagshaw*, 29 L. J. (Ex.) 59.

On the question of fraud, other false statements in the same business made by defendant may be submitted to the jury, but not as distinct causes of action; *Huntingford v. Massey*, 1 F. & F. 690. And the defendant may show under Not guilty, representations made by him to others, with the view of proving his own *bona fides*; *Shrewsbury v. Blount*, 2 M. & G. 475. In *Sheen v. Bumpstead*, 2 H. & C. 193; 32 L. J. (Ex. Ch.) 271, in an action for a false representation as to the trustworthiness of W., the plaintiff, as part of his case, showed that the defendant, at about the time of the representation had bought goods from W. at £25 per cent. under cost price. The defendant was allowed to ask his shopman (whom he had called to explain the last-mentioned transaction) and four other tradesmen of the town where W. carried on business, "Was W., at the time of the representation as to his character, trustworthy to your belief?" Where the declaration alleged a sale by defendant to plaintiff of a lease, premises, and good-will, and that defendant then falsely and fraudulently misrepresented the value of the business—Held that, on the plea of Not guilty, the plaintiff must show a contract of sale (in writing), and the false and fraudulent representation; and it is not enough to show the assignment of the premises *de facto*, without showing the contract of sale; *Mummery v. Paul*, 1 C. B. 316.

Action for counterfeiting trade marks.] Although there is no exclusive ownership of the symbols which constitute a trade mark apart from their application to a vendible commodity, yet the exclusive right to make such application is a property for the invasion of which a remedy is given at law by an action in the nature of deceit; *The Leather Cloth Company v. The American Leather Cloth Company*, 33 L. J. (Chanc.) 199. Where the defendants marked goods in imitation of the plaintiff's articles, and those who purchased them were accustomed to sell them as having been made by the plaintiff, although they were not sold as such by the defendant, it was held to be rightly left to the jury to say whether the defendants had knowingly sold goods as and for goods manufactured by the plaintiff; *Sykes v. Sykes*, 3 B. & C. 541; and Maule, J., in *Crawshay v. Thompson*, 4 M. & G. 357, 380. As there is no abstract right of a tradesman to appropriate marks, there must be an intention to deceive and make the goods pass as his, and the questions for the jury are: Is the resemblance such as to deceive ordinary persons? Was the mark adopted by the defendant with that intent, and in order to supplant the plaintiff's goods? If the jury find in the affirmative no special damage need be proved; *Rodgers v. Nowill*, 5 C. B. 109; *Crawshay v. Thompson*, *supra*. Nor is it necessary to show that defendant's goods are inferior to the plaintiff's; *Blofeld v. Payne*, 4 B. & Ad. 410. It is not necessary that the defendants should be aware that the mark has been appropriated by the plaintiff. If he finds an article sent to him from the market bearing a stamp, and intentionally uses that stamp for the purpose of designating his own article, laying aside the mark which he has previously used, he is liable; *McAndrew v. Bassett*, 33 L. J. (Chanc.) 568. In this case

the plaintiffs had manufactured liquorice, which they stamped with the word "Anatolia," and it was held that, though this was only a common geographical name, a property in it could be acquired when it had been notoriously applied to a vendible commodity. And see *Hall v. Barrows*, 33 L. J. (Chanc.) 204.

Misrepresentation of authority.] In *Jenkins v. Hutchinson*, 13 Q. B. 744, the defendant H. signed a charter-party in these words—H. for B. It was proved that he had no authority from B. to enter into the contract, but that he was not himself the real principal. It was held that he was not liable in an action treating him as a party to the contract. In *Lewis v. Nicholson*, 18 Q. B. 503, the defendants, who were attorneys of the assignees under a bankruptcy, wrote to the holder of a bill of sale of part of the bankrupt's goods, undertaking on behalf of the assignees (but without authority) to acknowledge his claims. It was held that they were not personally liable on the contract.

In *Randell v. Trimen*, 18 C. B. 786, the defendant, an architect, employed by a committee to superintend the building of a church, ordered from the plaintiff, on behalf of the committee, but without their authority, a quantity of stone. The plaintiff was held entitled to recover damages against the defendant, together with the costs of an unsuccessful action against a member of the committee, though the declaration charged fraud, and no fraud was proved. The Court, however, probably decided upon the ground that a warranty of the defendant's authority was stated on the pleadings. In *Collen v. Wright*, 8 E. & B. 647; 27 L. J. Q. B. 215, where the defendant's testator, as agent for G., had let land without authority, he was held liable upon an action charging him as having warranted that he had authority; and in the damages were included the costs of an unsuccessful Chancery suit against G.; *Simons v. Patchett*, 7 E. & B. 568; 26 L. J. (Q. B.) 195, is to the same effect. In *Richardson v. Dunn*, 8 C. B. N. S. 655; 30 L. J. (C. P.) 44, the plaintiff was in treaty for the purchase of the goodwill of a public-house. He was shown over the house by the defendant, who said that C., the owner of the premises, referred him to B. for inquiries as to the trade. The plaintiff commissioned the defendant to make these inquiries, and upon his report purchased the goodwill. Finding that what was reported to have been said by B. was incorrect, he commenced an action (charging fraud) against C. Failing in this action he sought to recover from the defendant the costs to which he had been put. It was held that the damages were too remote, the court distinguishing the case from *Randell v. Trimen*, where the defendant had encouraged the plaintiff to proceed with the Chancery suit.

As to the necessity of distinctly alleging that the defendant had in fact no authority, see *Ozenham v. Smythe*, 6 H. & N. 690; 31 L. J. (Ex.) 110.

Action for Defamation.

There is, as is well known, a legal distinction between written and spoken slander. Slanderous words spoken and published but not committed to writing are actionable only when they charge the plaintiff with an indictable offence, or attack him in relation to his trade or calling, or when, besides being clearly defamatory, they have

caused to the plaintiff some particular damage. But in the case of words published by writing, it is only necessary that they should be calculated to degrade or disparage the plaintiff, and hold him up to hatred, ridicule, or contempt in order to make them actionable. As, however, the pleadings in cases both of written or spoken slander are often very similar, it will be perhaps best to consider the evidence of slander, written or spoken, under one general heading.

Proof of introductory averment, &c.] All introductory averments essential to the plaintiff's case must be proved when denied upon the pleadings. But by the Common Law Procedure Act, 1852, s. 61, "In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient."

Since this provision no colloquium, or prefatory matter, is necessary, the pleader may put any construction on the words in the count, and leave it to the jury to say whether they bear such construction; *Hemmings v. Gasson*, 27 *L. J. (Q. B.)* 252. But such prefatory statements, although no longer necessary, are still admissible in the declaration, and the evidence by which they are proved is similar to that required in support of explanatory allegations introduced in the subsequent part of the declaration. Where the words are alleged to have been spoken of and concerning the plaintiff in a particular character, and are only actionable as having been spoken of the plaintiff in that character; *Lewis v. Walter*, 3 *B. & C.* 138 (n); *Cox v. Thomason*, 2 *C. & J.* 361, such character must, if put in issue by the plea, be proved; see *R. H. T.*, 1853. But where the words themselves admit the plaintiff's character, evidence of it is unnecessary; *Yrisarri v. Clement*, 3 *Bing.* 432. Where the plaintiff was described as assistant overseer, proof that he is acting in that capacity was held sufficient; *Cannell v. Curtis*, 2 *N. C.* 228.

Whether the words are spoken of the plaintiff in a particular character is for the jury; *Jones v. Littler*, 7 *M. & W.* 423; and if the words are such as must be injurious to the plaintiff as a trader (*e. g.* words imputing insolvency) it is then needless to prove them spoken of him as such; *Id.* The first count of the declaration stated that the plaintiff had been a woolstapler at C. and a brewer at O., and that the defendant spoke of him, as such trader as aforesaid, the following words:—"Mr. H. (the plaintiff) has been a bankrupt at C., &c." Another count alleged the words to have been spoken of the plaintiff in his trade of a brewer. There was no evidence of the plaintiff having been a woolstapler, but it was proved that he had been a brewer at O.; the Court held it no variance, for the place where the bankrupt became bankrupt was immaterial, he might have become a bankrupt whilst a brewer at O. by an act of bankruptcy committed at C.; *Hall v. Smith*, 1 *M. & S.* 287; *Figgins v. Cogswell*, 3 *M. & S.* 369; *Rutherford v. Evans*, 6 *Bing.* 451. To say of the master of a foreign-going ship, possessed of a certificate under the Merchant Shipping Act, 1854, that during his stay at a port he was drunk, and had to be carried to his boat to reach his vessel, is actionable without proof of special damage; *Irwin v. Brandwood*, 33 *L. J. (Ex.)* 257; 2

H. & C. 960. Where the words are spoken of several plaintiffs in trade, their joint trading must be proved. See *Le Fanu v. Malcomson*, 1 *H. L. Cas.* 637.

The 21 & 22 Vict. c. 90 provides means of proving the plaintiff's medical qualification by which the effect of the old cases upon this subject (*Moises v. Thornton*, 8 *T. R.* 303; *Collins v. Carnegie*, 1 *A. & E.* 695,) is entirely destroyed. The act will be found *ante*, p. 275. The books of a university (duly authenticated) conferring the degree of Doctor of Laws are evidence to prove that fact; *Moises v. Thornton*, *suprà*. An averment that the plaintiff practised as a surgeon and member of the College of Surgeons, which college has power to expel for unprofessional conduct, was followed by a charge of such misconduct; the plea denied that the plaintiff practised as surgeon or member of the said college, "having power to expel," &c. It was held to be necessary to prove both the practising and the power of expulsion; *Wakley v. Healey*, 4 *Ex.* 53.

In order to prove that the plaintiff is an attorney (where the libel does not admit it), an examined copy of the roll of attorneys is sufficient. So the book from the Master's office, containing the names of all the attorneys, produced by the officer in whose custody it is kept, is good evidence, together with proof that the plaintiff practised as an attorney at the time of the libel; *R. v. Crossley*, 2 *Esp.* 526; *Lewis v. Walter*, 3 *B. & C.* 138. The certificate need not be produced if the libel does not relate to it; *Jones v. Stevens*, 11 *Price*, 251. The Stamp Office certificate, countersigned by the Master of the Court, was held sufficient *prima facie* evidence of the party being an attorney; *Sparling v. Haddon*, 9 *Bing.* 11. Since the 6 & 7 Vict. c. 73 the Stamp office certificate is not countersigned; but the registrar's certificate, indorsed by the Stamp office, or a copy of the register of attorneys, would seem to be now evidence.

Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation is of course the proper evidence; 2 *Stark. Ev.* 1st ed. 860. And when the plaintiff averred that he was employed by "The New England Company," and that the libel was published of him in such employment, it was held sufficient to prove that the company was commonly so called, though that was not its legal name; *Rutherford v. Evans*, 6 *Bing.* 451.

Proof of the libel.] A mere omission in setting out part of a libel is not fatal, unless the sense of that which is set out is thereby varied; *Tabart v. Tipper*, 1 *Camp.* 353; see *Cartwright v. Wright*, 5 *B. & A.* 615; *R. v. Solomon*, *Ry. & Mood.* 253; *Bremridge v. Latimer*, 12 *Weekl. Rep.* 878.

Whether a writing is a libel or not is a question for the jury, and the judge is not bound to give any opinion on it; *Baylis v. Laurence*, 11 *Ad. & E.* 920; but the proper course (and the usual practice) is for the judge to define what is a libel in point of law; *Parmiter v. Coupland*, 6 *M. & W.* 105. And it may be defined to be a publication, without justification or lawful excuse, calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule; *per Parke, B., Ib.* A writing may be a libel on a private person which would not be so on a person in a public character or office; for the acts of public men, which concern the subject, may be lawfully commented upon without malice; but to impute bad or corrupt motives is a libel in either case, *Ib.*, and see *Campbell v. Spottiswoode*,

cited *post*, p. 524. In *Fray v. Fray*, 17 C. B., N. S. 603; 34 L. J. (C. P.) 45, the defendant, the plaintiff's brother, wrote a letter in which he charged her with having unnecessarily made him a party to a chancery suit, and said that it was a pleasure to her to put him to all the expense she could. It was held that there was evidence of a libel for the jury.

Proof of publication of libel.] Proof that the libel produced is in the defendant's handwriting is said to be presumptive evidence of publication, so as to throw proof of non-publication upon him; *R. v. Beare*, 1 Ld. Raym. 417; *Lamb's case*, 9 Rep. 59, b. But see the arguments in *R. v. Burdett*, 3 B. & A. 717; and 4 B. & A. 95; and a libel may be found under circumstances which preclude such presumption. Printing a libel, unless qualified by circumstances, is said to be, *prima facie*, a publishing, for it must be delivered to the compositors and the other subordinate workmen; *Baldwin v. Elphinstone*, 2 W. Bl. 1038; but this proposition is denied in *Watts v. Fraser*, 7 Ad. & E. 223. Indeed the mechanical work of compositors, and the division of labour among them, almost precludes the presumption that any of them have obtained any knowledge of the sense of what they are composing. A libel may be published in a letter to a third person; but the publication of a libellous letter to the plaintiff alone, though it may be the subject of an indictment, is not a publication to support an action; *Phillips v. Jansen*, 2 Esp. 624. Where, however, the libel was contained in a letter sent by the defendant to the plaintiff (and opened by his clerk), and the defendant knew that the plaintiff's letters were usually opened by his clerk, this is evidence of a publication; *Delacroix v. Thevenot*, 2 Stark. 68. In *Fox v. Broderick*, 14 Ir. C. L. Rep. 453, the defendant by mistake misdirected a letter intended for the plaintiff, and containing the libel, so that it reached one K. It was held that there was sufficient evidence of publication, and that it did not avail the defendant that he had no intention of giving the plaintiff a cause of action. So where the libel was delivered to an agent of the plaintiff, sent by him to buy it; *Duke of Brunswick v. Harmer*, 14 Q. B. 185.

A letter containing a libel was proved to be in the handwriting of the defendant; to have been addressed to a party in Scotland; to have been received at an intermediate post-office on the passage to Scotland to be forwarded thither, and was produced at the trial with the proper postmarks and the seal broken. This was held sufficient evidence of a publication to the person to whom it was addressed; *Warren v. Warren*, 1 C. M. & R. 250. Sending the libel in a letter addressed to the wife of the person libelled is a sufficient publication; *Wenman v. Ash*, 13 C. B. 836. Showing a copy of a libellous caricature to another, at his request, is said to have been held not sufficient evidence of publication to support an action, though the decision has been doubted; *Smith v. Wood*, 3 Camp. 323. The delivery of a libellous pamphlet by the governor of a colony to his attorney-general not for any official purpose is a publication; *Wyatt v. Gore*, Holt, N. P. C. 299. The sale of a libel in a defendant's shop, by his servant or agent there for the defendant's benefit, is a publication by the defendant, though he was not privy to the contents or sale; *Com. Dig. Libel* (B. 1). The delivery of a newspaper to an officer at the Stamp Office is a sufficient publication to sustain an indictment; *R. v. Amphitt*, 4 B. & C. 35; see *post*, p. 512. Proof that the defendant accounted with the officer of stamps for the duty on advertisements

in the paper in question is evidence of publication; *Cook v. Ward*, 6 Bing. 409. Evidence that the libel was written by the defendant's daughter, who was authorised to make out his bills and write his general letters of business, is not sufficient to charge the defendant; unless it can be shown that such libel was written with the knowledge or by the procurement of the defendant; *Harding v. Greening*, 1 B. Moore, 477. In order to show that the defendant had caused a libel to be inserted in a newspaper, a witness was called who proved that he had given a written statement to the editor, which had been communicated by the defendant for the purpose of such publication; and that the statement in the newspaper produced was exactly the same, with the exception of one or two slight alterations not affecting the sense. It was held that what the witness so published might be considered as published by the defendant, but that the newspaper could not be read in evidence without producing the written statement delivered by the witness to the editor; *Adams v. Kelly, R. & Mood*, 157. A paper in the defendant's handwriting found in the house of the editor of the newspaper in which the libel appeared is evidence against the defendant, though partially erased and altered (in immaterial parts) in the printed paper; *Tarpley v. Blabey*, 2 N. C. 437. Where A. and B. are sued jointly for a libel, and A. lets judgment go by default, it seems that the plaintiff must prove a joint publication in order to get a verdict against B.; *Johnson v. Hudson*, 7 Ad. & E. 233; for two co-defendants cannot be found guilty of separate publications. When a libel has been printed by the defendant's order, and he has taken away some of the impressions, one of those left by the printer may be read in evidence against him; *R. v. Watson*, 2 Stark. 129. The sale of each copy of a printed libel is a distinct publication; *R. v. Carlisle*, 1 Chitty, Rep. 451.]

The publication of the libel may likewise be proved by the admission of the defendant. Where the defendant admitted that he was the author of a printed libel, "errors of the press and some small variance only excepted," Pratt, C. J., received this as evidence of publication, and put it to the defendant to prove material variances; *R. v. Hall*, 1 Stra. 416.

Proof of publication in newspapers.] The proof of the publication of libels contained in newspapers is greatly facilitated by the statute 6 & 7 Will. 4, c. 76, repealing and re-enacting similar provisions in 38 Geo. 3, c. 78. The following is an abstract of its provisions:—

By sect. 6, declarations are to be delivered to the commissioners of stamps or other proper officer, specifying the names, additions, and abode of the printers, publishers, and two at least of the proprietors, with the proportional shares of the latter, and describing the printing-house, house of publication, and title of the paper.

By sect. 8, all such declarations shall be filed and kept in such manner as the commissioners of stamps shall direct; and copies thereof certified to be true copies, shall be admitted in all proceedings civil and criminal, and upon every occasion whatsoever touching any newspaper mentioned in such declaration, or touching publication matter or thing contained in such newspaper, as *conclusive* evidence of all matters set forth in such declaration as are hereby required to be therein set forth, and of their continuance respectively in the same condition down to the time in question against any person who shall have signed such declaration, unless it shall be proved that previous to such time such person became lunatic, or that previous to the pub-

lication in question on such trial such person did duly sign and make a declaration that such person had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said commissioners, or to such officers as aforesaid, or unless it shall be proved that previous to such occasion a new declaration of the same nature was duly signed and made and delivered respecting the same newspaper, in which the person sought to be affected on such trial did not join; and the said commissioners, or the proper officer by whom any such declaration shall be kept, shall upon application in writing made to them or him respectively by any person requiring a copy certified according to this act, in order that the same may be produced in any civil or criminal proceedings, deliver such certified copy to the person applying for the same upon payment of the sum of one shilling; and in all proceedings, and upon all occasions, a copy of any such declaration certified to be a true copy under the hand of one of the said commissioners, or of any officer in whose possession the same shall be, upon proof that such certificate hath been signed with the handwriting of a person described in or by such certificate as such commissioner or officer, and whom it shall not be necessary to prove to be a commissioner or officer, shall be received in evidence against any person named in such declaration as a person making or signing the same, as sufficient proof of such declaration, and that the same was duly made and signed according to this act, and of the contents thereof; and every such copy so produced and certified shall have the same effect for the purposes of evidence against any such person named therein to all intents whatsoever, as if the original declaration, of which the copy so produced and certified shall purport to be a copy, had been produced in evidence and been proved to have been duly signed, &c., by the person appearing to have signed the same; and whenever a certified copy of any such declaration shall have been produced in evidence against any person who signed it, and a newspaper shall afterwards be produced in evidence entitled in the same manner as the newspaper mentioned in such declaration, and wherein the name of the printer and publisher, and the place of printing, shall be the same as the name of the printer and publisher and the place of printing mentioned in such declaration, or shall purport to be the same, whether such title, name, and place, printed upon such newspaper shall be set forth in the same form of words as is contained in the said declaration, or in any form of words varying therefrom, it shall not be necessary for the plaintiff, &c., in any action, &c., to prove that the newspaper, to which such action or other proceeding may relate, was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants, &c.

By sect. 13, a copy of every paper, signed by the printer or publisher, with his name and abode, is to be delivered to the commissioners of stamps, or their officer in that behalf, within a certain time after the day of publication; and such commissioner, &c., shall, on application, produce the signed copy in evidence in any civil or criminal proceeding, or deliver it for that purpose to the party applying, upon security given to return it; and all copies so delivered shall be evidence against every printer, publisher, and proprietor of every such newspaper respectively, in all proceedings civil or criminal, to be commenced and carried on, as well touching such newspaper as any matter or thing therein contained, and touching any other newspaper and any matter therein contained, which shall be of

the same title, purport, or effect with such copy so delivered as aforesaid, although such copy may vary in some instances or particulars either as to title, purport, or effect; and every printer, publisher, and proprietor of any copy so delivered shall, to all intents and purposes, be deemed to be the printer, publisher, and proprietor respectively of all newspapers which shall be of the same title or effect with such copies or impressions so delivered, notwithstanding such variance, unless such printer, publisher or proprietor respectively shall prove that such newspapers were not printed or published by him, nor by, nor with his knowledge or privity. See *Mayne v. Fletcher*, 9 B. & C. 382; *R. v. Francey*, 2 Ad. & E. 49.

Proof of the speaking of the words.] Though the plaintiff need not prove the speaking of all the words laid in the declaration, it is necessary to prove some material part of them, and it is not sufficient to prove merely equivalent words; *per* Lawrence, J., *Maitland v. Goldney*, 2 East, 434. There are many decisions as to the effect of variance in the slander stated in the pleadings and that proved, which have been rendered comparatively worthless by the recent statutory powers of amendment. Words laid as spoken in English are not proved by evidence of words spoken in a foreign language. The original words must be stated, and then the meaning explained in English; *Zenobio v. Axtell*, 6 T. R. 162. And in *Amann v. Damm*, 8 C. B., N. S., 597, where the words spoken were in the German language, Williams, J., intimated that it should have been averred in the declaration, and proved that the person in whose hearing the words were spoken understood that language.

Proof of innuendo.] The plaintiff must in general prove the innuendoes as laid, if traversed, and they are so by a plea of "Not guilty." There are several cases where the Court has decided whether or not a libel is capable of bearing the meaning assigned by the innuendo; *Blagg v. Sturt*, 10 Q. B. 899; affirmed in error; *Broome v. Gosden*, 1 C. B. 728, leaving to the jury the question as to whether the words did upon the particular occasion bear the meaning assigned. The duty of the Court is probably limited to deciding whether, from the surrounding circumstances or otherwise, there is evidence for the jury that the words were used in a particular sense. Where B. held bills accepted by the plaintiffs, and the defendant said "you must look out sharp that those bills are met by them," it was held that witnesses could not be asked what they understood by the words, until it was proved that there was something to prevent those words from conveying the meaning which they ordinarily would convey; *Daines v. Hartley*, 3 Ex. 200; *Duke of Brunswick v. Harmer*, 3 C. & K. 10. The declarations of spectators whilst viewing a libellous picture publicly exhibited, were admitted by Lord Ellenborough as evidence that the picture was intended to represent the parties libelled; *Du Bost v. Beresford*, 2 Camp. 512.

The Court as well as the jury may notice the meaning of expressions which have passed into common use, however figuratively; and allusions to historical names and events, as a "frozen snake," will be taken to imply an imputation of treachery and ingratitude; and to act like "Judas" requires no explanation; *Hoare v. Silverlock*, 12 Q. B. 624, 633. In *Barnett v. Allen*, 3 H. & N. 376, 27 L. J. (Ex.) 412, the Court were divided in opinion as to whether the word "black-

leg" was actionable *per se*, and whether it could be explained by evidence.

By section 61 of the Common Law Procedure Act, 1852, it is provided that "where the words set forth, with or without the alleged meaning, show a cause of action, it shall be sufficient." In such cases an innuendo is necessary, and if misconceived by the pleader will not hurt, as the statute does not affect the common law in this respect; *Bremridge v. Latimer*, 12 *Weekl. Rep.* 878. An imputation upon no named person but on a class of persons (as owners of factories, &c.) may be applied by innuendo to a particular person, and it is for the jury to say whether the plaintiff was the person intended; *Le Fanu v. Malcomson*, 1 *H. L. Cas.* 637; *Turner v. Meryweather*, 7 *C. B.* 251.

It was formerly held that the whole of an innuendo, which is not on the face of the declaration a bad one, must be proved where it gives a specific character to the libel or slander; *Williams v. Stott*, 1 *C. & M.* 687; *Harvey v. French*, 1 *C. & M.* 11; *Roberts v. Camden*, 9 *East*, 93. Thus where the words imputed either a fraud or a felony, but by the innuendo were confined to the latter, Lord Ellenborough ruled that the plaintiff must prove that they were spoken in the latter sense; *Smith v. Carey*, 3 *Camp.* 461. See also *May v. Brown*, 3 *B. & C.* 128; *Sellers v. Till*, 4 *B. & C.* 655. But the power of amendment is sufficient to relieve the plaintiff from the restraint of his innuendo where the ends of justice require it. Where there are several innuendoes, some of which are proved and are sufficient to maintain the action, the plaintiff may confine his verdict to those which are proved; *Prudhomme v. Fraser*, 2 *Ad. & E.* 645.

Proof of malice.] Where the publication is defamatory the law infers malice, unless the circumstances attending the publication rebut that inference; *per Le Blanc, J., R. v. Creevey*, 1 *M. & S.* 282. Subject therefore to the exceptions, the nature of which will be immediately described, no evidence of malice beyond the defamation itself need be given. But in certain cases, such as where the statement is made in giving the character of a servant, or confidential advice, or in the course of judicial or official proceedings, or by way of answer to pertinent questions from interested persons, malice *in fact* must be proved; *Harrison v. Bush*, 5 *E. & B.* 344; *Taylor v. Hawkins*, 16 *Q. B.* 308; *Bromage v. Prosser*, 4 *B. & C.* 256.

In *Jackson v. Hopperton*, 16 *C. B., N. S.* 829, the defendant, when applied to respecting the character of the plaintiff, who had been his saleswoman, charged her with dishonesty. The plaintiff declared that after quitting the defendant's service he accused her of theft, but said that if she would return nothing should be said about it; and that afterwards, when she asked if he would give her a character, he refused unless she would admit that she had stolen his money. It was held, that there was evidence of express malice for the jury. In proving such express malice evidence that the character given was false, is admissible; *Rogers v. Clifton*, 3 *B. & P.* 587; *King v. Waring*, 5 *Esp.* 13; *Pattison v. Jones*, 8 *B. & C.* 578; *Harrison v. Bush*, 5 *El. & Bl.* 344; or, that part of the imputation is false; *Blagg v. Sturt*, 10 *Q. B.* 899. Mere untruth, however, is not evidence of malice, unless coupled with proof that the defendant knew that what he published was untrue; *Fountain v. Boodle*, 3 *Q. B.* 5. Thus where the words charged a governess with bad temper and ill manners, the plaintiff was allowed to give a general

proof of good manners and temper, and the fact that no contrary evidence was given by the defendant was held worthy of consideration by the jury, as tending to show that the defendant did not believe in the truth of the charge; *Ib.* But on a charge of want of skill in particular work done by the defendant for the plaintiff, the plaintiff cannot prove his general skill and competency in order to show malice; *Brine v. Bazalgette*, 3 *Ex.* 692. Where the defendant had pleaded only the general issue, but the plaintiff proposed nevertheless to give proof of the falsehood of the charge, Lord Ellenborough said that if he did so it would allow the defendant to give evidence of its truth; *Brown v. Croome*, 2 *Stark.* 297. Express malice need not always be proved by extrinsic evidence, but may be collected from the libel itself by the jury; *Wright v. Woodgate*, 2 *C. M. & R.* 573. A plea of justification, abandoned at the trial, is not available as evidence of express malice so as to negative the defence of a privileged communication under the general issue; *Wilson v. Robinson*, 7 *Q. B.* 68. But where such a plea is neither proved nor abandoned, nor its substance retracted at the trial, though plaintiff offers to accept nominal damages if retracted, this is legitimate evidence of malice; *Simpson v. Robinson*, 12 *Q. B.* 511. So the plaintiff may show that he and the defendant were on ill terms, as that he had had occasion to impute fraud to the defendant before the words were spoken; and he may prove this by evidence of an examination of the plaintiff in the defendant's presence in the Insolvent Debtors' Court, since the words spoken, on which occasion the defendant, though called upon, did not contradict the statement; *Ib.* See *Melen v. Andrews*, *Mood. & M.* 336, *ante*, p. 59. See *post*, pp. 518 to 524, as to privileged communications. A corporation (as a railway company) may be guilty of a libel, and it is said even of express malice, and that an action will lie against it, or against the guilty individuals composing it; *Whitfield v. South Eastern Railway Company*, 1 *E., B. & E.* 115. So an incorporated trading company may sue one of its members for a libel; *Metropolitan Omnibus Company v. Hawkins*, 4 *II. & N.* 87; 28 *L. J. (Ex.)* 201.

[*Evidence of other words or libels.*] In an action for libel or slander evidence of other libels or words is sometimes given to show the malevolence of the defendant. Thus it may be proved that the defendant spoke the same words at different times: *Charlter v. Barret*, *Peake Ca.* 22; *Camfield v. Bird*, 3 *C. & K.* 56. Publications going back more than six years before the libel complained of were allowed to be given in evidence; *Barrett v. Long*, 3 *II. L. Cas.* 395. So words spoken after those for which the action is brought, whether actionable or not, are admissible to show *quo animo* the words which were the subject of the action were spoken; *Rustell v. Macquister*, 1 *Camp.* 48 (n); *Tate v. Humphrey*, 2 *Camp.* 73 (n); *Lee v. Huxon*, *Peake Ca.* 167. And evidence of previous slander may be given for this purpose, though damages have already been recovered in respect of it; *Symmons v. Blake*, 1 *Mood. & Rob.* 477. So, in an action against the editor of a periodical work, articles published from time to time, alluding to the action and attacking the plaintiff, are admissible to show *quo animo* the libel was published, and that it was published concerning the plaintiff; *Chubb v. Westley*, 6 *C. & P.* 436. See *Mead v. Daubigny*, *Peake Ca.* 125. Evidence of subsequent words of the same import with the alleged slander has

been refused, when the words declared on were sufficient to show the intention of the defendant; *Pearce v. Ornsby*, 1 *Mood. & Rob.* 455; *Stuart v. Lovell*, 2 *Stark.* 93; *Defries v. Davis*, 7 *C. & P.* 112. In an action for a libel published in a weekly paper, evidence was admitted that other papers of the same title had been since purchased at the defendant's shop, to show that the papers, which purported to be weekly publications of public transactions, were sold deliberately in the regular course of public circulation, but Lord Ellenborough added that he should direct the jury not to take it into consideration in damages; *Plunkett v. Cobbett*, 5 *Esp.* 136; *Barwell v. Adkins*, 1 *M. & G.* 807. And the rule appears now to be, that where there is no pretence of privilege nor ambiguity in the libel, evidence is admissible on either side to prove or disprove actual malice, and for that purpose, repetitions of the same imputation, either before or since the libel complained of, may be shown, and if they establish another cause of action, the jury should be cautioned not to give damages in respect of it; *Pearson v. Le Maitre*, 5 *M. & G.* 700. This caution is one which a jury might find it difficult to act upon. It seems that it is not always necessary for the judge to give this caution; *Darby v. Ouseley*, 1 *H. & N.* 1; 25 *L. J. (Ex.)* 227. Evidence of other libels is not generally admissible, unless they relate to the libel set out in the declaration; *Finnerty v. Tipper*, 2 *Camp.* 72.

Where other words besides those inserted in the declaration are thus given in evidence, the defendant may prove such words to be true, because he has had no opportunity of justifying them; *Warne v. Chadwell*, 2 *Stark.* 457. But not where the words amount to a mere repetition of the slander in the declaration; *per Park, J.*, in *Higgs v. Snell*, *Exeter Sp. As.*, 1827.

Evidence of plaintiff's good character.] The plaintiff will not be allowed to go into general evidence of his good character, either where the general issue alone is pleaded, or where there are pleas of justification on the record; *Stuart v. Lovell*, 2 *Stark.* 93; *Cornwall v. Richardson*, *Ry. & Mood.* 305. Or at least unless the issue involves the question of general character. See *ante*, p. 74.

Proof of damage.] Where the words are actionable in themselves, or with reference to the plaintiff's trade, it is not necessary to give any evidence of damage; *Tripp v. Thomas*, 3 *B. & C.* 427; *Ingram v. Lawson*, 6 *N. C.* 212. The plaintiff will not be allowed, under a general allegation of damage, to give in evidence particular instances; *B. N. P.* 7, 1 *Saund.* 243 *d. (n.)*. Generally, the names of persons, who have ceased to deal with the plaintiff in consequence of the libel, must be mentioned in the count. But where the names of such persons are not within the plaintiff's knowledge the allegation may be general; thus, where the declaration, in an action for slander imputing incontinence to the plaintiff, stated that he was a preacher to a dissenting congregation in a certain chapel, and derived considerable profit from his preaching, and that by reason of the slander, "the said persons frequenting his chapel" had refused to permit him to preach there, and had discontinued his salary, &c., it was held sufficient, without saying who those persons were; *Hartley v. Herring*, 8 *T. R.* 130. But there must be some evidence that the diminished attendance was owing to the slander, and that the plaintiff suffered by it; *Hopwood v. Thorne*, 8 *C. B.* 293. In an action for slander, for words spoken of the plaintiff, in his trade

or in his business, with a general allegation of loss of business, it is competent to the plaintiff to prove, and the jury to assess damages for a general loss or decrease of trade, without showing who are the particular customers he has lost; *Evans v. Harries*, 1 H. & N. 251.

Where the declaration stated, that in consequence of the libel, the plaintiff lost the profits of certain performances at the theatre, it was held that a witness might be asked, "whether the receipts of the house had not diminished," but not "whether particular persons had not in consequence given up their boxes;" *Ashley v. Harrison*, 1 Esp. 48. The persons specified in the declaration as having left off dealing, &c., are the proper witnesses to prove the fact; 1 Saund. 243, d. (n.); and it cannot be proved from their declarations; *Tilk v. Parsons*, 2 C. & P. 201; and see 1 Esp. 50. An allegation that by reason of the speaking of slanderous words by the defendant one D. refused to trust the plaintiff, is not proved by evidence that the defendant spoke the words to E., who voluntarily, and without the privity of the defendant, repeated them to D.; *Ward v. Weeks*, 7 Bing. 211; *Tunncliffe v. Moss*, 3 C. & K. 83. *Parkins v. Scott*, 1 H. & C. 153; 31 L. J. (Ex.) 331, was an action brought by husband and wife. The slander proved imputed adultery to the female plaintiff. The husband declared that he left his wife in consequence of the charge after she had informed him of it. It was held that the action was not maintainable, as there was no obligation upon the wife to repeat what she had heard. *Lynch v. Knight*, 9 H. L. Cas. 577, is to the same effect. The special damage must be the legal and natural consequence of the words spoken, and not the mere wrongful act of a third person; *Vickers v. Wilcocks*, 8 East, 1; *Ward v. Weeks*, 7 Bing. 215; *Haddan v. Lott*, 15 C. B. 411. But this has been doubted; *Green v. Button*, 2 C. M. & R. 713, 715. And seems at variance with *Newman v. Zachary*, *Aleyn*, 3, where it was held that if a stranger wrongfully disturbs the plaintiff's possession in consequence of the defendant's slander, an action lies against the defendant, though the stranger may also be sued. And see *Lumley v. Gye*, 2 E. & B. 216, 239. Where, in consequence of defamatory words spoken by the defendant, the person to whom they were spoken turns the plaintiff out of his service, the defendant is liable, though the words were not believed to be true by the person to whom they were spoken; *Knight v. Gibbs*, 1 Ad. & E. 43.

The damage must not be too remote. Thus where the defendant libelled a public performer, in consequence of which she refused to sing, and the party who had engaged her to sing brought an action, Lord Kenyon was of opinion that the injury was too remote; *Ashley v. Harrison*, 1 Esp. 48. The loss of the substantial benefit arising from the hospitality of friends is sufficient special damage; *Moore v. Meagher*, 1 Taunt. 39. In *Roberts v. Roberts*, 33 L. J. (Q. B.) 249, words charging a woman with adultery, whereby she was not allowed to continue member of a society of dissenters, or to become a member of similar societies in the same sect, were held not to be actionable, as the damage was not of a substantial or pecuniary nature. This decision was, however, reversed by the Court of Exchequer Chamber. Words are not actionable, though special damage has ensued, unless they are defamatory or injurious in their nature; *Kelly v. Partington*, 5 B. & Ad. 645. Where several statements are inserted in the declaration as distinct parts of the same discourse, it will be taken as one count, and a general verdict and damages may be taken, though some of the statements are not actionable. But if the words are in

different counts, or (*ut semble*) are alleged as distinct conversations in the same count, damages should be assessed only on the actionable counts, or for the actionable words only; *Griffiths v. Lewis*, 8 Q. B. 841.

Defence.

By the rules H. T., 1853, in actions for torts, the plea of "Not guilty" shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment. In an action for slander of the plaintiff in his office, profession or trade, the plea of "Not guilty" will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. See s. 61, of the Common Law Procedure Act of 1852, *ante*, p. 508, as to proving under a denial of the libel or slander that the words were not used in a defamatory sense.

In an action for libel, "Not guilty" puts in issue the publication of the libel maliciously, and in the sense imputed in the innuendo; *Brunswick, Duke of, v. Pepper*, 2 C. & K. 683. Under such a plea a defence, that the words alleged to be used were a privileged communication, may be given in evidence; *Lillie v. Price*, 5 Ad. & E. 645; *Lucan v. Smith*, 1 H. & N. 481. But all the inducement properly introduced as such (*McGregor v. Gregory*, 11 M. & W. 287; *Pearson v. Le Maitre*, 5 M. & G. 700) is admitted, unless specially traversed; *Fradley v. Fradley*, 8 C. & P. 572. And this is so in an action for slander; *Heming v. Power*, 10 M. & W. 564. Special damage, whether necessary for the maintenance of the action or not, is put in issue by the plea of Not guilty; *Wilby v. Elston*, 8 C. B. 142; 18 L. J. (C. P.) 320.

The defendant, in an action for a libel, is entitled on the plea of "Not guilty" to have the whole publication read from which the libellous passages are extracted; *Cooke v. Hughes, Ry. & Mood*. 112; *Mullett v. Hulton*, 4 Esp. 249.

Evidence to disprove the malice. Privileged statement.] The defence of a privileged communication, as stated *suprà*, may be given in evidence under the general issue.

A communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminary matter, which, without this privilege, would be slanderous and actionable; *Harrison v. Bush*, 5 E. & B. 344; 25 L. J. (Q. B.) 25. In this case, a memorial addressed to the Secretary of State, was held to be privileged. See *Somerville v. Hawkins*, 10 C. B. 583.

When the defendant insists that the publication is privileged, it is for the judge to say whether the occasion creates the privilege. If the occasion creates such privilege, but there is evidence of express malice, either from extrinsic circumstances or from the language of the libel itself, the question of express malice should be left to the jury; *Cooke v. Wildes*, 5 E. & B. 328; 24 L. J. (Q. B.) 367; *Gilpin v. Fowler*, 9 Ex. 615; *Wright v. Woodgate*, 2 C. M. & R. 573.

The following are instances of privileged statements, where the *primâ facie* inference of malice is rebutted :—

Where the words are spoken by a member of Parliament in his place; *R. v. Creevey*, 1 *M. & S.* 273; *Davison v. Duncan*, 7 *E. & B.* 229; 26 *L. J. (Q. B.)* 104; where Campbell, C. J., says, "I quite concur in the doctrine, that a member of Parliament, who publishes an amended version of his speech, is liable for that, although he might have spoken the same words in his place with impunity; but if a member were to repeat *bonâ fide* to his constituents what he said in the House for the purpose of explaining his conduct to them, I think he would be protected."

There is a privilege where the words are spoken in the course of a legal proceeding, either by the party; *Ram v. Lamley*, *Hutt.* 113; *Weston v. Dobinet*, *Cro. Jac.* 432; *Astley v. Younge*, 2 *Burr.* 807; *Johnson v. Evans*, 3 *Esp.* 32; by a witness; *Brode's case*, cited *Palmer*, 144; *Harding v. Bulman*, 1 *Brownl.* 2; by counsel; *Brook v. Montague*, *Cro. Jac.* 90; *Hodgson v. Scarlett*, 1 *B. & A.* 232; or by a judge; *Jekyll v. Sir J. Moore*, 2 *New R.* 341; or, it would seem, for words addressed by a coroner in the course of his duty to a jury impaneled before him; *Thomas v. Chirton*, 2 *B. & S.* 475; 31 *L. J. (Q. B.)* 139. And it seems that no action will lie for words used in an affidavit in the course of a legal proceeding; *Revis v. Smith*, 18 *C. B.* 126; 25 *L. J. (C. P.)* 195.

So words spoken *bonâ fide*, for the purpose of obtaining redress, or of forwarding the ends of justice, though not spoken in the course of a legal proceeding, are privileged; *Lake v. King*, 1 *Saund.* 131; *R. v. Baillie*, *Bac. Ab. Libel*, A. 2; *R. v. Baillie*, 21 *How. St. Tr.* 10; *Fairman v. Ives*, 5 *B. & A.* 642. Where the libel complained of is a representation made *bonâ fide* to a public officer (as the Postmaster-General) by the defendant, respecting the conduct of a person under him, it is not actionable, and this defence may be given in evidence under the general issue; *Blake v. Pilford*, 1 *Mood. & Rob.* 198; *Woodward v. Lander*, 6 *C. & P.* 548. In *Beatson v. Skene*, 5 *H. & N.* 838; 29 *L. J. (Ex.)* 430, the defendant was the civil commissioner, attending a corps of cavalry, formerly commanded by the plaintiff. The officer succeeding the plaintiff was directed to inquire into and report upon the condition of the corps, and he was expressly referred to the defendant for information. He made inquiries, and then wrote a letter containing the libel, part of which was supplied by the defendant. It was held that the communication by the defendant was privileged. Where the defendant attacked the character of a Roman Catholic priest, by attributing to him improper conduct as a priest, it was held to be no excuse that the libel was published at a meeting to petition Parliament against Roman Catholics; *Hearne v. Stowell*, 12 *Ad. & E.* 719. A memorial addressed to the Secretary of State for the removal of the plaintiff from the commission of the peace, was held to be privileged; *Harrison v. Bush*, 5 *E. & B.* 344; 25 *L. J. (Q. B.)* 25.

Where the words are spoken in confidence, by way of advice or otherwise, they are privileged. Thus where a party is applied to for the character of a servant, and in giving it makes use of defamatory words, they are not actionable; *Edmondson v. Stephenson*, *B. N. P.* 8; *Weatherston v. Hawkins*, 1 *T. R.* 110. But if the supposed libel be not communicated *bonâ fide*, it does not fall within the protection of privileged communications. *Per Bayley, J., Pattison v. Jones*, 8 *B. & C.* 584; *Kelly v. Partington*, 5 *B. & Ad.* 645. Whether the

master made the communication voluntarily or not, is a circumstance which the jury are to consider in forming an opinion on the *bona fides*. "I do not mean to intimate," says Lord Alvanley, in *Rogers v. Clifton*, 3 B. & P. 592, "that if a servant were strongly suspected of having committed a felony while in his master's service, the master is not at liberty to warn others from taking him into their service; for it is the duty of every person to guard the public against admitting such servants into their houses." "A master may," says Bayley, *J. Pattison v. Jones*, 8 B. & C. 578, "when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion, and do some act to induce that other to seek information from and to put questions to him. The answers to such questions being *bona fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury whether the defendant has acted *bona fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury." See also *Child v. Affleck*, 9 B. & C. 403. When a person, after he has given a good character, discovers something to the prejudice of the servant, unknown to him at the time he gave the character, he may and ought to disclose it to the party who engaged the servant on the faith of the character so given, and he may make the communication voluntarily, and the whole is privileged; *Gardner v. Slade*, 13 Q. B., 796; 18 L. J. (Q. B.) 334. The defendant having given notice of dismissal to his footman and cook, they separately went to him and asked him his reason for discharging them, when he told each (in the absence of the other) that he or she was discharged because both had been robbing him. It was held a privileged communication; *Munby v. Witt*, 18 C. B. 544; 25 L. J. (C. P.) 294. If a person about to dismiss his servant for dishonesty, calls in a friend to hear what passes, the presence of such third person does not take away the privilege from words which the master then uses imputing the dishonesty; *Taylor v. Hawkins*, 16 Q. B. 308. The mate of a ship sent a private letter to the defendant, imputing gross misconduct and unfitness to the plaintiff, the captain of it, which defendant showed to the shipowner, who thereupon dismissed the plaintiff. The judges of the Common Pleas were divided as to whether this communication by the defendant to the owner was privileged. In this case the defendant was a stranger to the owner, and not interested in the matter, and he showed it to the owner by the advice of some friends, and appears to have acted in the belief that the owner ought to be informed of the misconduct; *Cozhead v. Richards*, 2 C. B. 569.

Defamatory words spoken by way of confidential advice to persons who ask it, or have a right to expect it, are privileged. Thus in an action for saying of a tradesman, "He will be a bankrupt soon," it appeared that the words were not spoken maliciously, but in confidence and friendship, and by way of warning; *Pratt, C. J.*, directed the jury to find the defendant not guilty; *Hewer v. Dowson*, B. N. P. 8; *M'Dougal v. Claridge*, 1 Camp. 267; *Dunman v. Bigg*, *id.* 269 (n). The defendant, the tenant of a farm, required some repairs to be done at the farm-house, and B., the agent of the landlord, directed the plaintiff to do them. The plaintiff did them, but in a negligent manner, and while they were proceeding got drunk; and circumstances occurred which induced the defendant to believe

that the plaintiff had broken open his cellar-door and got drunk and spoiled the work; and the defendant afterwards repeated to D., in the absence of the plaintiff, that the plaintiff had broken open the door. On the same day he made the same complaint to B. It was held that the complaint to B. was a privileged communication, if made *bonâ fide* and without any malicious intention. It was held also that the statement made to the plaintiff, in the presence of D., a stranger, was also privileged, if done honestly and *bonâ fide*, that the circumstance of its being made in the presence of a third person did not of itself make it unauthorised; and that it was a question for the jury to determine, from the circumstances, whether the defendant acted *bonâ fide* or was influenced by malicious motives. But it was held that the statement to D., in the absence of the plaintiff, was unauthorised and officious, and therefore not protected, though made in the belief of its truth, if it was false in fact; *Toogood v. Spyring*, 1 C. M. & R. 181; see also *Brooks v. Blanshard*, 1 C. & M. 779; *Bennett v. Deacon*, 2 C. B. 628. A charge of theft made against the plaintiff in the presence of a stranger is privileged, if the defendant believed it to be true and acted *bonâ fide*, and did not make it before more persons or in stronger language than necessary; and it is for the jury, not for the judge, to say whether the facts bring the case within the privilege; *Padmore v. Lawrence*, 11 Ad. & E. 380. In *Amann v. Damm*, 8 C. B., N. S., 597; 29 L. J. (C. P.) 313, the plaintiff was a clerk of H. and M., with whom the defendant had dealings. The plaintiff called at the defendant's shop, and having asked for two boxes which had been promised him, was desired to fetch them from an inner room. A box of some value was missed from this room, upon which the defendant went to the plaintiff's employers and said, in the presence of a witness, "There was no one else in the room, and he (the plaintiff) must have taken it." It was held that the communication was privileged, as the defendant was entitled to prevent the plaintiff from coming to his premises again. Where a person, having originated false reports prejudicial to a tradesman, was afterwards called on by the employers of the latter to examine the matters complained of, and then repeated to them the false statement, it was held that this communication was not privileged; *Smith v. Matthews*, 1 Mood. & Rob. 151; *Griffiths v. Lewis*, 7 Q. B. 61. But where a creditor of the plaintiff, believing that the plaintiff had committed an act of bankruptcy, and having reason to believe it, gave notice to a person whom the plaintiff had commissioned to sell his goods by auction, not to pay over the proceeds to him, "he having committed an act of bankruptcy," it was held that the communication was privileged; *Blackburn v. Pugh*, 2 C. B. 611. The plaintiff and defendant were jointly interested in property of which C. was manager, the defendant wrote to C. a letter principally about the property and the conduct of the plaintiff with regard thereto, but containing also a distinct charge against the plaintiff with reference to his conduct to his mother and aunt: it was held that though the part of the letter respecting the plaintiff's conduct as to the property was confidential and privileged, such privilege could not extend to the part relating to his mother and aunt; *Warren v. Warren*, 1 C. M. & R. 250. In *Fryer v. Kinnersley*, 15 C. B., N. S., 422; 33 L. J. (C. P.) 96, the plaintiff had been employed as a gardener under E., the superintendent of the Royal Horticultural Gardens, of which society the defendant was a member. The defendant applied to E. to recommend him a gardener, and E., who was in the habit of

recommending gardeners to members, sent the plaintiff to the defendant, by whom he was engaged. The defendant afterwards dismissed the plaintiff, and wrote a letter to E., saying, "On Saturday I had another scene with F. (the plaintiff) in my garden. He was extremely violent; came towards me several times with an open clasp knife in his hand, and eyes starting from the sockets with rage, a perfect raving madman. I was, fortunately, accompanied by my upper servant." The Court thought that although the letter might have been privileged if confined to a simple statement of the plaintiff's conduct as a servant, yet that there were expressions in it not justified by the occasion. Where the plaintiff brought an action against the defendant for saying he had heard that the plaintiff was hanged for stealing a horse, but it appeared upon the evidence that the words were spoken in grief and sorrow for the news, the plaintiff was nonsuited, there being no proof of malice; *Anon. coram Hobart, J.*, cited 1 *Lev.* 82. But it seems to be no defence that the words were spoken carelessly or in jest; *Hawk. P. C.*, B. 1, c. 28, s. 14, 8th ed. The defendant claimed rent of the plaintiff, the plaintiff denied his liability, whereupon the defendant wrote to the plaintiff's agent (who was in correspondence on the subject) a letter in which he insisted on his claim, and further charged the plaintiff with "a mean and dishonest attempt to defraud." It was held, that such an imputation, being wholly unnecessary, was not privileged; *Tuson v. Evans*, 12 *Ad. & E.* 733; see *Cooke v. Wildes*, 5 *E. & B.* 328. Words spoken *bonâ fide*, by way of moral advice, are privileged, as if a man writes to a father, advising him to have better regard to his children, and using scandalous words, it is only reformatory, and shall not be intended to be a libel; *Peacock v. Raynell*, 2 *Brownl.* 151. But if in such case the publication should be in a newspaper, though the pretence should be reformation, it would be libellous; *R. v. Knight*, *Bac. Ab. Libel*, A. 2.

In *Whiteley v. Adams*, 15 *C. B.*, *N. S.*; 392; 33 *L. J. (C. P.)* 89, the plaintiff was a well-known and esteemed member of the congregation of St. Barnabas, and a friend of C., one of the assistant curates of that church. The defendant, the incumbent of a country parish, and himself a member of the same congregation, was requested by C. to act as arbitrator between one of his parishioners and the plaintiff. This office he refused in a letter to C., which was one of the libels in question. The other was contained in a letter to a lady, also a member of the congregation, which was written in answer to a letter from her, in which she sought to clear the plaintiff from the charges brought against him. Both communications were held to be privileged.

Where defamatory words are spoken or written *bonâ fide* with the view of investigating a fact in which the party is interested, they are privileged. Thus where the defendant inserted an advertisement in a newspaper to ascertain whether, previously to a certain time, the plaintiff had been married, intending, as the innuendo stated, to insinuate that the plaintiff had been guilty of bigamy, but it appeared that the advertisement was inserted by the authority of the plaintiff's wife, from anxiety to know whether she was legally the wife of the plaintiff, it was justifiable; *Delany v. Jones*, 4 *Esp.* 191; *Finden v. Westlake*, *Mood. & M.* 462; *Hopwood v. Thorn*, 8 *C. B.* 293. So where the libel was an advertisement for the discovery of the plaintiff, an absconded debtor, and published at the request of a party who had sued out a *capias* for the purpose of enabling the

sheriff to take him; *Lay v. Lawson*, 4 *Ad. & E.* 795. But if the publication of the libel is more extensive than necessary for the purpose of obtaining information it may become actionable; *Brown v. Croome*, 8 *Stark.* 297.

The publication (though not a verbatim report) of the proceedings of a court of justice, containing defamatory matter, is privileged, if substantially fair and correct; *Curry v. Walter*, 1 *B. & P.* 525; *Duncan v. Thwaites*, 3 *B. & C.* 583; *Delegat v. Highley*, 3 *N. C.* 950; *Hoare v. Silverlock*, 9 *C. B.* 20. A correct and impartial report of the proceedings before magistrates duly acting within their jurisdiction is privileged in cases where, after both parties are heard, a final judgment is given pursuant to the 11 & 12 Vict. c. 43. So also where preliminary inquiries are held before magistrates respecting indictable offences, pursuant to 11 & 12 Vict. c. 42, if the inquiry is carried on publicly. If the inquiry is carried on privately a report of the proceedings would be unlawful; *Lewis v. Levy*, *E. B. & E.* 557; 27 *L. J. (Q. B.)* 282. There are cases where the unauthorised publication of criminal or ex parte proceedings, containing defamatory matter, has been held actionable; as a publication of depositions before a justice or a charge of murder; *R. v. Lee*, 5 *Esp.* 123; *R. v. Fisher*, 2 *Camp.* 563; *Duncan v. Thwaites*, 3 *B. & C.* 583; or of proceedings on a coroner's inquisition; *R. v. Fleet*, 1 *B. & A.* 379; or before a commissioner appointed by the crown for inquiry into certain public bodies; *Charlton v. Watton*, 6 *C. & P.* 385. In *Popham v. Pickburn*, 7 *H. & N.* 891, 31 *L. J. (Ex.)* 133, the defendant was the proprietor of a newspaper in which was published an account of what passed at a meeting of the parish vestry. At this meeting a report of the medical officer of the district board was read, containing the libel. This report would, according to the provisions of the Metropolis Local Management Act, have been circulated by the vestry a few months later. It was held that the reports of what took place at the meeting of such a body as this vestry were not privileged, and that the publication of the report authorised by the statute did not authorise a premature circulation of it by the defendant. To an action for a libel in a newspaper, it is no defence that the alleged libel consists of a true and accurate report of the proceedings at a public meeting, held under a local act for the improvement of a town; *Davison v. Duncan*, 7 *E. & B.* 229; 26 *L. J. (Q. B.)* 104.

Though it has been considered that the defendant cannot show in justification that the libel is a correct report of a preliminary or ex parte proceeding, yet he may, under the general issue, give in evidence the correctness of the report, in mitigation of damages; *East v. Chapman*, *Mood. & M.* 46; *Charlton v. Walton*, 6 *C. & P.* 385. So, under the general issue, he may contend that the writing is not injurious; as where the editor of a newspaper reported a former trial for libel, in which the plaintiff recovered a verdict, although the report contained some injurious allegations, yet the judge left it to the jury to say whether, taken altogether, the report was injurious, and the Court held that it was rightly so left; *Chalmers v. Payne*, 2 *C., M. & B.* 156.

The defendant may show, under the general issue, that the libel is a fair criticism on a literary work of the plaintiff; but if it contains observations unconnected with the work, and personally slanderous, it is actionable; *Carr v. Hood*, 1 *Camp.* 355 (n.); *Soune v. Knight*, *Mood. & M.* 74; *Thompson v. Shackell*, *Mood. & M.* 187;

Fraser v. Berkeley, 7 C. & P. 621. A publication is not a libel which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality. *Per Lord Ellenborough, C. J., Tabart v. Tipper*, 1 Camp. 352.

In *Campbell v. Spottiswoode*, 3 B. & S. 769; 33 L. J. (Q. B.) 185, the extent to which public acts or writings are open to criticism was much discussed. The plaintiff, the minister of a dissenting congregation, had established a newspaper in which a scheme was suggested for the conversion of the Chinese to Christianity. This scheme was ridiculed in an article contained in the defendant's periodical; and it was suggested to be a mere device for procuring a sale of the plaintiff's paper. The article also hinted that persons alleged by the defendant to be subscribers to his paper had no real existence. The jury found that the writer of the article *bonâ fide* believed that what it stated was true. It was held, however, by the Court of Queen's Bench, that the writing went beyond the range of fair criticism by imputing base and sordid motives to the plaintiff, and that he was entitled to a verdict.

Handbills or placards are subject to the same freedom of criticism, oral or in writing, as books; *Paris v. Levy*, 9 C. B., N. S., 342; 30 L. J. (C. P.) 77. So the editor of a newspaper may comment on any place of public entertainment, if the comment is made fairly, and without malice, or view to injure or prejudice the proprietor in the eyes of the public. *Per Lord Kenyon, Dibdin v. Swan*, 1 Esp. 28. And see *Gregory v. Duke of Brunswick*, 1 C. & Kir. 24, as to criticisms on actors. And it is not libellous fairly to comment upon a petition relating to matters of general interest, which has been presented to Parliament and published; *Dunne v. Anderson, Ry. & Mood*. 287; 3 Bing. 88. But comments on the conduct of a clergyman in the management of a private charity which he dispenses, are not privileged, but must, if at all, be specially justified by showing their truth; at least where the comments are published by a mere stranger, and in a newspaper; *Gathercole v. Miall*, 15 M. & W. 319. And it is questionable whether sermons preached in a church, but not published, are the lawful subjects of such public comments; *Ib.*

Publication of Parliamentary papers.] The Court of Queen's Bench decided, in *Stockdale v. Hansard*, 9 Ad. & E. 1, that the publication of a defamatory libel on a private person could not be justified by merely showing that it was part of the printed proceedings of the House of Commons, published by order of the House. But by 3 & 4 Vict. c. 9, all proceedings taken against persons acting under the authority of either House, for the publication of reports, papers, votes, or proceedings of either House, shall be stayed upon the certificate of the Lord Chancellor, Speaker, Clerk of the Parliament, or Clerk of the House of Commons. And, by sect. 2, in case of any civil proceeding for publishing a copy of such report, paper, &c., the defendant may, at any stage of the proceedings, lay before the Court the report, paper, &c., and the copy; and upon verifying the report, &c., and the correctness of the copy by affidavit, the proceedings shall be stayed. By sect. 3, in any proceeding commenced for printing an extract or abstract of such report, &c., the defendant may, under the general issue, give in evidence the report, &c., and show that the extract or abstract was published *bonâ fide*,

or without malice; and if such be the opinion of the jury, a verdict of Not guilty shall be entered.

Evidence of the truth of the libel, or words.] Where the defendant admits the publishing or speaking of the libel or words, as stated, and justifies so doing because they are true, he must plead this matter specially, and he will not be permitted to give it in evidence under the general issue; *Smith v. Richardson*, *Willes*, 20, 1 *Saund.* 130 (n). See *R. v. Newman*, 1 *E. & B.* 558, 577. Such evidence is inadmissible under the general issue, either in bar of the action or in mitigation of damages; *Underwood v. Parks*, 2 *Str.* 1200; *Rumsey v. Webb*, *Car. & M.* 104. But it is otherwise in the case of slander of title; *Watson v. Reynolds*, *post*, p. 527. There would seem, however, to be no objection to allowing the defendant to show, in mitigation of damages, facts which show that the libel was not utterly without foundation, although it cannot to its full extent be justified. Evidence admissible and pertinent under the general issue, cannot be excluded merely because it happens incidentally to prove the truth of the libel; *Munning v. Clement*, 7 *Bing.* 362. In support of a plea alleging the truth of the libel, the defendant cannot prove that the same charges were previously published in another publication, and that the plaintiff took no steps in consequence thereof; *R. v. Newman*, 1 *E. & B.* 268. When the libel imputes to the plaintiff the commission of a murder under aggravating circumstances, it is necessary to justify the aggravating portion as well as the substantial charge of crime; *Helsham v. Blackwood*, 11 *C. B.* 111, 20 *L. J. (C. P.)* 187.

Evidence that the words were first spoken by another.] This is a defence only when it amounts to a privileged statement; otherwise, it is admissible, if at all, only where the defendant at the time of speaking the words gave the name of the person from whom he heard the slander, when it may perhaps be used in mitigation of damages. See *Bennett v. Bennett*, 6 *C. & P.* 588; and *Speck v. Phillips*, 5 *M. & W.* 279; *Tidman v. Ainslie*, 10 *Ex.* 63.

Accord and satisfaction.] Accord and satisfaction is a good defence to this action, if pleaded; *Lane v. Applegate*, 1 *Stark.* 97. In *Boosey v. Wood*, 34 *L. J. (Ex.)* 65, a defence that, after the commencement of the suit the plaintiff and the defendant agreed together to accept mutual apologies, to be published by them in their weekly journal, in satisfaction of the right of action, and that these apologies were published accordingly, was allowed.

Evidence in mitigation of damages.] It was formerly held, that where the defendant pleaded the general issue without a justification, he might prove that the plaintiff had been generally suspected of the offence imputed to him by the defendant; *Earl of Leicester v. Walter*, 2 *Camp.* 251; — *v. Moor*, 1 *M. & S.* 284. But Abbott, C. J., refused to admit proof of rumours in *Waithman v. Weaver*, *D. & R.*, *N. P. C.* 10; 11 *Price*, 257 (n); and it was afterwards decided that general evidence of the plaintiff's bad character was not admissible in an action for a libel; *Jones v. Stephens*, 11 *Price*, 235. Such evidence was, however, admitted by Lord Tenterden, in *Manby v. Barber*, mentioned in 2 *Stark. on Evidence*, p. 470, and by Lord Denman,

C. J., after consulting Parke, B., at York Spring Assizes, 1836, in a case of *Moore v. Ostler*, where the defendant was allowed to give such general evidence, but not to go into particulars; and by the Court of Queen's Bench in *Duncombe v. Daniel*, cited 7 Dowl. P.C. 472. So, in *Richards v. Richards, Bodmin, Sp. Ass. 1844, 2 Mood. & Rob. 557*, where the slander imputed to the plaintiff, that he had been notoriously guilty of an offence, Cresswell, J., after conferring with Wightman, J., admitted proof of rumours, current in the plaintiff's neighbourhood before the uttering of the words, in mitigation under the general issue. It has been held that the defendant cannot ask as to rumours after the slander complained of, as these rumours may have been occasioned by the slander; *Thompson v. Nye*, 16 Q. B. 175; 20 L. J. (Q. B.) 859. In *Bell v. Parke*, 11 Ir. C. L. Rep. 413, in an action by an officer for slander, in charging him with stealing a watch, the statement of an officer of the same regiment that he had heard rumours that the plaintiff had committed the particular offence imputed to him by the slander, was rejected. And it was said by the Court that the cases show that evidence of reputation as to the plaintiff being guilty of some vicious or criminal habit can alone be admitted to disprove malice on the part of the defendant, but that he cannot rely upon rumours charging the plaintiff with some particular offence.

The defendant may show in mitigation of damages that the libel is a correct report of an investigation at a coroner's inquest; *East v. Chapman, Mood. & M. 46*. Where the defendant published an imperfect account of a trial which was libellous, he was allowed in mitigation under the general issue to show that he had copied the statement from another newspaper, but not that it had appeared in other newspapers which he did not appear to have followed; *Saunders v. Mills*, 6 Bing. 213. This last case was said by Lord Denman in *Talbutt v. Clark*, 2 Mood. & Rob. 312, to have been questioned, and his lordship refused to allow the defendant, the editor of a newspaper, to show that the libel had been taken from a letter written and signed by the newspaper correspondent. Accordingly in *Creevy v. Carr*, 7 C. & P. 64, the Court rejected evidence to the effect that the libel had appeared in a newspaper against which the plaintiff had proceeded and recovered damages, but allowed the defendant to show that he had taken his report from that newspaper.

By stat. 6 & 7 Vict. c. 96, s. 1, the defendant may (after notice given at the time of delivering the plea) show, in mitigation, that he made or offered an apology before action brought, or as soon after as he had an opportunity, in case the action was commenced before he had an opportunity. Sect. 2 of the act permits a special plea and payment of money into Court in certain cases of libels in newspapers. See *Chadwick v. Herapath*, 3 C. B. 885; *O'Brien v. Clement*, 15 M. & W. 435. The apology must be not only sufficient in its terms, but also inserted in a part of the paper at least as conspicuous as the libel, and in suitable type. If on issue joined the jury find the apology to be in this respect insufficient, there must be a verdict for the plaintiff; *Lafone v. Smith*, 28 L. J. (Ex.) 33; 3 H. & N. 735. In such a case where the plea is negatived by the jury, damages should be assessed irrespectively of the money paid into Court; *Ib.* 4 H. & N. 168; and *semble*, if such damages are less than 40s., the plaintiff will get no costs without a certificate; *Ib.*

Action for Slander of Title.

This is not strictly an action for defamation, but an action for special damage to the plaintiff by a false and malicious statement affecting his title to property; *Malachy v. Soper*, 3 N. C. 371; *Gutsole v. Mathers*, 1 M. & W. 499. To support it the words must be uttered maliciously, and the damage must have arisen from the words so uttered; *Brook v. Rawl*, 4 Ex. 521. If the defendant, being interested and not a mere stranger, makes the statement, though untrue *bonâ fide* and on reasonable grounds, he is not liable; *Pitt v. Donovan*, 1 M. & S. 639; *Watson v. Reynolds*, Mood. & M. 1. It seems that the allegation of falsehood in the declaration need not always be proved; for the malicious interference of a mere stranger is actionable; *Rowe v. Roach*, 1 M. & S. 304; *Pater v. Baker*, 3 C. B. 831, 868. In *Young v. Macrae*, 3 B. & S. 264; 32 L. J. (Q. B.) 6, the libel compared oil sold by the plaintiff with oil sold by the defendant, and said that the quality of the plaintiff's oil was inferior to that sold by the defendant, and that it gave a feeble light. It was held that the action was not maintainable, as the oil might be good, though inferior to that supplied by the defendant.

Action for Malicious Prosecution.

In an action for malicious prosecution the plaintiff may, by proper pleas, be put to prove—1, the prosecution of the plaintiff; 2, its determination; 3, that the defendant was the prosecutor; 4, his malice and want of probable cause; and 5, the damages sustained. All these facts, except the second, are in issue under the plea of Not guilty.

[*Evidence of prosecution.*] The plea of Not guilty puts the plaintiff to prove the prosecution; *Drummond v. Pigou*, 2 N. C. 114; *Watkins v. Lee*, 5 M. & W. 272. The fact of the prosecution, where instituted in the Superior Courts or Quarter Sessions, is usually proved by the production of the record, or of an examined copy; *B. N. P.* 13; which is admissible in evidence without inquiry into the mode by which the plaintiff became possessed of it; *per* Lord Tenterden, C. J.; *Caddy v. Barlow*, 1 M. & R. 277; *Leggatt v. Tollervay*, 14 East, 302. The act 14 & 15 Vict. c. 99, s. 13, allows proof to be given by a paper certified by the clerk of the court, or other officer having the custody of the records, to be a copy (omitting the formal parts) of the proceedings in question. In an action for malicious prosecution by indicting the plaintiff, it is not sufficient to produce the original bill of indictment (unless it was ignored), a record should be made up and regularly proved; see *ante*, p. 53. It is as well to give some proof of the identity of the plaintiff and the party prosecuted.

The Common Law Procedure Act, 1852, has made a variance in the charge made and that stated in the declaration of comparatively small importance. Where the declaration stated a malicious charge of having feloniously stolen certain articles, and the proof was that the defendant laid an information, in which he deposed that the articles had been stolen, and that he suspected and believed that they had

been stolen by the plaintiff, it was held no variance; *Davis v. Noake*, 6 M. & S. 29. See *Byne v. Moore*, 5 Taunt. 187. An allegation that the defendant maliciously and without probable cause preferred an indictment, is proved, if some of the charges in the indictment were malicious and without probable cause; *Reed v. Taylor*, 4 Taunt. 617.

If the proceeding was by preferring a charge before a magistrate, the magistrate's clerk should be served with a *subpoena duces tecum* to produce the proceedings. When the information was laid by the defendant, his oath and handwriting should be proved, as also the issuing of the warrant to the constable, &c. The warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under it; 2 Stark. Ev. 910, 1st ed.; and see *Freeman v. Arkell*, 2 B. & C. 495. If the action is for maliciously procuring the plaintiff to be arrested upon a warrant on a charge of felony, and it does not appear that any information has been taken, evidence may be given of the warrant without proving any information; *Newsam v. Carr*, 2 Stark. 69. See also *Clarke v. Postan*, 6 C. & P. 423.

Evidence of determination of prosecution.] It must appear that the prosecution is determined; for otherwise *non constat* that the plaintiff may not be convicted, and the prosecution thereby shown to be just; *Arundell v. Tregono*, Yelv. 116; B. N. P. 13. The return of *no bill* by the grand jury, or the verdict of acquittal, will be evidence of this fact. An action lies, though the plaintiff was acquitted on a mere defect in the indictment; *Wicks v. Fentham*, 4 T. R. 247; *Pippet v. Hearn*, 5 B. & A. 634.

The termination of the proceedings is not put in issue by the plea of Not guilty; *Drummond v. Pigou*, 2 N. C. 114; 2 Scott, 228; *Haddrick v. Heslop*, 12 Q. B. 267.

Evidence that the defendant was prosecutor.] The proper evidence to establish this fact is, that the defendant employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it; paid the expenses; procured the attendance of witnesses, or was otherwise active in forwarding the prosecution; 2 Stark. Ev. 678, 3rd ed. Proof of the information of the defendant taken by the magistrate is sufficient for this purpose; 2 Phill. Ev. 161. Or of the recognisance to prosecute entered into by the defendant, though this is by no means conclusive as the recognisances are often hurriedly filled up; *Eagar v. Dyott*, 5 C. & P. 4. The indorsement of the defendant's name on the bill is evidence that he was sworn as witness; but not of his being prosecutor; B. N. P. 14. One of the grand jury before whom the bill was preferred, may be called to prove that the defendant was the prosecutor; *Sykes v. Dunbar*, Selw. N. P. 1004; but this has been questioned; 2 Stark. Slander, 678. Where the proceeding was before a magistrate he may be called to prove it; *Freeman v. Arkell*, 2 B. & C. 494. Where the defendant's son, a youth of about seventeen, had caused the plaintiff to be taken before a magistrate by whom he was remanded, and the defendant upon hearing of the matter said that as he (the son) had begun it he would not interfere, this was held to be no evidence of authority or subsequent ratification by the father; *Moon v. Towers*, 8 C. B., N. S. 611. And where a summons was issued by the servant of the plaintiffs without their knowledge, and they were merely informed of it, and attended the hearing, it must be proved that the prosecution

was proceeded with by them without reasonable or probable cause; *Weston v. Beeman*, 27 L. J. (Ex.) 57. It would seem that this action may be maintained against a corporation; *Stevens v. Midland Counties Railway*, 10 Ex. 352.

Evidence of Malice.] It is essential that the plaintiff should give some evidence of the defendant's malice; and malice is in issue on a plea of Not guilty; *Porter v. Weston*, 5 N. C. 715. Personal enmity is evidence of malice, but any indirect motive is sufficient. Proof of an acquittal for want of prosecution is not even *primâ facie* evidence of malice; *Purcell v. Macnamara*, 9 East, 361. If the plaintiff proves want of probable cause, malice may be inferred; *Burley v. Bethune*, 5 Taunt. 583. But the want of probable cause is not conclusive evidence of malice; *Mitchell v. Jenkins*, 5 B. & Ad. 588. Where a servant of the plaintiff, in his absence and without his knowledge, summoned the plaintiff on a charge of felony, which was dismissed, the defendant being present at the hearing only, the want of probable cause was held to be no evidence of malice against him; *Weston v. Beeman*, 27 L. J. (Ex.) 57. Proof that the defendant published an advertisement of the finding of the indictment, with other scandalous matter, is evidence of malice; *Chambers v. Robinson*, 1 Stra. 691. See *Cuddy v. Barlow*, 1 Mood. & R. 275; *Haddrick v. Heslop*, 12 Q. B. 267.

Evidence of want of probable cause.] The plaintiff must give some evidence of want of probable cause: and this on the general issue. And where there is a special plea stating certain facts as constituting reasonable and probable cause it is sufficient to prove so much of the plea as in the opinion of the judge constitutes reasonable and probable cause; *Hailes v. Marks*, 7 H. & N. 56; 30 L. J. (Ex.) 389. Proof of the strongest malice is no evidence of want of probable cause, if it be proved that the defendant was cognisant of circumstances which led to a legal and reasonable suspicion that the plaintiff was guilty of an offence against the law, and upon which he might have acted; *Johnstone v. Sutton*, 1 T. R. 545; *Turner v. Turner*, Gow. 20. But if it can clearly be proved that the defendant under such circumstances did not believe that he had a legal right to prosecute, this is evidence of want of reasonable cause; *Turner v. Ambler*, 10 Q. B. 252. Therefore in *Delegal v. Highley*, 3 N. C. 950, the defendant was required to show that at the time of the prosecution he knew of the facts upon which he relied as a defence. And the belief or disbelief of the defendant is a question for the jury; *Taylor v. Willans*, 2 B. & Ad. 857: where also it is said that slight evidence of the defendant's knowledge of the insufficiency of his charge is all that is required, as it is difficult to prove a negative. Abandoning the prosecution is not of itself sufficient evidence of want of probable cause; *Incedon v. Barry*, 1 Camp. 203 (n.) Nor neglecting to prefer an indictment after a charge laid; *Wallace v. Alpine*, Id. 204 (n.); *Willans v. Taylor*, 6 Bing. 188. So proof that the bill was thrown out by the grand jury has been held no evidence of the want of probable cause; *Byne v. Moore*, 5 Taunt. 187; but in *Nicholson v. Coghill*, 4 B. & C. 23, it was said *obiter* by the Court, that evidence of the bill having been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause; at least where the facts are wholly within the defendant's knowledge. Where the defendant charged the plaintiff with felony, the taking

being under a claim of lien, and defendant, after the apprehension of the plaintiff, admitted to him, "that he knew that he (plaintiff) did not intend to steal the article taken," it was held evidence of want of probable cause; *Huntley v. Simpson*, 2 H. & N. 600; and see *Venafra v. Johnson*, 10 Bing. 301; *Musgrove v. Newall*, 1 M. & W. 582. If the defendant has laid all the facts of the case fully and fairly before counsel, and acted *bonâ fide* upon the opinion given (however erroneous it may be), it will be evidence to prove probable cause; *per* Bayley, J., *Ravenga v. Mackintosh*, 2 B. & C. 697; *Hewlett v. Crutchley*, 5 Taunt. 281. It has been said that where the facts lie in the knowledge of the defendant himself, he must show probable cause, though the indictment was found by the grand jury; otherwise the plaintiff shall recover without proving express malice; *Parrot v. Fishwick*, B. N. P. 14. But this position is not supported by another report of the same case, 9 East, 362 (n.), from which it appears, that the plaintiff having been acquitted upon the indictment, Lord Mansfield said, "it was not necessary to prove express malice, for if it appeared there was no probable cause, that was sufficient to prove an implied malice, which was all that was necessary to support this action. In this case all the facts lay in the defendant's own knowledge, and if there was the least foundation for the prosecution, it was in his power and incumbent upon him to prove it." It seems therefore from this last report that some evidence of want of probable cause had been given from which malice was inferred, and that the question was, whether it was incumbent upon the plaintiff to go further. And see *Sykes v. Dunbar*, cited 9 East, 363. Where the defendant was the only witness upon the indictment, Lord Kenyon held that the proof of malice lay upon the plaintiff. But it would seem that by the word *malice* in this case, absence of belief on the part of the defendant that he had acted legally was meant.

How far what is reasonable and probable cause is a question for the judge.] Where there are no facts, nor any inference from facts in dispute, "reasonable and probable cause" is a pure question of law, and the judge may nonsuit the plaintiff, if he thinks that there was such cause; *Panton v. Williams*, 2 Q. B. 169; *Michell v. Williams*, 11 M. & W. 205. But where there are facts in evidence tending to show that the defendant knew his charge to be unwarrantable; or where the question is mixed up with disputed facts, the judge cannot nonsuit the plaintiff, but must leave the case to the jury; *McDonald v. Rooke*, 2 N. C. 217; *James v. Phelps*, 11 Ad. & E. 483. In a case in which the defendant had preferred an indictment for an assault committed in removing him from the plaintiff's house, the judge told the jury, that if the defendant knew he was in the wrong when he preferred the indictment, then there was no probable cause: held that this must be taken to have meant, was the assault committed under circumstances that no reasonable man could have supposed that it was excessive? and that therefore the direction was substantially correct; *Hinton v. Heather*, 14 M. & W. 131, and see *Turner v. Ambler*, 10 Q. B. 252; *Panton v. Williams*, *supra*, has been doubted, but being a decision on error, has since been followed. And it is now the practice for the judges at Nisi Prius to give hypothetical directions to the jury, or to submit to them certain facts, and then upon receiving their finding upon them, to decide as to reasonable and probable cause. As, however, has been before stated, the decision of questions of disputed fact, the motive and malice of the

defendant, his knowledge of those facts, and belief in the plaintiff's guilt and in the existence of probable cause, are all questions for the jury. See *West v. Bazendale*, 9 C. B. 141; *Heslop v. Chapman*, 23 L. J. (Q. B.) 49; *Douglas v. Corbett*, 6 E. & B. 511.

Where the defendant presented two bills for perjury against the plaintiff, but did not himself appear before the grand jury, and the bills were ignored; he then presented a third bill, and upon his own testimony it was found. The prosecution was kept suspended by the defendant for three years, till the plaintiff took the record down to trial, when the defendant declined to appear as a witness, although in court and called, the plaintiff was acquitted. It was held that this was *prima facie* evidence of want of probable cause; *Willans v. Taylor*, 6 Bing. 187. S. C. in *Error*, 2 B. & Ad. 845.

Proof of circumstances attending a felony which might have justified the defendant in making inquiries concerning the plaintiff do not amount to evidence of reasonable and probable cause; *Busst v. Gibbons*, 30 L. J. (Ex.) 75. And where it appeared that the plaintiff refused to give up a forged note, which he had taken in the course of business, to the defendant, a bank inspector; and the defendant, in the absence of all circumstances of suspicion, charged the plaintiff before a magistrate with feloniously having the note in his possession, this was held to be evidence of want of probable cause; *Brooks v. Warwick*, 2 Stark. 389.

When the action is for a malicious indictment for perjury in which there are several assignments of perjury, the plaintiff is entitled to recover if he shows that as to one of them there was no probable cause; *R. v. Prosser*, cited 1 T. R. 533; *Delisser v. Towne*, 1 Q. B. 333. Where the plaintiff's counsel offers no evidence as to the want of probable cause for one of the several assignments of perjury in the indictment, it is not competent for the defendant to show probable cause as to that; *Ellis v. Abrahams*, 8 Q. B. 709.

The observations of the judge on the trial of the indictment, tending to cast censure on the mode in which the prosecution had been conducted, were admitted for the plaintiff by *Littledale, J.*, in *Warne v. Terry*, *Winton Sum. As.* 1836, on the same principle on which the hesitation of the jury had been held by Lord Kenyon to be evidence by the defendant of probable cause (see *infra*, *Smith v. Macdonald*, 3 Esp. 7); but in *Barker v. Angell*, 2 Mood. & Rob. 371, Lord Denman, C. J., refused to admit such proof. Perhaps such evidence is not strictly admissible in either case. At most, it only shows the opinion of the judge or jury (or of some of the jury) on the evidence at the trial of the indictment; the evidence in the action may be very different.

Damages.] The jury may give damages for the loss of reputation, the imprisonment, if any have taken place, and the expenses incurred by the plaintiff in making his defence; *B. N. P.* 13. Where the defendant showed that he was imprisoned at half-past one, and detained till after two o'clock, and that he would have been taken into the employment of a cigar manufacturer if he had appeared at two o'clock at the factory, but being unwell in consequence of the imprisonment returned home, and found the next morning that the place had been filled up, it was held that the damage was too remote, and that the evidence was therefore rightly rejected; *Hoey v. Felton*, 11 C. B., N. S. 143; 31 L. J. (C. P.) 105. In the case of an indictment of several persons for a conspiracy, where all rely on the same

matter of defence, any one may be liable for and pay, and subsequently recover, all the costs; but if different grounds of defence are relied on, the same rule does not apply; *Rowlands v. Samuel*, 11 Q. B. 39. See further as to the amount of damage, *post*, p. 535.

Defence.] The defendant may prove the plaintiff's guilt, for this shows good ground for prosecution; *B. N. P.* 15; *Jackson v. Bull*, 2 Mood. & Rob. 177. The plea of not guilty admits the acquittal when stated in the declaration; *Haddrick v. Heslop*, 12 Q. B. 267. The existence of probable cause may be shown under this plea; *Cotton v. Brown*, 3 Ad. & E. 312.

In order to show probable cause for the prosecution, the defendant has been allowed to prove that the jury deliberated long on the trial of the indictment; *Smith v. Macdonald*, 3 Esp. 7. But see *suprà*, p. 531. And Lord Kenyon ruled that the defendant might give evidence of the plaintiff's bad character; *Rodriguez v. Tadmire*, 2 Esp. 721; but in later cases such evidence has been refused, on the ground that it affords no proof of probable cause to justify the defendant; *Newsam v. Carr*, 2 Stark. 70; *Cornwall v. Richardson*, Ry. & Mood. 305; see also *Downing v. Butcher*, 2 Mood. & Rob. 374. It is no answer that the defendant was bound over to prosecute if the jury think that he maliciously caused himself to be so bound by making an unfounded charge; *Dubois v. Keats*, 11 Ad. & E. 329.

Fitzjohn v. Muckinder, 9 C. B., N. S. 505; 31 L. J. (C. P.) Ex. Ch. 257, is rather a curious case. The defendant, in a case tried in a county court, produced a paper which he falsely swore was signed by the plaintiff. This the plaintiff denied, and the judge thereupon ordered him to be committed for perjury, and bound over the defendant to prosecute. The plaintiff having been acquitted, it was held by a majority of the Court that the defendant was liable to an action for malicious prosecution.

Action for Malicious Arrest and Abuse of Civil Process.

Actions for maliciously holding a person to bail were frequent before the change in the law of arrest on mesne process. The action is now, however, not so common, though it may still be maintained for falsely, maliciously, and without reasonable or probable cause making an affidavit of belief that the plaintiff is going abroad, and thereby obtaining a judge's order for his arrest; *Daniels v. Fielding*, 16 M. & W. 200. An action may also be maintained when it appears that proceedings have been taken against the plaintiff in order to effect some object not within the scope of the process. See *Grainger v. Hill*, 4 N. C. 212. In an action for malicious arrest the plaintiff may have to prove the affidavit to hold to bail, and the judge's order for the *capias* in the former action; the suing out of such *capias*; the arrest under it; the rescission of the judge's order; the defendant's malice and want of reasonable or probable cause; and the damage.

The Judge's order for the capias.] As to proof of this, see *ante*, p. 74.

The writ of capias.] As to proof of the writ, see *ante*, p. 33.

The arrest.] The plea of not guilty puts in issue the arrest by the procurement of the defendant; *Watkins v. Lee*, 5 M. & W. 270.

The affidavit to hold to bail.] When not guilty is pleaded, the plaintiff should be prepared to prove the affidavit to hold to bail by the production of the original or an examined copy; *Crook v. Dowling*, 3 Dougl. 75, B. N. P. 14; *Cusburn v. Reid*, 2 B. Moore, 60; *Rees v. Bowen*, M'Cl. & Y. 392. It is not always absolutely necessary to prove the affidavit; *Arundell v. White*, 14 East, 224. In one case, though the return of *cepi corpus* appeared on the writ, Lord Kenyon ruled that, as against the defendant there was no evidence of the arrest having been under the writ, and the plaintiff not being able to prove the warrant, was nonsuited; *Lloyd v. Harris*, Peake Ca. 174. But it seems that the sheriff's return is *prima facie* evidence of the fact therein stated; *Gyfford v. Woodgate*, 11 East, 297; *Rogers v. Ilcombe*, 2 Esp. Dig. (N. P.) 38, ante, pp. 47, 54. And proof of the warrant is unnecessary when the defendant has admitted that the arrest took place under the writ; *Petrie v. Lamont*, 3 M. & G. 702. In order to prove the arrest the plaintiff may call the sheriff's officer. If a bailiff who has process against anyone says to him (whether on foot or riding), "You are my prisoner; I have a writ against you," upon which he submits, and goes with him, though the bailiff never touches him, yet this is an arrest, because he had submitted to the process; but if instead of going with the bailiff he runs away or escapes, it is no arrest unless the bailiff had actually laid his hand on him; *Horner v. Battyn*, B. N. P. 62. Placing a party under arrest by a sheriff's officer, who holds a writ of *capias*, without proceeding to actual contact, may be an arrest; *Grainger v. Hill*, 4 N. C. 212. Where a sheriff's officer, having a warrant to arrest the plaintiff, sent a message to him to fix a time to call and give bail, and plaintiff accordingly fixed a time, attended and gave bail, this was held to be no arrest for which this action could be maintained; *Berry v. Adamson*, 6 B. & C. 528; *George v. Radford*, 3 C. & P. 464. See also *Bieten v. Burridge*, 3 Camp. 140, post, p. 535, and further as to what constitutes an arrest, post, *Actions against constables*, part iii. Proof of detainer satisfies the allegation of an arrest; *Whalley v. Pepper*, 7 C. & P. 506.

Rescission of the Judge's order, or determination of the suit.] In an action for malicious arrest it is necessary to show that the original proceeding which formed the alleged ground of the action is at an end; and this cannot be done under the plea of not guilty; *Watkins v. Lee*, 5 M. & W. 270. It is necessary to show that the proceeding complained of terminated in such a way so favourable to the plaintiff as to give him a right of action, and the proof must correspond with the allegation; *Combe v. Capron*, 1 Mood. & Rob. 398. Proof of a rule to discontinue, and that the costs have been accordingly taxed and paid, is sufficient evidence of the determination of the suit; *Bristow v. Haywood*, 4 Camp. 214; *Gadd v. Bennett*, 5 Price, 540; *Brandt v. Peacock*, 1 B. & C. 649. So a rule to stay proceedings, and to deliver up to the then defendant a bill of exchange upon which the action was brought; *Brook v. Carpenter*, 3 Bing. 297. But see *Kirk v. French*, 1 Esp. 80. Not declaring for a year after the return of the writ is evidence of the determination of the suit, and will support an averment that the plaintiff in the original suit did not declare, but permitted it to be discontinued; *Pierce v. Street*, 3 B. & Ad. 397. In an action for an arrest upon a plaint in the Sheriffs' Court at London, evidence was given that the usual course of that court, upon the abandonment of a suit by the plaintiff, was to make an entry in the

minute-book of "withdrawn." It was held that proof of such entry in the minute-book was sufficient to prove the determination of the suit; *Arundell v. White*, 14 *East*, 216. The termination must be such as to afford *prima facie* evidence that the suit was without foundation; therefore, where it appeared that a *stet processus* had been entered by consent, the plaintiff was nonsuited, for the defendant might perhaps have recovered in the former action if the plaintiff had not stopped it by consent; *Wilkinson v. Howel*, *Mood. & M.* 495.

In *Parton v. Hill*, 12 *Weekl. Rep.* 733, where the declaration alleged that the defendant falsely and maliciously, and without any reasonable or probable cause, swore an affidavit that the plaintiff was indebted to him, and procured his goods, &c., to be attached in the Lord Mayor's Court, it was held to be necessary to show that the suit had terminated in the plaintiff's favour. But where the proceedings are *ex parte*, as in the case of articles of the peace maliciously exhibited against the plaintiff, it is not necessary to show that the proceedings have concluded favourably to the plaintiff; *Steward v. Grommett*, 7 *C. B.*, *N. S.* 191; 29 *L. J. (C. P.)* 170. And an action for abuse of process, in order to extort money from the plaintiff, as where the plaintiff issues several writs against the defendant in respect of the same cause of action, is not in the nature of an action for malicious arrest so as to make it necessary to aver or prove a determination of the suit, or the want of probable cause; *Grainger v. Hill*, 4 *N. C.* 212; *Heywood v. Collinge*, 9 *Ad. & E.* 269. Where it appeared the judgment creditor had maliciously indorsed a *ca. sa.* with directions to levy more than was due, and that the plaintiff before his arrest had tendered the true amount of his debt, it was held that the plaintiff need not show that he had procured his discharge from custody before bringing the action; *Gilding v. Eyre*, 10 *C. B.*, *N. S.* 592; 31 *L. J. (C. P.)* 134. In an action for maliciously suing out a commission of bankruptcy, it must be averred, and, if traversed, proved, that the commission was superseded before the commencement of the action; *Whitworth v. Hall*, 2 *B. & Ad.* 695. The plea of not guilty does not put the plaintiff to this proof; *Atkinson v. Raleigh*, 3 *Q. B.* 79.

Evidence of malice and want of probable cause.] It lies upon the plaintiff in this action (as in the action for a malicious prosecution) to prove both malice and the want of probable cause; and these are put in issue under Not guilty; *Watkins v. Lee*, 5 *M. & W.* 270; *Hounsfeld v. Drury*, 11 *Ad. & E.* 98. As in an action for malicious prosecution, the want of probable cause is evidence of malice, and whether the facts amount to want of probable cause is generally a question for the judge; see the cases *ante*, p. 530; and *Gibbons v. Alison*, 3 *C. B.* 181. Proof that the suit was discontinued was held by Lord Ellenborough not to be evidence of want of probable cause; *Bristow v. Heywood*, 1 *Stark.* 50; but in a later case, where the plaintiff had arrested the defendant on an affidavit of debt for money paid to his use, but did not declare until ruled to do so, and a few days afterwards discontinued the action and paid the costs, this was held to be evidence to go to the jury of malice and the want of probable cause; *Nicholson v. Coghill*, 4 *B. & C.* 21; *Webb v. Hill*, *Mood. & M.* 254. That the defendant suffered himself to be non-prossed in the former suit has been held not to be evidence to support this action; *Sinclair v. Eldred*, 4 *Taunt.* 7. However, in a previous case of *Hamilton v. Reddell*, coram Pratt, C. J., *Bearcroft's*

MSS., 22, not cited in *Sinclair v. Eldred*, it was ruled that the defendant's suffering the former action to be non-prossed was sufficient *primâ facie* evidence of malice; and *per Pratt, C. J.*, "The defendant's never proceeding, and suffering a non-pros, is, in my opinion, *primâ facie* evidence of malice. I hold most clearly that the affidavit, arrest, bail, and non-pros, make up sufficient *primâ facie* evidence to call for a defence." Where there are mutual dealings between the plaintiff and the defendant, and items are known to be due on both sides of the account, an arrest for the amount of one side only, without deducting what is due on the other, is malicious and without probable cause; *Austin v. Debnam*, 3 *B. & C.* 139, overruling *Brown v. Pigeon*, 2 *Camp.* 594. Taking a less sum out of court and not proceeding in the suit, is not enough in itself to show want of probable cause of action for a larger sum; *Jackson v. Burleigh*, 3 *Esp.* 34. The plaintiff hearing while at a port in Northumberland that the defendant, who was in London, intended to arrest him, paid the debt to the defendant's agent and took a receipt. More than a month afterwards the plaintiff was arrested in London by the defendant's attorney upon a writ grounded upon the original affidavit of debt. Held that these facts afforded no evidence of malice; *Gibson v. Chaters*, 2 *B. & P.* 129. A. sued out a bailable writ against B., and the officer told B. of it, but did not take him into actual custody; on the mistake being discovered, B. was told that he had given himself no further trouble in the matter, but he afterwards put in bail and incurred an expense of 14*l.* Held that no action lay; there being no arrest, nor any inconvenience, except what he had voluntarily incurred; *Bieten v. Burridge*, 3 *Camp.* 140. So where the plaintiff was actually arrested on a bill which purported to be, but was not in fact, accepted by him, it was ruled that no action lay; the defendant having acted through mistake and without malice; *Spencer v. Jacob, Mood. & M.* 180.

The question in this action is whether the original plaintiff had a probable cause of action for the amount for which he held the party to bail, and not whether he had a probable cause of action in the particular form of action brought; thus, when A. had a good cause of action for a sum of 1150*l.* against B. & C. separately, but not jointly, and he sued B. & C. jointly, and arrested B. in that action for the amount, it was held that an action for a malicious arrest would not on that account lie at the suit of B.; *Whalley v. Pepper*, 7 *C. & P.* 506. In an action for not accepting the debt and costs from a party in custody under a *ca. sa.*, the refusal of the plaintiff in the first action to sign a discharge to the sheriff on tender of the debt and costs, is *primâ facie* evidence of malice; *Crozer v. Pilling*, 4 *B. & C.* 26.

Damages.] If two are found guilty, it must be of joint acts, and the damages must be joint; *Hilditch v. Eyles*, 2 *Selv.*, 12*th ed.* 1082. And where there are several plaintiffs, they can only recover for their joint damage; as for the expenses of an action depending upon their joint retainer; *Barratt v. Collins*, 10 *B. Moore*, 446; *Pechell v. Watson*, 8 *M. & W.* 691.

In an action for a malicious arrest the Court of Common Pleas decided that the plaintiff was not entitled to recover more, on account of costs and expenses, than the taxed costs which he had incurred; *Sinclair v. Eldred*, 4 *Taunt.* 7; and see *Rogers v. Ilcombe*, 2 *Esp. Dig. N. P.* 38; *Jenkins v. Biddulph*, 4 *Bing.* 160. And Best, C. J.,

ruled the same way in *Webber v. Nicholas, Ry. & Mood.* 419. But Lord Ellenborough held that he might recover the amount of costs as between attorney and client; *Sandback v. Thomas*, 1 *Stark.* 306. And Lord Abinger was of the same opinion in *Gould v. Barratt*, 2 *Mood. & Rob.* 171. See *Jones v. Dyke, Sugd. V. & P. App.* 8; *Hodges v. Litchfield, Earl of*, 1 *N. C.* 500; *Grace v. Morgan*, 2 *N. C.* 534; and the opinions expressed by the court in *Doe v. Filliter*, 11 *M. & W.* 80.

[*Statute of Limitations.*] In an action for maliciously opposing the plaintiff's discharge as an insolvent on a false affidavit, and causing his imprisonment, the Statute of Limitations runs from the time of opposition, though the imprisonment ordered by the judge continued to within six years; *Violett v. Simpson*, 8 *E. & B.* 344; 27 *L. J. (Q. B.)* 138.

Action for Excessive Distress.

In an action for an excessive distress founded on the Statute of Marlbridge, the declaration states the tenancy of the defendant at a certain rent; the rent claimed to be due; the taking a distress of goods of much greater value than the rent in arrear and charges of the distress; and the damages.

The simple fact of making a distress, accompanied by an untrue claim of more rent than is due, and selling the goods under such claim, is not actionable unless some special damage be proved, or unless it be shown that a larger quantity of goods has been sold than was sufficient to satisfy the rent actually in arrear; *Tancred v. Leyland*, 16 *Q. B.* 669. And in *Glynn v. Thomas*, 11 *Ex.* 870; 25 *L. J. (Ex.)* 125, where it appeared that the tenant after the seizure of goods under an excessive claim had discharged it without previously tendering what was really due, it was held that the detention if *bonâ fide* was lawful, and that there was no cause of action; and see *French v. Phillips*, 26 *L. J. (Ex.)* 82; 1 *H. & N.* 564; *Lucas v. Tarleton*, 3 *H. & N.* 116; 27 *L. J. (Ex.)* 246. Where, however, a tender of the rent due had been made before impounding the distress, the court held that an action could be brought, *Crompton, J.*, saying that the case of *Glynn v. Thomas* had gone quite far enough; *Loring v. Warburton*, *E. B. & E.* 507; 28 *L. J. (Q. B.)* 31; and see *Crowder v. Self*, 2 *Mood. & Rob.* 190; *Chandler v. Douulton*, *post*, 538.

[*Evidence of the tenancy and rent due.*] The usual allegation in the declaration is general, that the plaintiff held and enjoyed certain premises as tenant thereof to the defendant, which must be proved in the usual manner; that is, by production and proof of the lease or its counterpart, or by the defendant's receipts for rent, of notices to quit, or other admissions by him of the terms; or by parol evidence of the contract when there is none in writing. These preliminary statements are, however, usually admitted by the broker's notice of distress or other proceedings. It has been held that the tenancy must be proved as laid; and that where the rent was stated to be due to A., and it appeared that the distress warrant was signed by A. only as agent to B., the real lessor, it was a variance; *Ireland v. Johnson*, 1 *N. C.* 162. Such variances are no longer of im-

portance. An action for an excessive distress lies at the suit of a lodger against the landlord of the person under whom he occupies; *Fisher v. Algar*, 2 C. & P. 374.

Proof of the distress.] The plaintiff must prove that his goods were distrained, but it is not necessary to prove that they were sold or taken away; the seizure as a distress is sufficient; *Baylis v. Usher*, 4 Moore & P. 791; *Sells v. Hoare*, 8 B. Moore, 453. Where the landlord's agent went upon the tenant's premises, walked round them, gave a written notice that he had distrained certain goods lying there on arrear of rent, and then went away without leaving any person in possession, it was held that this was a sufficient seizure to give the tenant a right of action for an excessive distress; for the statute 11 Geo. 2, c. 19, s. 10, gives the landlord power to impound, or secure on the premises, goods distrained for rent; *Swann v. Earl of Falmouth*, 8 B. & C. 456. So where the broker demanded, and tenant paid the expenses of levy, under protest, before any seizure or inventory made; *Hutchins v. Scott*, 2 M. & W. 809. As to what is an impounding, see *post*, *Action of Replevin—Tender*.

The fact of the distress may be proved by calling the bailiff, broker, or other person who made the distress, who will also prove his authority from the defendant. If this evidence cannot be procured, the plaintiff should serve the defendant with notice to produce the warrant of distress, and give secondary evidence of it, or should connect the act of the bailiff with the defendant by some other evidence.

Proof of the excess.] When a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take it. *Per Bayley, J., Willoughby v. Backhouse*, 2 B. & C. 823; *Field v. Mitchell*, 6 Esp. 71. A landlord is liable to damages in an action on the case for an excessive distress, where the excess consists wholly of seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the ownership and control of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been on replevying the crops; *Piggott v. Birtles*, 1 M. & W. 441. See *Ridgway v. Stafford*, 6 Ex. 404. An action is not maintainable for distraining beasts of the plough, when there is no other sufficient subject of distress on the premises besides growing crops; *Piggott v. Birtles*, *supra*. Where the defendant distrained goods worth £30 or £40 for the rent of £10, after a tender of the latter sum, the plaintiff was held entitled to waive the trespass and to sue for an excessive distress; *Branscombe v. Bridges*, 3 Stark. 171; 1 B. & C. 145. In order to establish the excess, the plaintiff must be prepared with proof of the value of the goods seized. In an action for an excessive distress, the counsel for the plaintiff proposed to ask a witness what he thought might have been obtained for the goods distrained from an incoming tenant in the same line of business as the plaintiff; but, *per Parke, B.*, "To determine whether the distress was excessive, you must ascertain what the goods seized would have sold for at a broker's sale;" *Wells v. Moody*, 7 C. & P. 59.

Damages.] In *Grace v. Morgan*, 2 N. C. 534, it was held that the plaintiff could not recover in this action the costs as between attorney and client, of a replevin suit (in respect of the same distress) of which he had received the taxed costs. See, however, the cases, *ante*, p. 536. As to the measure of damages for excessive distress of growing crops, see *Piggott v. Birtles*, 1 M. & W. 441, cited *supra*, p. 537. In *Chandler v. Doulton*, 34 L. J. (Ex.) 89, the defendant distrained goods in the plaintiff's mill of more than double the value of the rent due, and kept possession of them for five days. At the trial the plaintiff proved no actual damage. It was held that he was entitled at any rate to a verdict for nominal damages. In an action for a distress, where no rent is due (2 Wm. & M. c. 5, s. 4), the jury should be directed to give the double value of the goods distrained; *Masters v. Farris*, 1 C. B. 715. Sale of the goods at an undervalue cannot be shown unless alleged in the count; *Thompson v. Wood*, 4 Q. B. 493. In an action for selling goods distrained for rent without appraisement, the measure of damages is the real value of the goods sold, minus the rent due; *Knight v. Egerton*, 7 Ex. 407. And see *Keen v. Priest*, 4 H. & N. 236; *Attack v. Bramwell*, 3 B. & S. 520; 32 L. J. (Q. B.) 146.

Defence.

The plea of Not guilty (by statute) puts the plaintiff to the proof of the whole of his declaration when the action relates to any distress on premises chargeable with a rent to which the distrainer is entitled, and the defendant may show under it any defence. The defendant may give evidence that the distress was not excessive, or that the chattel distrained was entire, and that there was no other distress; *Field v. Mitchell*, 6 Esp. 71. Where the plaintiff had previously recovered in replevin for the same taking, such recovery was held to be a bar to this action in *Phillips v. Berryman*, 3 Dougl. 286, cited *Selwyn, Ni. Pri., Distress*, 12th edit. 690, but the contrary seems to be assumed in *Grace v. Morgan*, 2 N. C. 534, cited *supra*. Where there has been an excessive distress, it is no defence that the plaintiff, after the distress, authorised the defendant to sell, and gave him other powers with regard to the goods seized; *Willoughby v. Backhouse*, 2 B. & C. 821; *Sells v. Hoare*, 8 B. Moore, 451; 1 Bing. 401. The defendant is not bound by his notice of distress, but may abandon it, and show that more rent was due than is there stated, subject to any special damage that may have thereby been caused to the plaintiff; *Gwinnet v. Phillips*, 3 T. R. 645; *Crouther v. Ramsbottom*, 7 T. R. 658. And he may distrain for rent really due before a previous distress, although such previous distress purported to be for all rent due at that time, and though the second distress purported to be for rent due since the first; *Gambrell v. Falmouth*, 4 Ad. & E. 73.

Action for Seduction.

This action is founded, not upon the wrong done to the person seduced, but upon that done to the person who has a right to her services, and who is always the plaintiff. The origin and principle of actions for seducing or enticing away servants, or those who have

entered into contracts for personal service, are discussed in *Lumley v. Gye*, 2 E. & B. 216. In an action for seduction, the plaintiff may have to prove (1), that the party seduced was in the plaintiff's service; and (2), the seduction.

Evidence of the service.] Although this action cannot be maintained without some proof of the service, or liability to service, and it is not sufficient merely to show that the plaintiff has incurred an expense in consequence of the confinement of the party seduced; *Saterthwaite v. Duerst*, 5 East, 47 (n.); 4 Dougl. 315; *Postlethwaite v. Parkes*, 3 Burr. 1878; *Hall v. Hollander*, 4 B. & C. 662; *Grinnell v. Wells*, 7 M. & G. 1033; yet it is not necessary to prove an actual contract of service, or that wages have been paid. Where the daughter is a minor, living at her father's house, the service may be presumed; *Harris v. Butler*, 2 M. & W. 542, per Parke, B., *Maunder v. Venn*, Mood. & M. 324; *R. v. Chellesford*, 4 B. & C. 102. And where the daughter is of age (in which case the action is maintainable; *Booth v. Charlton*, cited 5 East, 47; *Tullidge v. Wade*, 3 Wils. 18), the slightest evidence of service, such as milking cows, has been held sufficient; *Bennett v. Alcott*, 2 T. R. 168. Even making tea has been said to be an act of service; per Abbott, C. J., *Carr v. Clarke*, 2 Chitty's Rep. 261; *Mann v. Barrett*, 6 Esp. 32. Where a daughter has been seduced, the parent may maintain an action on the supposed relation, though the rank and circumstances of the parties make it improbable that she should be treated as a menial servant; *Fores v. Wilson*, Peake Ca. 55. The action was held to lie, though the daughter had not been actually confined before action brought, and though the plaintiff had voluntarily turned her out of his house upon discovery of her pregnancy; per Lord Denman, C. J., *Joseph v. Corvander*, Winton Sum. Ass. 1834. In *Manvell v. Thomson*, 2 C. & P. 303, the action was maintained, although it did not appear that the daughter had become pregnant.

It must in general appear that the daughter was residing with the father at the time of the seduction, or at least that, though absent from home, she was still constructively in his service. The daughter at the time of the seduction was acting as housekeeper to her brother-in-law, and though she might have left him when she pleased, had no intention of so doing: Held, that the action could not be maintained; *Dean v. Peel*, 5 East, 45. In *Carr v. Clarke*, 2 Chitty's Rep. 260, the daughter, though in the service of a relation, was in the habit of paying to her father part of her wages: Held, that this circumstance gave him no right of action. So in *Blaymire v. Haley*, 6 M. & W. 55, although the daughter intended to return to her father's when she quitted her service. But where by permission of her parents she attended to the defendant's shop for a few days, during the temporary absence of his wife, the Court decided in favour of the action; *Griffiths v. Teetgen*, 15 C. B. 344. And in *Johnson v. McAdam*, cited 5 East, 47, the action was successfully brought where the daughter was on a visit *animo revertendi*. Where the daughter, by permission of her mistress, did work for her mother after the usual day's work was done: Held, that this would not support the action; *Thompson v. Ross*, 5 H. & N. 16; 29 L. J. (Ex.) 1. Where the daughter lived at her father's house from six in the evening of one day until seven in the morning of the next day, and during the rest of her time was occupied in the service of the defen-

dant as a labourer in husbandry: Held, that there was sufficient evidence of service under the father; *Rist v. Faux*, 32 L. J. (Q. B.) 387. But where the plaintiff put a daughter out to board and reside with the defendant as an apprentice for two years, no action was held to lie against the defendant for seducing her, whereby she became ill, and was obliged to remove to the plaintiff's house again, and to be supplied by him with medicines, &c.; *Harris v. Butler*, 2 M. & W. 539; *Davies v. Williams*, 10 Q. B. 725.

Where the daughter was a married woman, separated from her husband, and living as servant with her father, it was held that the latter might maintain this action, as he had a right as against a wrongdoer to her services; *Harper v. Luffkin*, 7 B. & C. 387. Where the action was brought by the aunt of the party seduced, with whom she resided, it was held that she stood in *loco parentis*, and was entitled to recover, though the mother was living; *Edmondson v. Machell*, 2 T. R. 4. So where the plaintiff, an officer in the army, had adopted the daughter of a deceased soldier, he was held entitled to maintain this action; *Irwin v. Dearman*, 11 East, 23. So a master, not related to his servant, may recover damages against the defendant for debauching her; *Fores v. Wilson*, Peake Ca. 55. See *Hall v. Hollander*, 4 B. & C. 663. But the action cannot be supported by the assignees of the bankrupt master; *Howard v. Crowther*, 8 M. & W. 601.

Damages. Evidence in aggravation.] Although the loss of service is the legal foundation of this action, and though it is difficult to reconcile with principle the giving of greater damages on another ground, the practice has become inveterate, and cannot now be shaken; per Lord Ellenborough, C. J., in *Irwin v. Dearman*, 11 East, 24. Damages may therefore be given for the loss which the plaintiff has sustained by being deprived of the society and comfort of his child, and by the dishonour which he suffers; *Southernwood v. Ramsden*, Selw. N. P., 12th ed. 1127; *Chambers v. Irwin*, *Ib.*; *Bedford v. McKowl*, 3 Esp. 120; *Tullidge v. Wade*, 3 Wils. 19.

The plaintiff may prove that the defendant was addressing his daughter as an honourable suitor; *Dodd v. Norris*, 3 Camp. 519; *Elliott v. Nicklin*, 5 Price, 641. It has been held that neither in chief nor in cross-examination can the plaintiff show that the defendant had previously made a promise of marriage to the daughter; for this is a distinct cause of action by the daughter; *Dodd v. Norris*, *suprà*; *Tullidge v. Wade*, 3 Wils. 19. But several cases are mentioned by Mr. Starkie (vol. ii., p. 722) where such evidence has been admitted, not with the view of augmenting the damages, but to vindicate the character of the person seduced, and to show the means used by the defendant to effect the injury; and in *Capron v. Balmond*, *Exeter Sp. Ass.*, 1831, Park, J., not only allowed proof of a promise, but also that the defendant had persuaded the daughter to take measures to destroy her offspring, and had spoken to her about hiring a nurse, and other arrangements in contemplation of marriage, these facts being all immediately connected with the act complained of.

The plaintiff is allowed to prove the amount of the expenses sustained by him in consequence of his daughter's confinement, &c. The expenses of medical attendance, though not paid, may be recovered; *Dixon v. Bell*, 1 Stark. 289. Lord Ellenborough there told the jury to give no damages in respect of physicians' fees, as payment of them could not be enforced; but this is not now the law; see *ante*, p. 277.

Declarations of the defendant's wife, tending to prove a confederacy between them to seduce the plaintiff's daughter, have been admitted in aggravation; *Knowles v. Compigne, Winton Summ. Ass., 1835.*

Evidence of character.] The plaintiff cannot give evidence of the daughter's good character, except in answer to evidence of *general* bad character on the one side; *Bamfield v. Massey, 1 Camp. 460*; and even where the daughter had been cross-examined as to circumstances of extreme indelicacy and levity in her conduct, Lord Ellenborough ruled that the plaintiff was not at liberty to call witnesses to character, for there was an opportunity of explaining on re-examination the questions put on the cross-examination; *Ibid.* But in another case, where the cross-examination of the party seduced went to shew that she had conducted herself immodestly towards the defendant before the seduction, and had kept improper company, the plaintiff was allowed, without objection, to prove the general good character and modest deportment of his daughter, and the general respectability of the family; *Bate v. Hill, 1 C. & P. 100.* See *ante*, p. 114.

Defence.

Not guilty—Mitigation.] In case for seduction, the plea of not guilty does not put the plaintiff to proof of the service; *Torrence v. Gibbins, 5 Q. B. 297.* But the defendant may shew under it that he is not the father of the child, though he admits the criminal intercourse; *Eager v. Grimwood, 1 Ex. 61.*

Where the plaintiff had been guilty of gross misconduct in suffering the defendant to continue his visits as a suitor to his daughter, knowing that he was a married man, on an alleged probability of divorce, Lord Kenyon nonsuited the plaintiff; *Reddie v. Scoolt, Peake Ca. 240.* But it may be doubted whether this was not rather matter in reduction of damages. In mitigation of damages the defendant may shew the loose character of the girl; but if she be asked whether, before her acquaintance with the defendant, she had not been criminally connected with other men, she is not bound to answer the question; *Dodd v. Norris, 3 Camp. 519, ante, p. 114.* Where, however, the evidence would tend to shew that the defendant is not the father of the child, it may be otherwise; *Garbutt v. Simpson, 32 L. J. (M. C.) 186.* He may prove expressions of the daughter tending to shew the levity of her character; but if the expressions also tend to contradict her evidence, they cannot be proved without previously asking her, on cross-examination, whether she used them; *Carpenter v. Wall, 11 Ad. & E. 803.*

Action for Assault and Battery.

In an action of trespass for assault and battery the declaration usually states the assault in very general terms.

Evidence of the assault.] Under Not guilty the assault or battery must be proved. An attempt to do a corporal injury to another, coupled with a present ability, or any act or gesture from which an

intention to commit a battery may be implied, is an assault; *Genner v. Sparkes*, 1 *Salk.* 79; *Read v. Coker*, 13 *C. B.* 850. So riding after a person and obliging him to run away to avoid being beaten, is an assault; *Martin v. Shoppee*, 3 *C. & P.* 373. To upset a chair or carriage in which a person is sitting is an assault; *Hopper v. Reeve*, 7 *Taunt.* 700. To throw a lighted squib at A., who, in self-defence, throws it from him, so that it accidentally falls on B., is an assault by the first thrower on B.; *Scott v. Shepperd*, 2 *W. Bl.* 892. Where parish officers cut off the hair of a pauper against her will, it was held to be an assault; *Forde v. Skinner*, 4 *C. & P.* 239.

A battery, which always includes an assault, is the actual doing an injury, be it ever so small, in an angry or revengeful, or rude or insolent manner, as by spitting in a man's face, or violently jostling him out of the way; *B. N. P.* 15. To throw water upon a person is a battery; *Pursell v. Horne*, 8 *Ad. & E.* 602. An assault or battery must be an act done against the will of the party assaulted; *per Patteson, J.*; *Christopherson v. Bare*, 11 *Q. B.* 477. Therefore a touch or stroke in jest is no assault; *Williams v. Jones*, *Hardw.* 301. So a touching to engage attention; *Coward v. Baddeley*, 4 *H. & N.* 478; 28 *L. J. (Ex.)* 260. It is not essential that the act should appear to be wilful, it is enough if it be negligent; *Weaver v. Ward*, *Hob.* 134.

If an assault is committed by the authority of a corporation, an action lies against it. The authority must be proved to make them liable; *Eastern Counties Railway Company v. Brown*, 6 *Ex.* 314.

Plaintiff, how far confined as to the time and number of assaults, &c.] Where the declaration states that the defendant on divers days and times between two specified days assaulted the plaintiff, the plaintiff may give in evidence any number of assaults within that period; or he may prove a single trespass at any time before action brought; *B. N. P.* 86; 1 *Saund.* 24 (n). And even after proving several assaults within the period mentioned, he would perhaps be allowed to give evidence of assaults committed before that time, as proof of the defendant's malice; 2 *Phill. Ev.* 194; as to trespasses *diversis diebus*, see *ante*, p. 459. If trespasses incapable of continuance are improperly so laid, the defendant may confine the plaintiff at the trial to a single act; *B. N. P.* 86.

Where the declaration contained only one count, it was held that the plaintiff could not, after giving evidence of one assault, be permitted to abandon it and go into evidence of another; *Stante v. Prickett*, 1 *Campb.* 473. So where the plaintiff proved a joint trespass against all the defendants, it was held that he could not waive that trespass and prove another against some of the defendants only, though there were two counts in the declaration; *Tait v. Harris*, 1 *Mood. & Rob.* 282; *Sedley v. Sutherland*, 3 *Esp.* 202. But the principle of this decision was doubted by *Patteson, J.*, in *Hitchen v. Teale*, 2 *Mood. & Rob.* 30; and it has been ruled that a plaintiff who has proved a trespass by three of four defendants, may abandon it, and prove another implicating all four; *Roper v. Harper*, 5 *Scott*, 250. Where the plaintiff proves distinct and unconnected trespasses by different defendants, he will be made to elect on which he will proceed before the defendant opens his case; *Howard v. Newton*, 2 *Mood. & Rob.* 509.

Evidence under alia enormia.] Nothing can be given in evidence

under *alia enormia* but acts which could not be put upon the record. Therefore, in an action for trespass and false imprisonment, it was ruled that the plaintiff could not show that he had been stinted in his food; *Lowden v. Goodrick*, *Peake Ca.* 46; or that he caught the gaol fever; *Pettit v. Addington*, *Id.* 62. But he may prove intemperate language of the defendant; *Merest v. Harvey*, 5 *Taunt.* 442.

Damages.] The circumstances of time and place, when and where the insult was given, require different damages; thus it is a greater insult to be beaten upon the Royal Exchange than in a private room; *per Bathurst, J., Tullidge v. Wade*, 3 *Wils.* 19; and see *Bracegirdle v. Orford*, 2 *M. & S.* 77. And the fact of putting on the record a special plea imputing felony, which is abandoned at the trial, may be urged in aggravation; *Warwick v. Foulkes*, 12 *M. & W.* 507. Damages must be assessed jointly on co-trespassers, although the motives of all may not be equally culpable; *Elliott v. Allen*, 1 *C. B.* 18. And the criterion of damage is the injury sustained, and not the act or motives of the most guilty or the least guilty of the defendants; *Clark v. Newsam*, 1 *Ex.* 131. The costs of setting aside a judgment cannot be recovered in trespass for executing it; *Holloway v. Turner*, 6 *Q. B.* 928. See *Foxall v. Barnett*, 2 *E. & B.* 928, noticed *post*, p. 551.

Defence.

Evidence on Not guilty.] The defendant may show under Not guilty that he committed the assault by the leave and licence of the defendant; for an assault excludes consent; *Christopherson v. Bare*, 11 *Q. B.* 473. Or that the injury was unavoidable, and the conduct of the defendant entirely without fault; *Wakeman v. Robinson*, 1 *Bing.* 213; *B. N. P.* 15. But where a soldier in exercise unintentionally wounded one of his comrades, he was held liable in trespass; *Underwood v. Hewson*, 1 *Str.* 596. Where the defence was that the plaintiff slipped off the kerbstone as the defendant's cart was passing, and was run over, this was not allowed to be proved under the general issue; *Hall v. Fearnley*, 3 *Q. B.* 919. In trespass against several there can be no verdict taken for one of the defendants until the case of the plaintiff is finally closed; *Souch v. Champion*, 1 *Fost & Fin.* 495, *per Martin, B.*

Mitigation of damages.] Although the defendant cannot under the general issue give in evidence matter of defence amounting to a justification, yet he may perhaps prove any circumstance in mitigation which tends to reduce the quantum of damages, and which could not have been pleaded; 3 *Stark. Ev.* 1460; *Vin. Ab. Ev.* (1. b.) pl. 16; *Watson v. Christie*, 2 *B. & P.* 225 (note). Where the defendant had given the plaintiff in charge of a constable for felony, he was allowed to show reasonable ground of suspicion in mitigation of damages; *Chinn v. Morris, Ry. & Mood.* 424. So in trespass for false imprisonment against the captain of a ship, Buller, J., admitted under the plea of Not guilty, evidence of expressions used by the plaintiff at the time tending to create mutiny and disobedience; for everything which passed at the time is part of the transaction on which the plaintiff's action is founded, and he cannot

therefore be surprised by the evidence; *Bingham v. Garnault*, 1 *Esp. Dig. N. P.* 337; *B. N. P.* 17. But in trespass for assault and battery, plea Not guilty, where evidence was offered that the beating was given by way of punishment for misbehaviour on board the ship of which defendant was captain, and it was insisted that the conduct of the plaintiff at the time of the assault, being necessarily in evidence, proved the misbehaviour, Lord Eldon, C. J., held that as no justification was pleaded, the jury should give damages to the amount of the injury suffered, without lessening them on account of the circumstances under which it was inflicted, and the Court of Common Pleas confirmed this direction; *Watson v. Christie*, 2 *B. & P.* 224. And in trespass for assault and false imprisonment on a charge of false pretences, the plaintiff's witnesses cannot be cross-examined as to his character, or previous charges against him; *Downing v. Butcher*, 2 *Mood. & Rob.* 374.

Evidence under son assault demesne, &c.—New Assignment—Excess.] One of the most common pleas in this action is *son assault demesne*, i. e., that the plaintiff made the first assault, and that the defendant's battery was in self-defence; *Co. Lit.* 212 b. If the plaintiff joins issue on this plea, he puts the whole plea in issue, and the defendant will have to prove the prior assault by the plaintiff, which occasioned the defendant's assault; *Timothy v. Simpson*, 1 *C., M. & R.* 757. If he proves that the plaintiff lifted up his stick and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him; *B. N. P.* 18. But it is not every assault that will justify every battery; and it is matter of evidence whether the assault was proportionable to the battery. Thus, if A. strikes B., B. cannot justify drawing his sword and cutting off A.'s hand; *Cook v. Beal*, 1 *Ld. Raym.* 177. However, in such case, the plaintiff, before the Common Law Procedure Act, 1352, would not in general be allowed to take advantage of the *excess* in the violence of the defendant's assault under a general replication denying the facts relied upon as a defence, but should reply the excess. *R. v. Tebbart, Skinner*, 387. See *Franks v. Morris*, 10 *East*, 81 (n.). Thus, where the plaintiff declared that the defendant beat, bruised, and wounded him, and the defendant pleaded *son assault demesne*, to which plaintiff replied by a general traverse, &c., and it appeared in evidence that the plaintiff meeting the defendant shook his stick at him, whereupon the defendant committed a violent assault upon the plaintiff and beat him: on a verdict for the defendant, the Court held, that if the defendant had assaulted the plaintiff more violently than was necessary for self-defence, the plaintiff ought to have replied that fact specially; *Dale v. Wood*, 7 *B., Moore*, 33; *Oakes v. Wood*, 3 *M. & W.* 150. It is not always necessary to new assign. Thus where the plaintiff alleges and proves an assault and battery, and the plea alleges matter to justify both, the defendant must prove enough of his plea to justify both. *Per Curiam, Lamb v. Burnett*, 1 *C. & J.* 294. So when the declaration alleged an assault, a turning out of plaintiff's house, and imprisonment, and the plea (besides Not guilty) justified the assault and removal by a *molliter manus*, &c., and that because the plaintiff assaulted him, the defendant gave him in charge to a constable; it was held that if the plaintiff proved the imprisonment, the defendant must prove the prior assault by the plaintiff; *Reece v. Taylor*, 4

Nev. & M. 469. So, where the plaintiff complained of imprisonment and blows by the defendant, and defendant pleaded a justification of the imprisonment under process, and because the plaintiff conducted himself with violence when in custody therefore defendant struck him, it was held that the defendant was bound on the replication *de injuriâ* to prove the plaintiff's violence in order to justify the blows, and that plaintiff was not obliged to new assign; *Phillips v. Howgate*, 5 *B. & A.* 220. In one case, decided since the Common Law Procedure Act, 1852, it was held that, if, in an action of assault and battery, the defendant pleads the form of plea given by Schedule B., No. 45 of that Act, viz., that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence, and the plaintiff joins issue on such plea, the plaintiff may, without replying excess, show that although he struck the first blow, the defendant was guilty of excess; *Dean v. Taylor*, 11 *Ex.* 68. It may be doubted whether this case was rightly decided; and it will be prudent, until this decision is confirmed, to reply the excess. And see *Blunt v. Beaumont*, 2 *C.*, *M. & R.* 412.

When the plaintiff can justify his first assault, he must reply such matter of justification specially; for it cannot be given in evidence under a general replication; *King v. Phippard*, *Carth.* 281; *B.*, *N. P.* 18. Thus he cannot show that the first assault was lawfully committed by him in enforcing a public right of way which the defendant prevented him from using; *Bird v. Jones*, 7 *Q. B.* 742, 750, *per* Patteson, J. But where the defendant and another person were fighting, and the plaintiff came and took hold of the defendant by the collar in order to separate the combatants, whereupon the defendant beat the plaintiff; on *son assault demesne* pleaded, and replication *de injuriâ* generally, it was objected that the plaintiff ought to have replied the matter specially; but Legge, B., overruled the objection, observing that the evidence was not offered by way of justification, but for the purpose of showing that there was not any assault, for it was the *quo animo* that constituted an assault, which was matter to be left to a jury; *Griffin v. Parsons*, 1 *Selw. N. P.* (n.). It may be argued in favour of this case (which has been doubted), that the defendant's battery under such circumstances was not an act of self-defence, but a wanton attack on the plaintiff to prevent his amicable interference.

Where there is only one count and one assault in the declaration, and the defendant pleads *son assault demesne*, and proves an assault by the plaintiff on the day mentioned in the count, or any other day before action brought, the plaintiff will not be entitled to give evidence of another assault committed by the defendant on another day; *Douves v. Skrymsker*, 1 *Brownl.* 233; *B.*, *N. P.* 17; *Roll. Abridg. Trial* (C.). If, in fact, there are two assaults, one only of which the defendant can justify, and he pleads *son assault demesne*, the plaintiff should new assign. But if there are two counts in the declaration, the new assignment will be unnecessary; for as the defendant can only prove one justification, the plaintiff, on proving two assaults, must have a verdict; *B.*, *N. P.* 17. Yet, where there are two counts, if the defendant pleads Not guilty and a justification, and his justification alleges that the trespasses in both events are one and the same, and the plaintiff replies *de injuriâ*, &c., he (plaintiff) will be confined to proof of one trespass only; *Gale v. Dalrymple*, *Ry. & Mood.* 118; *Gibson v. Hawkey*, *Id.* 121 (n.); for, by allowing

the defendant to identify the trespasses, he has deprived himself of the advantage of his two counts. So, in some cases, though there are two counts, the plaintiff may by new assigning preclude himself from giving evidence of an act of trespass under each count. Thus where the declaration contained two counts for false imprisonment by defendants, A. and B., and the defendant pleaded Not guilty to both counts and a justification under *mesne process* to the first count; and the plaintiff, as to the justification, new assigned a retaking under the same process, after a voluntary escape (whereby he admitted that the arrest under the *mesne process* was justified), but failed to fix B. under the new assignment, it was held that the plaintiff could not recover against A. on the second count for the trespass newly assigned; for that there was but one imprisonment besides that which he had waived, and *that* one was the subject of the new assignment on which he had failed. But if the plaintiff could have proved that there were in fact two imprisonments besides that which he waived, he might have made use of the second count; *Atkinson v. Matteson*, 2 T. R. 172. It is observable, that in this case A. was the bailiff who executed the process at the suit of B., and had let plaintiff go at large without B.'s consent. The new assignment alleged such consent, which was negatived on Not guilty, and the case was in fact decided on the ground that as the retaking was before the return of the writ, A. was, at all events, justified.

Evidence on plea of justification in defence of possession.] If the defendant pleads that he was possessed of a house, &c., and that the plaintiff, without his licence, entered and disturbed him, whereupon he requested the plaintiff to depart, and, on refusal, gently lay hands upon him to turn him out; and the plaintiff joins issue on the plea; the defendant must show his possession, the plaintiff's entry and disturbance, the request to depart, and his refusal. If, in fact, the defendant was guilty of an excess of violence in resisting the plaintiff, the latter should new assign (or reply) such excess; *Weaver v. Bush*, 8 T. R. 78. If the plaintiff enters forcibly into the defendant's house, the latter may resist force by force without any previous request to depart, but the justification in such case should not be pleaded by way of *molliter manus imposuit*; the defendant should plead that the plaintiff, with a strong hand, endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance, &c., and that if any damage happened to the plaintiff, it was in defence of the possession of the close; *Com. Dig. Pleader* (3 M. 16, 17). So where the plaintiff alleged an assault, battery, and dragging through a pond, and defendant pleaded (1) Not guilty; and (2) as to the assault and battery, that plaintiff was unlawfully in the defendant's close, &c.: Held, that the second plea did not cover the dragging through the pond, and that plaintiff was entitled to a verdict for so much, if proved under the general issue and need not new assign; *Bush v. Parker*, 1 N. C. 72. Where the declaration stated an assault and battery, ill-treating and wounding with a *truncheon*, &c., and the defendant pleaded (1) Not guilty; (2) As to the assault and battery and ill-treating, a removal out of defendant's house, because the plaintiff was making a disturbance there; and there was a replication traversing in general terms, the facts relied upon as a defence: Held, that plaintiff was entitled to a verdict, and damages for the

wounding without a new assignment; but that he could not show under his replication that the defendant removed him for other and different reasons and motives than those assigned in the special plea; *Oakes v. Wood*, 2 *M. & W.* 791; 3 *M. & W.* 150. And, generally, where a defendant pleads and proves a good cause of justification, it is no answer upon a general replication, that he, in fact, alleged and acted upon another, and a bad one at the time of the trespass; *semb. per cur.* in *Baillie v. Kell*, 4 *N. C.* 650, 651.

A plea justifying the removal of the plaintiff from a boat in defendant's possession is not supported by proof, that the boat had been engaged for one day by the defendant on a pleasure excursion, the crew employed by the owner still remaining upon it; *Dean v. Hogg*, 10 *Bing.* 345. Under a replication traversing generally a plea justifying in defence of his *dwelling-house*, it is not enough for the defendant to show possession of a room as a lodger; *Monks v. Dykes*, 4 *M. & W.* 567. These variances would now probably be amended. A plea justifying the battery in defence of the carriage of the defendant, which the plaintiff was endeavouring to take, is not supported by proof that the plaintiff stopped the carriage in order to obtain the defendant's name and address; *Gaylard v. Morris*, 3 *Ex.* 695.

Where the plaintiff wrongfully holds possession of land against the will of the freeholder, who assaults him while endeavouring to regain possession, no action will lie; *Harvey v. Bridges*, 14 *M. & W.* 437; *per Parke, B.* And in *Blades v. Higgs*, 10 *C. B.*, *N. S.* 713; 30 *L. J. (C. P.)* 347, it was held to be a good defence to an action for assault, that it was committed in an attempt to take from the plaintiff dead rabbits which he had refused to give up, and which he held without the consent of the defendant's master, to whom they belonged.

Evidence on plea of raisonnable chastisement.] As to the mode of pleading this defence, see *Lamb v. Burnett*, 1 *C. & J.* 294; *Penn v. Ward*, 2 *C. M. & R.* 238; *ante*, p. 544.

Evidence of justification under process of law.] Where process is irregular merely, no action can be maintained until that process is set aside. *Per Parke, B.*, *Riddell v. Pakeman*, 2 *C. M. & R.* 30. And the party at whose suit it is issued, and his attorney may justify under it until it has been set aside; *Prentice v. Harrison*, 4 *Q. B.* 852. But it would seem that they cannot justify under void process, as where the Court has no jurisdiction; *Parsons v. Loyd*, 3 *Wils.* 341. After process has been set aside for the irregularity, the client and his attorney are liable in trespass for an arrest or the like made under it; *Codrington v. Lloyd*, 8 *Ad. & E.* 449. A *ca. sa.*, set aside on the ground that it issued for a cause of action under £20, will not justify either attorney or client; *Collett v. Foster*, 2 *H. & N.* 356, though the client had no knowledge of the issuing of the writ. And they are liable, even though the writ be not set aside, for the act makes the writ absolutely unlawful; *Brooks v. Hodgkinson*, 4 *H. & N.* 712. Whether set aside or not, the sheriff and his officer, and all persons acting under the sheriff, are in general protected by it, however irregular; *Woolley v. Clerk*, 5 *B. & A.* 746, provided it be not void on the face of it, or did not issue from a Court without jurisdiction, and provided he or they do not join in the same plea with the party; *Phillips v. Biron*, 1 *Str.* 509. If the writ is only erroneous,

a party may justify under it after it has been set aside for an act done under it before it has been set aside; *Prentice v. Harrison*, 4 Q. B. 852. Where the defendant justifies under a *ca. sa.*, and the plaintiff, admitting the writ, replies, *de injuria absque residuo*, &c., he may show that the defendant did not in fact act under the writ at all, but he cannot show the arrest to be a trespass *ab initio* in consequence of antecedent matter without a special replication; *Price v. Peek*, 1 N. C. 380. A touching by an officer through a broken pane of glass is an arrest, and justifies forcible entry and seizure of the person so arrested; *Sandon v. Jarvis*, 28 L. J. (Ex.) 156.

Certificate under 9 Geo. 4, c. 31, s. 27.] A certificate of a summary conviction or dismissal by two justices, on a complaint in respect of the same assault or battery, must be specially pleaded. Where the plea stated the giving of a certificate "forthwith" (in the words of the act), and the replication denied that the defendant had obtained such certificate, *modo et formâ*, it was held that the replication put in issue the obtaining *forthwith*, and that a certificate granted some months after dismissal, did not support the plea: Held also, that the dismissal of the complaint, as not proved, was not in itself an answer, independently of the certificate; *R. v. Robinson*, 12 Ad. & E. 672. And in *Bradshaw v. Vaughton*, 9 C. B., N. S. 103; 30 L. J. (C. P.) 93, where the defendant was summoned before a magistrate, and before the day appointed for the hearing received notice that the summons was withdrawn, but nevertheless attended before the magistrates on the appointed day, who granted him a certificate in the absence of the complainant, it was held that this certificate was a bar to a subsequent action, and that the dismissal was a "hearing" within section 27.

Action for False Imprisonment.

In the action of trespass for false imprisonment the plaintiff under the general issue must prove the fact of imprisonment, and the special damage, if any. Most of the cases under the last head of trespass for assault and battery are applicable to this action.

Action against judges, magistrates, &c.] The general rule of law as to actions of trespass against persons having a limited authority (as commissioners in bankruptcy, &c.) is plain and clear. If they do any act *beyond* the limit of their authority they thereby subject themselves to an action of trespass; but if the act done be *within* the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action; *per* Abbott, C. J., *Doswall v. Impey*, 1 B. & C. 169; *Lowther v. The Earl of Radnor*, 8 East, 113; *Mills v. Collett*, 6 Bing. 85. And even where they exceed their jurisdiction, they are not liable unless they know, or have the means of knowing, the defect of jurisdiction; *Calder v. Halket*, 3 Moore, P. C. C. 28. For harsh, undue, or oppressive exercise of a legal authority the remedy is not by action of trespass; *per cur.* *Willes v. Bridger*, 2 B. & A. 286. Where a magistrate acts without those circumstances which must concur to give him jurisdiction, as where he grants a warrant without information upon a supposed charge of felony, he is liable in trespass; *Morgan v. Hughes*, 2 T. R. 225. But if there be an information it

matters not that it is or purports to be founded on inadmissible evidence; *Cave v. Mountain*, 1 *M. & G.* 257. So where a magistrate commits a person for re-examination for an unreasonable time, he is answerable in trespass; the continuance of a person in custody after a reasonable time being a new trespass; *Davis v. Capper*, 10 *B. & C.* 28; and whether reasonable or not is a question for the jury; *Cave v. Mountain*, 1 *M. & G.* 257. Actions against justices of the peace for acts done by them in the execution of their office are regulated by stat. 11 & 12 Vict. c. 44, noticed *post*, *Actions against Justices*. Where an officer detains a person under process after bail tendered, or other ground of discharge, he is (at least where he has no notice of the facts affording ground of discharge) not liable in trespass; *Smith v. Egginton*, 7 *Ad. & E.* 167, 175. It has been stated to be a trespass to remove a prisoner to a *wrong class* in a prison; see *Cobbett v. Grey*, 4 *Ex.* 729; 19 *L. J. (Ex.)* 137; but although imprisonment in a part of the prison in which the plaintiff cannot legally be confined is *prima facie* a trespass, the case is hardly an authority to show that every irregular distribution of prisoners, under lawful commitment, is a trespass by the gaoler. *Kemp v. Neville*, 10 *C. B.*, *N. S.* 523; 31 *L. J. (C. P.)* 158, was an action against the Vice-Chancellor of the University of Cambridge. The plaintiff had been arrested, carried before the defendant, and sentenced to imprisonment for a fortnight in a private gaol called the Spinning House. No witnesses were examined at the hearing of the charge against the plaintiff, nor was any warrant of commitment prepared at the time, though it was admitted that the defendant had acted *bona fide*, and to the best of his judgment and discretion. It was also found by the jury that the defendant had not made due enquiry into the character of the plaintiff. It was held that as the charter of the University expressly gave authority to the defendant to punish by imprisonment or otherwise, he thereby became a judge of a court of record; and as no form of proceeding was defined by the charter, either for the hearing, or the determination, or the committal, an action of trespass could not be sustained for any of the judicial acts complained of. It was also held that, as the place of confinement appeared to be the accustomed place used for that purpose by the University, it must be taken to be a lawful gaol.

An action of trespass cannot be maintained against a judicial officer, as against the steward of a court baron, where his bailiff by mistake takes the goods of A. under a precept against B.; *Holroyd v. Breare*, 2 *B. & A.* 473. But if the steward of a court baron, or hundred court, instead of leaving process to be executed by the usual officer directs it to persons named by the party, from whom he takes an indemnity, he is then liable in trespass for their acts; *Bradley v. Carr*, 3 *M. & G.* 221. In *Kelly v. Lawrence*, 33 *L. J. (Ex.)* 197, *M. K.*, the plaintiff, was served by mistake with a writ against *I. W. K.*, another person. He told the process-server his name, and that he was not the man named in the writ. As the plaintiff did not appear, a judgment was obtained and a *ca. sa.* issued, under which he was arrested by virtue of a warrant from the sheriff to his officer directing him to take *I. W. K.* It was held that the sheriff was liable to an action for false imprisonment. See *Stratten v. Lawless*, 14 *Ir. Com. L. Rep.* 432. Where a county court judge issues a warrant of commitment against a person not within his jurisdiction, but whom he *bona fide* believes to be within it, not by reason of any erroneous statement of facts made before him, but in misapprehension

of the law, he is liable in trespass; *Houlden v. Smith*, 14 Q. B. 841; 19 L. J. (Q. B.) 170. The clerk of a county court is a mere ministerial officer, acting under s. 102 of the 9 & 10 Vict. c. 95, and is not liable in trespass for imprisonment under a warrant reciting a bad order; *Dews v. Ryley*, 11 C. B. 434; 20 L. J. C. B. 264. As to commissioners of sewers for the metropolitan districts, and persons acting under their directions, not being personally liable when they act *bonâ fide*, see 11 & 12 Vict. c. 112, s. 128; *Ward v. Lee*, 26 L. J. (Q. B.) 142.

See further, as to the liability of magistrates and officers, *post*, *Actions against Constables and Justices*.

Form of action with regard to private persons.] If a party acts himself in apprehending another, he is liable in trespass; but if he falsely and maliciously, and without any probable cause, puts the law in motion, it is properly the subject of an action for malicious prosecution; *Elsee v. Smith*, 1 D. & R. 103; *Barber v. Rollinson*, 1 C. & M. 330.

In *Sowell v. Champion*, 6 Ad. & E. 407, 417, it was held that the attorney who places a writ of execution in the hands of an officer, is not guilty of trespass, though he may be persuaded that the officer will execute it in a place which turns out upon inquiry to be out of his jurisdiction. But if he directs it to be executed there, or if the officer tells the attorney of his intention, and the attorney, knowing it to be illegal, acquiesces in it, it may make him a trespasser. See 1 *Saund.* 74 (n.). An attorney who obtains a warrant from a Commissioner of Bankrupts to arrest a party summoned for examination, is not liable in trespass, though it proves invalid, and though he urged the issuing of it, and gave it to the messenger to be executed; *Cooper v. Harding*, 7 Q. B. 928. And in an action of trespass, though the plaintiff's counsel opens the case as an arrest upon an illegal warrant, the plaintiff is not bound to produce the warrant, but the defendant, if he relies upon it, must produce it; *Holroyd v. Duncaster*, 3 Bing. 492. Though an arrest under a *ca. sa.* on a judgment for less than 20*l.*, yet the sheriff may justify under it; *Brooks v. Hodgkinson*, cited *ante*, p. 547. Where the defendant represented that the plaintiff was a fit person to be impressed, and in consequence he was impressed though not a fit person, it was held that the defendant was liable in trespass; *Flewster v. Royle*, 1 Camp. 187. It would seem, however, that this ruling is questionable, unless the defendant directed the impressment; if the defendant only meant that he believed the plaintiff to be a fit person, or was ready to prove it, this would hardly make him a co-trespasser; *Gosden v. Elphick*, 4 Ex. 445; *Grinham v. Willey*, 4 H. & N. 496. Where a sheriff's-officer arrests a person under two writs, and detains him after he has a right to discharge under one until he has given a bail-bond in both, yet trespass does not lie, if in fact his imprisonment was justifiable under the other; *Blessby v. Sloman*, 3 M. & W. 40. The plaintiff, solicitor in a Chancery suit, was succeeded by S., who obtained a writ of attachment against him for refusing to deliver up certain papers. The plaintiff was detained under the attachment, and unsuccessfully applied to the Master of the Rolls to procure it to be set aside. This decision was reversed by the Lords Justices, who discharged the plaintiff from custody. It was held that neither S. nor his client was liable in trespass; *Williams v. Smith*, 14 C. B., N. S., 596.

Proof of the imprisonment.] The circumstances which will amount in law to an arrest or imprisonment are stated in another place. See *ante*, *Action for malicious Arrest*; and *post*, *Actions against Constables*, &c. It is no imprisonment merely to prevent a person from going in a certain direction along the highway; *Bird v. Jones*, 7 Q. B. 742. See also *Wright v. Wilson*, 1 L. Raym. 739; and *Warner v. Riddiford*, 4 C. B. (N. S.) 180.

Damages.] If the plaintiff has been compelled by arrest under a void warrant to pay more money than is due, he is entitled to recover back the whole, and not only the overpayment; *Clark v. Woods*, 2 Ex. 395. Where the plaintiff, being unjustifiably arrested on a charge of felony, was remanded by the magistrate, the defendant who made the charge is not liable for damages for the imprisonment under the remand, for that is not his act; *Lock v. Ashton*, 12 Q. B. 871. In an action for malicious prosecution the case would have been different. Defendant by a warrant of commitment on a coroner's inquisition without jurisdiction caused the plaintiff to be imprisoned; he was bailed, and afterwards, while on bail, procured the inquisition to be quashed: Held, that in an action for such false imprisonment, plaintiff was entitled, under an allegation that he had incurred expense in procuring his discharge from custody, to recover damages for the expense of quashing the inquisition; *Fozall v. Barnett*, 2 E. & B. 928. See *ante*, 543.

Defence.

By R. 16, II. T., 1853, the plea of Not guilty operates as a denial only of the wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment. In an action for an *assault*, the defendant may show, under Not guilty, that he committed the trespasses complained of by the leave and licence of the plaintiff; *Christopherson v. Bare*, 11 Q. B. 473; *ante*, p. 542. But in an action for false imprisonment, when the trespass is admitted, no matter which goes to excuse the act of the defendant can be given in evidence as a defence under that plea; *Hall v. Fearnley*, 3 Q. B. 919. In trespass for false imprisonment, a justification under an attachment must be pleaded specially; *Bryant v. Chutton*, 1 M. & W. 408. A justification by authority of law requires a special plea, except where certain Acts of Parliament enable the party to plead generally; as 21 Jac. 1, c. 12, and other acts referred to in Part III., *post*, *Actions against Constables, Justices*, &c. It has, however, been held that where an action is brought against the judge of a superior court for issuing the process under which the act was committed, in the exercise of his judicial functions, the defence is available under the general issue; *Dicas v. Brougham*, Lord, 6 C. & P. 249; 1 *Mood. & Rob.* 309; *Hamond v. Howell*, 1 Mod. 184, *per Atkins, J.*; *Taaffe v. Downes*, 3 Moore, P. C. C. 36. See also the judgment in *Houlden v. Smith*, 14 Q. B. 841. Where the defendant, a naval officer of the Crown, acted by authority of the Crown, and in the execution of his duty, in destroying the property of a foreigner, it was held that, the act being in effect an act of the State, the defence was available under the general issue; *Buron v. Denman*, 2 Ex. 167.

A private individual is not within the above statute, 21 Jac. 1,

c. 12, s. 2, unless acting in aid of the constable; *Bond v. Rust*, 2 C. & P. 342; and he must, therefore, plead his justification specially, and prove it as stated.

In trespass for imprisonment on a charge of false pretences, the plaintiff's witnesses cannot be cross-examined on the plaintiff's character, or on previous charges against him; *Downing v. Butcher*, 2 Mood. & Rob. 374. In an action for giving the plaintiff into custody on a charge of stealing oysters from an oyster bed, it was held that the defendant could not for the purpose of proving *bona fides* on his part (which he wished to prove in order to show that he was entitled to notice of action) give evidence of a prior conviction of a third party for stealing oysters from the same bed, such conviction not having come to the knowledge of the defendant at the time of his giving the plaintiff into custody; *Thomas v. Russell*, 23 L. J. (Ex.) 233; 9 Ex. 764.

ACTION FOR TRESPASS TO PERSONAL PROPERTY.

The evidence for the plaintiff in an action of trespass for taking away or injuring personal property varies according to the nature of the issue joined between the parties.

Form of action—trespass, or case.] Before the C. L. Pro. Act, 1852, in cases of accidents occurring in driving carriages, steering ships, &c., questions frequently arose as to the proper form of action; and the distinction between trespass and case may still be open to discussion since that act, as may be seen in *Nargatt v. Nias*, 28 L. J. (Q. B.) 143. But since that act such questions rarely arise, or, if they do, the declaration would probably be considered amendable. The cases illustrating the distinction, collected in some former editions of this work, have therefore been omitted as of little or no importance.

What possession of the plaintiff is sufficient.] Any possession is sufficient property as against a third person who has no title at all; *Com. Dig. Tresp. (B. 4)*; *Nelson v. Cherrill*, 8 Bing. 316. Therefore a mere wrongdoer cannot set up the title of the real owner under a plea denying the plaintiff's property; *Carter v. Johnson*, 2 Mood. & Rob. 263. The master of a ship or boat may bring trespass for an injury to it, though not his property; *Moore v. Robinson*, 2 B. & Ad. 817. And property is sufficient without possession; for the right of property draws to it the possession. Therefore where goods are taken after the owner's death and before probate granted to his executor, the latter, after probate granted, may maintain trespass; *Com. Dig. Tresp. (B. 4)*; *Smith v. Milles*, 1 T. R. 480; *Dunwich v. Sterry*, 1 B. & Ad. 831. So the lord of a manor may maintain trespass for an estray or wreck before seizure by him; *ibid.* So the vendee of goods, when the property passes, may bring it, though he never had possession; *Thomas v. Phillips*, 7 C. & P. 573. So a person who has leased his land for years without any reservation of the timber may have during the continuance of the term trespass for

taking and removing goods against a third person who wrongfully cuts down the timber, and carries it away; *Ward v. Andrews*, 2 Chitty's Rep. 636. But the lessee cannot maintain an action for timber severed from the freehold; *Evans v. Evans*, 2 Camp. 491. If one lends oxen to another to plough his lands, and he kills them, the owner may have trespass or trespass on the case at his election; *Co. Lit.* 71. As to a bailor maintaining an action against a vendee when the bailee sells the goods, see *Cooper v. Willomatt*, 1 C. B. 672, noticed *post*, p. 590. Lord Abinger was of opinion that where the plaintiff left a certificate of his character with the defendant, he could not maintain trespass for an injury to it while in the defendant's custody; *Taylor v. Rowan*, 1 Mood. & Rob. 491. But, generally, if the owner of a chattel gratuitously permits another to use it, he may maintain trespass for an injury done to it by a third person while so used; *Lotan v. Cross*, 2 Camp. 464; see *White v. Morris*, 11 C. B. 1015. •An auctioneer, in possession of a house for the purpose of selling fixtures which are to be removed by the buyer and paid for on removal, cannot bring trespass *de bonis asportatis* against the buyer if he takes them without payment; *Davis v. Danks*, 3 Ex. 435.

Trespass does not lie for taking animals *feræ naturæ*, unless reclaimed or privileged *ratione loci*; *Buc. Ab. Tresp. (E.)* Nor will it lie for fish which the plaintiff had nearly secured in his net at sea, but was prevented by the defendant from wholly enclosing; *Young v. Hichens*, 6 Q. B. 606. It lies for taking privileged goods for a distress; as tools, when there is enough without them; *Nargatt v. Nias*, 1 E. & E. 439; 28 L. J. (Q. B.) 143. In *Attack v. Bramwell*, 3 B. & S. 520; 32 L. J. (Q. B.) 146, the defendant in order to distrain, entered the plaintiff's premises by breaking in at a fastened window. It was held that the distress was altogether void, and the defendant a trespasser; and see *Keen v. Priest*, cited *ante*, p. 538.

Evidence to connect defendant with the trespass.—Relation.] Though a party is not liable for the act of a stranger, as for the act of the postilion driving him in a hired carriage, &c., yet where the defendant sat on the box, and was heard to give directions, this was held evidence of a joint trespass in a case of collision; *M'Laughlin v. Pryor*, 4 M. & G. 48. Trespass against A. and B. for taking plaintiff's gun. Plaintiff proved that A. took it, and afterwards delivered it to B., who refused to give it up to the plaintiff: Held that this did not make B. a joint trespasser by relation, unless it was at first taken for B.'s use or benefit; *Wilson v. Barker*, 4 B. & Ad. 614; see *Wilson v. Tumman*, 6 M. & G. 236. If the sheriff's officer, in executing a fi. fa. seizes the goods of a stranger, the execution creditor does not make himself liable by accepting an interpleader issue to try the title to the goods; *Woollen v. Wright*, 1 H. & C. 554; 31 L. J. (Ex.) 513. A landlord, whose bailiff has wrongfully distrained fixtures, is not liable in trespass, although he has received the proceeds in ignorance of the illegal act; *Freeman v. Rosher*, 13 Q. B. 780. But where the broker takes goods which it was intended that he should take, the landlord is liable for any irregularity in the conduct of the distress; *Huseler v. Lemoyne*, 5 C. B., N. S. 530; 28 L. J. (C. B.) 103. For other cases of relation, see further, *post*, pp. 563-4, and *Actions against Sheriffs*, Part III. A pound-keeper is not liable for receiving goods wrongfully distrained, unless he exceeds his duty or assents to the trespass; *Badkin v. Powell*, *Coup.* 478. But where a servant, authorised to distrain cattle, damage feasant,

drives cattle off the plaintiff's land into his master's, and then distrains them, the master is not liable in trespass; *Lyons v. Martin*, 8 *Ad. & E.* 512. Trespass lies against a corporation for the act of an agent in the course of his duty; as where he distrains barges for toll claimed to be due; *Maund v. Monmouth Canal Co.*, 4 *M. & G.* 452. In *Goff v. The Great Northern Railway*, 30 *L. J. (Q. B.)* 148, the plaintiff had taken a return ticket from the London station of the defendants' railway, and at the end of the return journey by mistake gave up an old half ticket. He was taken to the ticket office, where he explained the mistake, and then went with the collector to the inspector of police, who took him to the superintendent of the line. The superintendent after hearing the matter, directed a constable to take the plaintiff to the station-house. It was held that there was evidence that the superintendent acted under the authority of the company, and that they were liable in trespass; see *post*, *Actions by and against Companies*.

Damages.] See *post*, p. 555.

Defence.

Evidence under the general issue.] By Rules, *H. T.* 1853, the plea of Not guilty operates as a denial of the defendant having committed the wrong alleged by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein. In trespass for taking plaintiff's goods, the defendant, having pleaded only not guilty, cannot, even in mitigation of damages, give in evidence a repayment by him, after action brought, of money produced by the sale of the goods; *Rundle v. Little*, 6 *Q. B.* 174.

In trespass for taking goods, chattels, and effects, it is no variance to show that they were fixtures; *Pitt v. Shew*, 4 *B. & A.* 206. Nor do fixtures, easily removable without injury to the freehold, necessarily become part of the freehold, but the jury may find that they are the property of a person other than the freeholder; as in the case of hatches put into a stream by his consent for the use of another; *Wood v. Hewett*, 8 *Q. B.* 913; or a door hung on hooks; *Mant v. Collins*, *Ibid.* 916 (*n*); or a pile driven into the bed of a public navigable river for the private convenience of the owner of a wharf; *Lancaster v. Eve*, 5 *C. B. (N. S.)* 717; 28 *L. J. (C. P.)* 235. Locking up the plaintiff's goods in a room which he has occupied, and refusing to let him have them till the rent is paid, is not an act for which trespass for taking and removing goods lies; *Hartley v. Moxham*, 3 *Q. B.* 701. So where a landlord, after a rightful seizure for distress and impounding, accepts the rent due and expenses, but refuses to cause the goods to be re-delivered and afterwards sells them; *West v. Nibbs*, 4 *C. B.* 172.

In trespass for taking goods as a distress for rent, the defendant may give his justification in evidence under the general issue, by stat. 11 Geo. 2, c. 19, s. 21; but where the goods have been clandestinely removed from the premises, and afterwards seized by the defendant, the defence must be specially pleaded; *Vaughan v. Davis*, 1 *Esp.* 257; *Furneaux v. Fotherby*, 4 *Camp.* 136.

Generally, the defendant cannot justify under the process of a court without a special plea; *Coomer v. Latham*, 16 *M. & W.* 713. See further *ante*, p. 551.

Evidence on a plea denying property.] In trespass *de bonis asportatis*, a plea denying that the goods are the plaintiff's, puts in issue the property in, as well as the possession of, the goods. *Harrison v. Dixon*, 12 M. & W. 142; 1 D. & L. 454; *Jeffries v. The Great Western R. C.*, 5 E. & B. 802; 25 L. J. (Q. B.) 107. And a lien may be given in evidence under that plea; *Richards v. Symonds*, 8 Q. B. 90. Where, in trespass for taking plaintiff's goods, the plaintiff proved at the trial, that the sheriff had seized the goods, being the property of B., under an execution against B., and had sold them to plaintiff; it was held, that defendant might show, under a plea that the goods were not the plaintiff's, that the sale was fraudulent as against creditors, and that he (the defendant) had taken the goods under an execution against B., which was the alleged trespass. *Ashby v. Minnitt*, 8 Ad. & E. 121. See *Williams v. Roberts*, 7 Ex. 618.

In trespass for several articles described in the declaration, if the jury find that some belong to the plaintiff and some to the defendant, the verdict must be entered distributively. *Routledge v. Abbott*, 8 Ad. & E. 592; and this without resort to the C. L. Pro. Act, 1852, s. 75; as to which see *post*, p. 573.

Evidence, on issue joined on a plea of justification.] Where, before the C. L. Pro. Act, 1852, in trespass for taking goods, the defendant justified under a *fi. fa.*, and the plaintiff replied (admitting the writ), a general traverse of the statements contained in the plea, he might show that the acts of the defendant were not really done under or in execution of the writ, but for another purpose, and under another claim, and that the writ and the proceedings under it were a mere contrivance to get possession of the goods; *Lucas v. Nockells*, 10 Bing. 157; see *ante*, *Price v. Peek*, 1 N. C. 380, *ante*, p. 548. In trespass for taking goods, chattels, and effects, defendant pleaded Not guilty; and, as to goods and chattels, a distress for rent; and plaintiff denied the tenancy: Held, that the plea covered the declaration, and that the plaintiff could not show at the trial that the defendant had taken some fixtures; but should have replied that fact; *Twigg v. Potts*, 1 C. M. & R. 89.

Where the plaintiff declared for taking his cattle, and the defendant pleaded possession of a close called H., in which they were damage feasant, and plaintiff denied the possession of the said close in which, &c.; it was held not enough for the defendant to show possession of a close called H., without also showing it to be the close in which the cattle were trespassing; *Bond v. Downton*, 2 Ad. & E. 26. On a plea of distress damage feasant, where the question is whether a reasonable time elapsed to fetch the cattle after notice, it is a question for the jury, and not for the judge, to say whether it was reasonable "under all the circumstances;" *Goodwyn v. Cheveley*, 4 H. & N. 631; 28 L. J. (Ex.) 298.

Damages.] In trespass for taking goods under process in a place out of the jurisdiction of the court, the plaintiff is entitled to the value of the goods, and not merely to the damage sustained by reason of the taking in a wrong place; *Sowell v. Champion*, 6 Ad. & E. 407. In trespass for destroying a picture, the defendant may show under Not guilty that it was a scandalous libel; and the plaintiff shall only recover the value of the canvas and paint; *Du Bost v. Beresford*, 2 Camp. 511; and *quære*, if he be entitled to recover at all? *Fores*

v. Johnes, 4 *Esp.* 97. Where a landlord distrains privileged goods, and the tenant thereupon pays the rent, he cannot recover in trespass against the landlord more than the value of the goods so taken; *Harvey v. Pocock*, 11 *M. & W.* 740. A stranger, whose sheep are on a tenant's land, may bring trespass against the lord for distraining them, when there are other distrainable goods or cattle on the land, and may recover the full value of the sheep; *Keen v. Priest*, 4 *H. & N.* 236; 28 *L. J. (Ex.)* 157. In trespass for taking the plaintiff's goods under colour of a judgment, the plaintiff cannot recover as special damage (though laid in the declaration) the costs of setting aside the judgment; *Holloway v. Turner*, 6 *Q. B.* 928; but see *Foxhall v. Barnett*, cited *ante*, p. 551. Repayment of the proceeds of goods wrongfully taken, *after action brought*, is not evidence in mitigation; *Rundle v. Little*, 6 *Q. B.* 174. A vendor who retakes goods sold by him to the plaintiff is liable to the full value, and cannot reduce damages by setting off the unpaid price; *Gillard v. Brittan*, 8 *M. & W.* 575. The sheriff wrongfully seized the goods of the plaintiff on a writ against A.; after seizure, a water company distrained them for rates due from A., and the plaintiff thereupon paid the rates to get back the goods: Held that A. could recover, as special damage, in trespass against the sheriff, the money paid to get them back; *Keene v. Dilke*, 4 *Ex.* 388. In *Walker v. Olding*, 1 *H. & C.* 621; 32 *L. J. (Ex.)* 142, the defendant wrongfully took in execution the plaintiff's goods. The sheriff obtained an interpleader order, in pursuance of which the goods were sold, and the proceeds paid into court. The interpleader issue was decided in the plaintiff's favour. Held, that he could not recover from the defendant damages incurred since the date of the order. In *Brierly v. Kendall*, 17 *Q. B.* 937, where an assignment had been made to secure a debt, and the assignees prematurely took possession of the goods; it was held that, under the circumstances, the assignor was only entitled to recover the value of his limited interest in the goods; and see *Toms v. Wilson*, 32 *L. J. (Q. B.)* 382.

ACTION FOR TRESPASS TO LAND.

The evidence in this action varies according to the terms of the issue joined between the parties.

Evidence of possession.] In order to maintain this action the plaintiff ought to have possession, actual or constructive; *Topham v. Dent*, 6 *Bing.* 516. Any possession is a legal possession as against a wrongdoer; *Graham v. Peat*, 1 *East*, 246; *Oughton v. Seppings*, 1 *B. & A.* 241. A possession by the incumbent of a chapel and vestry erected under a Church Building Act, and vested in trustees, is sufficient to justify him in removing a trespasser from them; *Jackson v. Courtenay*, 8 *E. & B.* 8; 27 *L. J. (Q. B.)* 37. But a person, who obtains possession by a trespass, cannot maintain this action against the person whom he has dispossessed, and who forcibly reinstates himself; and this state of facts may be shown under a denial of the property in the plaintiff; *Browne v. Dawson*, 12 *Ad. & E.* 624. A person occupying crown lands under a parol licence has such a possession as entitles him to maintain trespass against a wrongdoer; *Harper v. Charlesworth*, 4 *B. & C.* 574. So where overseers enclose waste

land without consent of the lord of the manor, they may bring trespass against a mere stranger; *Matson v. Cook*, 4 N. C. 392. So if a tenant holds over after the expiration of his lease, or incurs a forfeiture by committing waste or otherwise, yet if the landlord permits him to continue in actual possession he may maintain trespass against any person entering upon him, and not having a better title than himself; *per Littledale, J., Harper v. Charlesworth*, 4 B. & C. 594; *Com. Dig. Trespass (B. 1)*. So the outgoing tenant, who is entitled by custom to have and to cut certain growing crops, and is obliged to keep up the fences until the cutting, has such a possession as to maintain or resist an action of trespass *quare clausum fregit*; *Griffiths v. Puleston*, 13 M. & W. 358. Persons who have merely a right to enter upon the *locus in quo* for the purpose of doing certain acts, cannot maintain trespass. Therefore commissioners of sewers under the statute of 23 Hen. 8, c. 5, have not such a possession of their works as will enable them to maintain trespass for breaking down a wall, or dam erected by them across a navigable river; *Newcastle, Duke of, v. Clark*, 8 Taunt. 602. But, where certain private individuals contracted with the proprietors of a navigation to form a canal, and erected a dam of earth and wood upon a close with the permission of the owner for the purpose of completing their work, it was held that they had a sufficient possession to support trespass against a wrongdoer; *Dyson v. Collick*, 5 B. & A. 603. An auctioneer, who enters into possession of a house for the purpose of selling fixtures, cannot maintain trespass *q. c. f.*; *per cur.* in *Davis v. Danks*, 3 Ex. 435. So persons, who are merely authorised by parliament to make navigable a certain river, have no interest in the soil of a bank formed of the earth excavated from the channel of the river, so as to entitle them to support trespass for an injury to such bank; *Hollis v. Goldfinch*, 1 B. & C. 205. Plaintiff held a close by lease under tenant for life. Before the expiration of it by lapse of time, the tenant for life died. The plaintiff had before then locked the close up and left it unoccupied, but did not surrender it. Afterwards he took a fresh lease of the remainder man; but before he had entered under it the defendant committed a trespass: Held, that the plaintiff could not bring an action of trespass; for his possession, in the absence of some act on his part, could not be presumed after it had ceased to be lawful, and he had not actually entered under the new lease; *Brown v. Notley*, 3 Ex. 219. The plaintiff A., being owner of a house, agreed to a partnership with defendant B., to be carried on in part of A.'s house. The firm was to be charged with rent. The partnership continued from August to December, when it was ended by notice from A. to B.: Held, that A. then had such an exclusive possession as entitled him to sue B. in trespass for entering afterwards; for B.'s interest ended with his partnership; *Benham v. Gray*, 5 C. B. 138. In *White v. Bailey*, 10 C. B., N. S. 227; 30 L. J. (C. P.) 253, the plaintiff had been engaged by the defendants, a Swedenborgian society, as their manager, storekeeper, and agent. In pursuance of a resolution of the society that he should have premises rent and tax free, he became the occupier of a house of which the society were lessees, and was allowed to carry on a retail trade there, and to paint his name over the door of the shop. The society gave the plaintiff notice immediately to quit the premises, and took possession of them. It was held that there was no evidence for the jury of a trespass by the defendants. The occasional possession of the key of a chapel in order to preach

there is not sufficient to support trespass *quare clausum fregit*; *Revett v. Brown*, 5 Bing. 7. In *Griffin v. Deighton*, 5 B. & S. 108; 33 L. J. (Q. B.) 181, it was held that the plaintiff, the lay rector of a church, could not maintain trespass against the vicar for removing a lock placed by the rector upon a door leading into the chancel.

Where the owner of the soil has not divested himself of the exclusive possession of it, he may still bring this action. Thus the owner of the soil of a street dedicated to the public, may maintain trespass for an injury to the freehold; *Lade v. Shepherd*, 2 Stra. 1004; see *Every v. Smith*, 26 L. J. (Ex.) 344; so also the owner of a market; *Mayor of Northampton v. Ward*, 1 Wils. 107. And even where another party has exclusive possession of the surface for certain months for the purpose of pasture, or (*ut semble*) has *primâ vestura*, yet the freeholder retains sufficient possession of the under-soil to support trespass for digging holes; but not for riding over it; *Cox v. Glue*, 5 C. B. 533. The declaration in this last case had two counts, and the plaintiff recovered on the one which alleged an entering on the soil of the plaintiff, viz., the "soil of a certain close:" but *semb. per* Maule, J., "close" may include surface and subsoil, and a trespass on either of them may entitle the freeholder to recover, if in possession of that which was trespassed upon. The jury expressly found that the plaintiff continued in possession of the subsoil. In *Lonsdale v. Rigg*, 1 H. & N. 924; 26 L. J. (Ex.) 196, it was held that the lord of a manor might bring an action of trespass against the owner of a cattle-gate for taking and killing grouse; the "cattle-gate" there appearing to be an hereditary, customary, tenement holden of the lord by fines for admittance, quit-rents, and suit of court, but entitling to rights only in the nature of commonable rights.

Evidence of possession—property in the soil not necessary.] We have seen that an interest in the soil, without an exclusive use of it, is enough to support trespass. On the other hand exclusive possession, without property or interest in the soil, is also sufficient for this action. Thus one who has the herbage (*Co. Litt.* 4, b; *Welden v. Bridgewater*, Cro. Eliz. 421; *Vin. Ab. (Trespass)*); or the vesture or pasture of a close (*Co. Litt.* 4, b; *Parker v. Staniland*, 11 East, 366; *Evans v. Roberts*, 5 B. & C. 837), may maintain trespass. So a person entitled to the exclusive enjoyment of a crop growing on land during the proper period of its full growth, and until it be cut and carried away, may, in respect of such exclusive possession, maintain trespass; *per* Lord Ellenborough, C. J., *Crosby v. Wadsworth*, 6 East, 609; *Tompkinson v. Russell*, 9 Price, 287. So where a person has an exclusive right of digging turves; *Wilson v. Mackreth*, 3 Burr. 1824; or a grant of underwood; *Hoe v. Taylor*, Cro. Eliz. 413. So the owner of a free warren *in alieno solo*, for breaking his free warren; *Dacre, Lord, v. Tebb*, 2 W. Bl. 1151; *Carnarvon, Lord, v. Villebois*, 13 M. & W. 313; but not for breaking his close; *Y. B.* 5 Hen. 7. 10, cited *Welden v. Bridgewater*, Cro. Eliz. 421. The owner of a "several" fishery, even in the soil of another, may maintain trespass, though no fish are taken; *Holford v. Bailey*, 8 Q. B. 1000. But not the owner of a "sole and exclusive" fishery, except in cases where those words import a several fishery, which after verdict they will be assumed to do. *Ib.* on error, 13 Q. B. 426. And see *Marshall v. The Ulleswater Steam Navigation Company*, 3 B. & S. 732; 32 L. J. (Q. B.) 139. Where a meadow is divided

annually amongst certain persons by lot, after their several portions are allotted each has an exclusive possession and may maintain trespass; *Welden v. Bridgewater*, *suprà*; *Co. Litt.* 4, a, 48; *Cox v. Glue*, 5 C. B. 533, 552. A copyholder has such a possession of the mines under his land as to maintain trespass for taking coals, though there be no entry on, or injury to, the surface; *Lewis v. Branthwaite*, 2 B. & Ad. 437.

Evidence of possession—actual and immediate.] It must appear that the plaintiff was in the actual and immediate possession of the *locus in quo* when the trespass was committed. Therefore an heir before entry, who has only a seisin in law, cannot maintain trespass; *Com. Dig. Trespass* (B. 3). Nor a bargainee before entry; *Ibid. Barker v. Keat*, 2 Mod. 251; but see *Anon. Cro. Eliz.* 46. Neither the conusee of a fine (*Berry v. Goodman*, 2 Leon. 147, *Arg.*), nor a devisee (*Anon.* 2 Mod. 7; *Geary v. Bearcroft, Bridgman's Judgm.* 495), nor a surrenderee (*Br. Ab. Surr.* 50), nor a reversioner after the expiration of an estate for life or years (*Keilw.* 163, a; *Com. Dig. Trespass* B. 3), nor a lessee for years (*Keilw.* 163, a; *Bac. Ab. Leases, M.*), can bring trespass before entry. Therefore a mortgagee by demise for years cannot bring trespass against a stranger before entry; *Wheeler v. Montefiore*, 2 Q. B. 133; *Turner v. Cameron's Coalbrook Co.*, 5 Ex. 932, nor a parson before induction; *Hare v. Bickley, Plowd.* 258. But after induction he may maintain trespass for an injury to the glebe lands, although he has not made an actual entry upon the part on which the trespass was committed; for the act of induction puts him into possession of part for the whole; *Bulwer v. Bulwer*, 2 B. & A. 470. On the determination of a lease at will by the death of the lessee, the lessor may maintain trespass before entry; *Co. Litt.* 62, b; *Geary v. Bearcroft*, 1 Lev. 202. And there are authorities to show that, where land is let at will and a trespass is done on the land, both the lessor and lessee may maintain trespass; *per Holroyd, J., Harper v. Charlesworth*, 4 B. & C. 583; 2 Roll. Ab. 551, l. 49; *Com. Dig. Tresp.* (B. 2); *Geary v. Bearcroft, Bridgman's Judgm.* 496 (n). If a lessee at will commits voluntary waste, the lessor may immediately maintain trespass against him; for the committing of waste amounts to a determination of the will; *Lady Shrewsbury's case*, 5 Co. Rep. 13, b; *Co. Litt.* 57, a. Where trees are excepted in a lease, the lessor may maintain trespass *quare clausum fregit* against any one who cuts them down; for by the exception of the trees, the close on which they grow is excepted also; *Ashmead v. Ranger*, 1 Ld. Raym. 552; *Rolls v. Rock*, 2 Selw. N. P. 1342. Actual possession at the time of the trespass done is sufficient; it is not necessary that the plaintiff should be in possession at the time of action brought; 2 Roll. Ab. 569, l. 20.

Evidence of possession by relation.] Although to maintain this action the plaintiff must have the immediate possession at the time of the injury, yet there are some cases in which, by the doctrine of relation, the plaintiff is allowed to recover for trespasses committed at a period when he was not in fact in possession. Thus a disseisee, who re-enters, revests the possession in himself *ab initio*, and may have trespass against the disseisor or a stranger for any act of trespass committed between the disseisin and the re-entry; 2 Roll. Ab. 550, l. 7, 554, l. 39; *Co. Litt.* 257, a; or against the disseisor 'for

continuing in possession; *Butcher v. Butcher*, 7 B. & C. 399; *Litchfield v. Ready*, 5 Ex. 939. The entry of an heir relates back to the time of the right of entry, so as to support an action against a wrongdoer for a trespass committed after the accrual of the right and before actual entry; *Barnett v. Guildford, Earl of*, 11 Ex. 19; 24 L. J. (Ex.) 281. An administrator may sue for a trespass done before the grant of administration; *Tharpe v. Stallwood*, 5 M. & G. 760. The action of trespass for mesne profits affords another instance of the doctrine of relation. See that title, *post*.

By stat. 6 Anne, c. 18, guardians, trustees, husbands seized *jure uxoris*, and tenants *pur autre vie*, holding over without consent, are declared trespassers, and made liable to the parties entitled for the profits from the expiration of their interests.

Evidence of the ownership of wastes, rivers, walls, ditches, &c.] The waste land adjoining to a highway or occupation road is presumed to belong to the owner of the adjoining inclosed land, as the road or way itself *usque ad medium filum* does. But the presumption may be rebutted by acts of ownership, &c.; *Steel v. Prickett*, 2 Stark. 468; *Holmes v. Bellingham*, 7 C. B., N. S. 329; 29 L. J. (C. P.) 132. Thus after a turnpike road and two pieces of land adjoining had been separately numbered in certain deposited plans, a conveyance of the two pieces of land specified their numbers, but omitted all mention of the number which had been applied to the road, it was held that there was a presumption that the latter had not been included in the conveyance; *Salisbury v. Great Northern Railway Company*, 5 C. B., N. S. 174. And the rule is the same whether the adjoining land be freehold or copyhold; *Doe v. Pearsey*, 7 B. & C. 304; *Doe v. Kemp*, 2 N. C. 102; *Cooke v. Green*, 11 Price, 736. But where land adjoining a highway was conveyed as all the land coloured red on a plan annexed to the conveyance, and the pieces coloured red made up the quantity conveyed exclusive of the road; it was held, that as the general words were annexed to the description of the parcels, and there was nothing to show that the highway was excluded, a moiety of it must be taken to have passed; *Berridge v. Ward*, 10 C. B., N. S. 400; 30 L. J. (C. P.) 218. If the strip be contiguous to, or communicate with, open commons or larger portions of open land, the presumption is either rebutted or considerably narrowed; for then the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them; *Grose v. West*, 7 Taunt. 41; *Headlam v. Hedley, Holt*, N. P. C. 463. And where the strip was claimed as part of the adjacent glebe, proof of inclosure of other portions of the same strip under titles adverse to the rector, was held admissible to rebut the presumption; *Doe v. Hampson*, 4 C. B. 267. Upon a question whether a piece of waste land, lying between a highway and the plaintiff's inclosed land, belonged to the plaintiff or to the lord of the manor, it was held, that grants by the lord of other slips of waste land on either side of the same road, abutting on inclosed lands of the lord himself and of other persons, were admissible for the purpose of showing that the *locus in quo* was part of the waste of the manor, without showing continuity; *Dendy v. Simpson*, 18 C. B. 831. If two lessees of the same lord of the manor lay claim to the strip as included in their respective demises, no presumption is said to exist in favour of the lessee whose land it adjoins; *White v. Hill*, 6 Q. B. 487. And where a road through common land is set out by commis-

sioners under an Inclosure Act, it is doubtful whether the usual presumption as to the right of the owners of the adjoining land applies; *R. v. Edmonton*, 1 *Mood. & Rob.* 32; see also *R. v. Wright*, 3 *B. & Ad.* 681. And it seems that where the herbage of a road is vested by the General Inclosure Act (41 Geo. 3, c. 109) in the owners of the adjacent allotments, no presumption arises that the soil itself belongs to them; *R. v. Hatfield*, 4 *Ad. & E.* 156.

Fresh rivers of common right belong to the owners of the soil adjacent, so that the owners of each side are presumed to have the property of the soil and the right of fishing *usque ad filum aquæ*. A crown grant of land describing it as bounded by a (freshwater) creek or river, may impliedly include half the soil of it, and presumably does include it *ad filum aquæ*; *Lord v. City of Sydney*, 12 *Moo. P. C. C.* 473. If a man is owner of the land on both sides, by common presumption he is owner of the whole river; *Hale, de Jure Maris*, *Harg. Law Tracts*, 5. Where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them; *R. v. Landulph*, 1 *Mood. & Rob.* 393. The sea-shore is presumably extra-parochial; *Q. v. Musson*, 8 *E. & B.* 900; 27 *L. J., M. C.* 100. Proof that the annual parish perambulations proceeded along the banks and shore of a public navigable river, the neighbouring parishes along the same shore having always included the *medium filum* in their perambulations, is evidence that the *medium filum* is the boundary throughout; *McCannon v. Sinclair* (case of *Rotherhithe*), 28 *L. J. (Q. B.)* 360.

A wall has been said to differ in point of ownership from a bank; being an artificial edifice, the property is presumed to be in him who is bound to repair it; while the property in a bank follows that of the soil from which it is constructed; *Cullis on Sewers*, 74, 4th ed.; *Newcastle, Duke of, v. Clark*, 8 *Taunt.* 602. If two tenants in severalty build a party wall, one half of the thickness of which stands on the land of each (contributed under the Building Act, 14 Geo. 3, c. 78), the wall ensues the nature of the land, and the owners of the lands are not tenants in common of the wall, but tenants of divided moieties; *Matts v. Hawkins*, 5 *Taunt.* 20; see *Murly v. M'Dermott*, 8 *Ad. & E.* 138. But in a case to which the Building Act does not apply, and where there is no distinct proof of exclusive property as to the whole or part, the common user of a wall separating adjoining lands belonging to different owners is *primâ facie* evidence that the wall, and the land on which it stands, belong to the owners of the adjoining lands in equal undivided moieties as tenants in common; *Cubitt v. Porter*, 8 *B. & C.* 257. Where no such liability or act of ownership is shown, a wall, as well as a bank, presumably ensues the property of the soil.

Where A. licensed B. to build a bridge on his (A.'s) land, and B. covenanted to repair it, it was held that the property in the materials of the bridge, when built and dedicated to the public, continued in B., subject to the right of passage by the public; and that, when severed and taken away by a wrongdoer, B. might obtain trespass for the asportation; *Harrison v. Parker*, 6 *East*, 154; see *Spooner v. Brewster*, 3 *Bing.* 139.

The rule with regard to the presumptive ownership of hedges and ditches has been thus stated: Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be

shown by proving acts of ownership; *Guy v. West*, 2 *Schw. N. P.* 1342, 9th ed. No man making a ditch can cut into his neighbour's soil, but usually he cuts to the extremity of his own land; he is, of course, bound to throw the soil which he digs out, upon his own land; therefore, if he afterwards cuts beyond the edge of the ditch, he cuts into his neighbour's land, and is a trespasser; *Vowles v. Miller*, 3 *Taunt.* 138. The land which constitutes the ditch is therefore part of the close on the other side of the bank. *Per Holroyd, J.*, *Doe v. Pearsey*, 7 *B. & C.* 308.

It is said that if A. plants a tree at the extreme limit of his own land, and it extends its roots into the land of B., A. and B. are tenants in common of the tree; but if all the roots grow in A.'s land though the boughs shadow the land of B., the property is in A. *Per Holt, C. J.*, *Waterman v. Soper*, 1 *Ld. Raym.* 737; *B. N. P.* 85; 2 *Roll. Rep.* 255. According to another authority, if a tree grows in A.'s close, and its roots in B.'s, yet the body or the main part of the tree being in the soil of A., all the residue of the tree belongs to him; *Masters v. Pollie*, 2 *Roll. Rep.* 141. In a like case, *Littledale, J.*, ruled, that the tree belongs to him in whose soil it was first sown or planted; *Holder v. Coates*, *Mood. & M.* 112; and see *note, Ibid.* The property in trees is in the landlord; the property in bushes, even where they have been cut down by a stranger, in the tenant; therefore the landlord cannot bring trespass *de bonis*, &c., to recover the cuttings of the latter; *Berriman v. Peacock*, 9 *Bing.* 384.

Acts of ownership.] The proof of ownership by documentary and other assertions of right is treated of, *ante*, pp. 32-50. Cutting down trees is evidence of right to the soil; *Vin. Ab. Ev. T. b.* 102. A perambulation made by the lord is evidence of the limits of a manor, and it is not necessary that any person against whom it operates should be present at or know of it; *Woolway v. Rowe*, 1 *Ad. & E.* 114. Generally any act done upon the land is admissible evidence; *ib.* 117. And such acts are not evidence on the ground of acquiescence, but as showing possession. *Per Parke, B.*, in *Jones v. Williams*, 2 *M. & W.* 328. The acts of tenants may be evidence against their reversioners, where their declarations are not; *Tickle v. Brown*, 4 *Ad. & E.* 369. And acts in one place may be evidence of ownership in another, where there is a common character of locality: thus, cutting timber in a wood or close is evidence of title to the whole wood or close; so of a continuous hedge, or different parts of the bed of a river, &c.; *Jones v. Williams*, 2 *M. & W.* 326.

Where the surface and the minerals are several inheritances (as is common in mining districts), the user or ownership of one is no evidence of property in the other; *Rowe v. Grenfel, Ry. & Mood.* 396; *Rich v. Johnson*, 2 *Str.* 1142; *Hodgkinson v. Fletcher*, 3 *Doug.* 31. Working in one part of a mine is possession of the whole; *Wild v. Holt*, 9 *M. & W.* 672. So, working under part of a demised tract of land is evidence of the possession of mines under the whole tract; *Taylor v. Parry*, 1 *M. & G.* 604.

Evidence of the situation of the premises—Abutments, &c.] The venue in this action is local; therefore trespass will not lie for breaking and entering a house out of the realm; *Doulson v. Matthews*, 4 *T. R.* 503. It was formerly not necessary to name or specify the abutments

of the *locus in quo*. But by *R. 18, H. T., 1853*, "In actions of trespass to land, the close or place in which, &c., must be designated in the declaration by name, or abutments, or other description; in failure whereof, the plaintiff may be ordered to amend, with costs, or give such particulars as the court or a judge may think reasonable;" *Beaufort v. Vivian*, 7 *Ex.* 580. This rule is to prevent the necessity of a new assignment, which might otherwise, sometimes, be necessary after a plea of *liberum tenementum*; *North v. Ingamells*, 9 *M. & W.* 249, 1 *Dowl. N. S.* 151. It is therefore sufficient to give such a description of the close that the defendant may know what close is intended. The close should be described as it stood at the time of the trespass; *Humphrey v. London and North-Western Railway Company*, 7 *Ex.* 325. A description by two abutments is sufficient; *North v. Ingamells*, 9 *M. & W.* 249; 1 *Dowl. N. S.* 151. Where the owner of a close, called Hall Close, added a small slip of land adjoining a public road to it, and, in an action for a trespass committed upon this slip of land a year afterwards, in his declaration described the *locus in quo* as Hall Close, it was held that the description was sufficient; *Brownlow v. Tomlinson*, 1 *M. & G.* 484. But the rule is not complied with by describing the close as abutting towards (instead of upon) another close; *Lempriere v. Humphreys*, 3 *Ad. & E.* 181; 4 *N. & M.* 638. See *Webber v. Richards*, 1 *Q. B.* 439. The plaintiff, though he will not be defeated on the trial by a minute variance in one out of several particulars in the description of the abutments, must show that the close in which the trespass was committed is faithfully described in substance; *Webber v. Richards*, *suprà*. But, in case of a misdescription, an amendment will be allowed at *Nisi Prius* on the merits.

Evidence of trespass committed by defendant.] If the landlord, who has let apartments to the plaintiff, excludes him from the house and removes his name from the outer door, this is evidence of a trespass committed by breaking and entering the apartments; *Lane v. Dixon*, 3 *C. B.* 776.

Trespass lies against the party who did the trespass and all aiding him; *Com. Dig. Tresp. (C. 1)*; and a person may become a trespasser by previous command, or, where the trespass has been committed for his use and benefit, by subsequent assent; *Barker v. Braham*, 3 *Wils.* 377. But in cases of subsequent assent, it must appear that the trespass was for his use; *Wilson v. Barker*, 4 *B. & Ad.* 614. See *ante*, p. 553. A *femme covert* and an infant cannot make themselves trespassers either by prior command or subsequent assent; *Co. Litt.* 180, b, note (4), 357, b. Trespass lies against a tenant in common with the plaintiff for destroying a common wall; but not for pulling it down with intent to rebuild it, or for raising its height; *Cubitt v. Porter*, 8 *B. & C.* 257. And it lies against him or his licensee for digging peat or turf, and carrying it away for his own use; *Wilkinson v. Haygarth*, 12 *Q. B.* 837. And for actual expulsion; *Murray v. Hall*, 7 *C. B.* 441. A master is not liable for the wilful trespass of his servant; 2 *Roll. Ab.* 553, l. 25; *Chandler v. Broughton*, 1 *C. & M.* 29. But, where he orders his servant to do an act, the natural consequence of which is a trespass, and the servant uses ordinary care in the execution of the order, the master is liable, though he directs the servant not to trespass; *Gregory v. Piper*, 9 *B. & C.* 591. See, on the liability of a master for the acts of his servant, *ante*, *Action for Nuisance*, and *for Negligence*. A

party is liable for the acts of his attorney on proof of retainer; thus, A. employed B., an attorney, to enforce payment of a debt; B. directed his agent to sue out a *justices* in the county court; before the return of the *justices* the debtor paid the debt, and costs, to B.; his agent, not knowing of such payment, afterwards entered up judgment and sued out execution, under which the trespass was committed: Held, that both A. and B. were liable as trespassers; *Bates v. Pilling*, 6 B. & C. 38. See also *Crook v. Wright, Ry. & Mood*, 278. And, generally, an attorney who, as such, deliberately directs the execution of a void warrant, is liable in trespass; *Green v. Elgie*, 5 Q. B. 99. So, if he misleads the sheriff by indorsing on a writ of execution a direction by which the sheriff is induced to seize the goods of a wrong party; *Rowles v. Senior*, 8 Q. B. 677; *Stratten v. Lawless*, 14 Ir. C. L. Rep. 432. But where the attorney delivers a writ of execution to an officer, who executes it by entering a house out of the jurisdiction, the attorney is not liable, though he may have had reason to believe it would be so executed; *Sowell v. Champion*, 6 Ad. & E. 407. Where a writ is set aside for irregularity, both attorney and principal are liable in trespass for an act done under it; *Codrington v. Lloyd*, 8 Ad. & E. 449.

The owner of animals *mansuetæ naturæ*, such as oxen, &c., is liable for trespasses committed by them in the land of another; *Keilw.* 3, b, *Com. Dig. Tresp. (C.)*. In *Read v. Edwards*, 34 L. J. (C. P.) 31, the question whether the owner of a dog is liable for every unauthorised entry of the animal into the land of another, was raised, but was not decided. A person, from whose land animals *feræ naturæ*, as rabbits, &c., escape, is not liable for such injury; *Boulston's case*, 5 Co. Rep. 104, b.; *Cooper v. Marshall*, 1 Burr. 259; *Beckwith v. Shordike*, 4 Burr. 2093. See further, *ante*, pp. 468-9.

Trespass for breaking into plaintiff's house on 1st March, and continuing therein for eight days. Payment into court as three days, and Not guilty as to the rest. It was proved that defendant left after three days, returned on fifth, and continued three days more: Held that the last trespass was admissible, though one continuing trespass was alleged; *Percival v. Stamp*, 9 Ex. 167.

Trespass ab initio.] Where the defendant enters under an authority *in law*, the plaintiff may show that he has abused such authority and so become a trespasser *ab initio*; but a mere non-feasance will not be such an abuse; nor does the subsequent abuse of an authority *in fact* (as a licence) make a trespass *ab initio*; *Six Carpenters' case*, 8 Co. Rep. 146, a. The distinction is said to be founded on a presumed intention, *ab initio*, to abuse the authority given by the law, and not by the act of the party; but it seems to be founded rather on the necessity of a more stringent protection against the abuse of powers given by law; whereas those who voluntarily give powers can limit or recall them as they please. A lessor who enters to view waste, and does damage, or stays all night; a commoner who enters to view his cattle, and outs down a tree; a man who enters a tavern, and continues there all night against the will of the landlord;—are all trespassers *ab initio*; *Com. Dig. Tresp. (C. 2)*. So is an officer of a court who neglects to remove goods attached, within a reasonable time, and continues on the premises in possession; *Reed v. Harrison*, 2 W. Bl. 1218; *Aikenhead v. Blades*, 5 Taunt. 198. See also *Ladd v. Thomas*, *infra*. So, the abuse of a distress made a trespass *ab initio* at common law; but since 11 Geo. 2, c. 19, a person distraining who

remains in possession, without consent, above five days, is now a trespasser only for the period after the five days (*Winterbourne v. Morgan*, 11 East, 395; *Messing v. Kemble*, 2 Camp. 115); for that act provides that no "unlawful act" afterwards done by the distrainer shall make the distress for rent due unlawful, or the distrainer a trespasser *ab initio*. A tenant who tenders his rent after distress, but before impounding, may maintain trespass *quare clausum* for a subsequent removal of the distress; *Vertue v. Beasley*, 1 Mood. & Rob. 21. But it is otherwise if the tender is after impounding, whether for rent-arrear or damage feasant; *Ladd v. Thomas*, 12 Ad. & E. 117. So, a landlord who enters to distrain does not become a trespasser *ab initio* by taking some privileged goods; *Harvey v. Pocock*, 11 M. & W. 740. Under a warrant of distress for rent there is no power at common law to break open the outer door or gate; *Brown v. Glenn*, 16 Q. B. 254; *Attack v. Bramwell*, 3 B. & S. 520; 32 L. J. (Q. B.) 146.

The authority of process is, it seems, an authority in law within the rule. See *Reed v. Harrison*, *supra*, which was the case of a bailiff of an inferior court, who was in the nature of a sheriff; *Com. Dig. Trespass*, C. 2. But an irregularity of the sheriff or officer of a superior court will not necessarily make his act a trespass *ab initio*. Thus, if he illegally breaks a door, or executes a writ on Sunday, yet the execution may be valid; *Percival v. Stamp*, 9 Ex. 167. So a detention under an attachment beyond the proper time does not make the attachment by the sheriff wholly illegal; *Smith v. Egginton*, 7 Ad. & E. 167.

When the plaintiff relies on an act which makes the defendant a trespasser *ab initio*, he must reply it; but where the abuse is a substantive trespass, but not one which makes a trespass *ab initio*, it must be newly assigned; 1 *Williams' Saund.* 300, n.; *Smith v. Egginton*, *supra*.

Evidence under alia enormia.—Damages.] In trespass for breaking and entering the plaintiff's house, evidence that the defendant at the same time debauched the plaintiff's daughter has been allowed under *alia enormia*; per Holt, C. J., *Russel v. Corn*, 6 Mod. 127; *Ca. Temp. Holt*, 699; *B. N. P.* 89. It is not now the practice to offer, under this general averment, proof of acts; such as the debauching of a daughter, entirely unconnected with, and distinct from, the substantive ground of action, though, in point of time, the one may have immediately followed the other; 2 *Phill. Evid.* 185. Yet as such an act cannot be treated as special damage, and is not necessarily actionable in itself, it seems properly matter of aggravation. The plaintiff may give in evidence that his wife was so terrified at the trespass that she was immediately taken ill, and soon afterwards died; but this evidence was held inadmissible only for the purpose of showing how outrageous and violent the trespass was, and not as a substantive ground of damage; *Huxley v. Berg*, 1 Stark. 98. Where the plaintiff declared for breaking and entering her house, and, under a false charge that she had stolen property in it, ransacking and searching, &c., whereby she was injured in her credit, it was held that the jury might give damages for the trespass as aggravated by the false charge; *Bracegirdle v. Orford*, 2 M. & S. 77; *Bell v. The Midland Railway*, 30 L. J. (C. P.) 273; *Emblen v. Myers*, 6 H. & N. 54; 30 L. J. (Ex.) 71. The jury may consider not only the pecuniary damage sustained, but also the intention

with which the act has been done, whether for insult or injury ; *per* Abbott, J., *Sears v. Lyons*, 2 *Stark.* 318 ; *Merest v. Harvey*, 5 *Taunt.* 442.

In trespass for cutting away part of the plaintiff's land, the defendant is bound to pay the value of the land so cut away, but not the expense of reinstating it ; for this may be more than the land was ever worth ; *Jones v. Gooday*, 8 *M. & W.* 146. See *Holmes v. Wilson*, 10 *Ad. & E.* 503. If a house is pulled down by the defendant, the damages are measured by the reduction in the selling value of the land ; *semb. Hosking v. Phillips*, 3 *Ex.* 168 ; *ante*, p. 459. In trespass for breaking a mine and taking the plaintiff's coal, the plaintiff is entitled, as against a mere wrongdoer, to the value of the coal when it first existed as a chattel, without deducting the expense of getting it ; *Wild v. Holt*, 9 *M. & W.* 672. But the expense of afterwards bringing it to the pit's mouth must be allowed ; for the plaintiff cannot profit by the increased value caused by the removal ; *Morgan v. Powell*, 3 *Q. B.* 278. And where there is a *bonâ fide* disputed title and no fraud, the jury should give only the fair value per acre, as if the defendant had bought the coal-field of the plaintiff ; *Wood v. Morewood*, *Id.* 440 (*n*). See *post*, 599.

The defendant may show circumstances which he could not have pleaded in justification ; as, in trespass for cutting trees, that they were applied to purposes for which the plaintiff had covenanted to furnish timber ; *Rennell v. Wither*, *Manning's Index*, 291, 2nd ed., *semb. contra, Simmons v. Norton*, 7 *Bing.* 640. A recovery against a co-trespasser not joined is not admissible in mitigation, but should be specially pleaded in bar ; *Day v. Porter*, 2 *Mood. & Rob.* 151.

Defence.

[*Evidence under the general issue.*] By *R. 19, H. T. 1853*, "In action for trespass to land, the plea of Not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially."

By various statutes particular persons are enabled to give special matter in evidence under the general issue ; as parties distraining for rent arrear by 11 *Geo. 2, c. 19, s. 21* ; justices of the peace, mayors, constables, churchwardens and overseers, surveyors of highways, and other officers, noticed hereafter under the heads *Actions against Constables, Revenue Officers, Justices, &c., post*, Part III.

In these and other cases, where the plea is given by statute, the new rules do not deprive the defendant of the right to avail himself of it, but he must insert in the margin of the plea the words, "by statute," and state the act and the chapter and section of the same upon which he relies, and whether the act is a public one, otherwise it shall be taken not to be pleaded by statute. See *R. 21, H. T. 1853*, noticed fully, *post*, *Actions against Constables*.

By 5 & 6 *Vict. c. 97*, it is enacted, as to "all acts commonly called public, local, and personal ; or local and personal ; or acts of a local and personal nature," that the privilege of showing special matter under the general issue shall be repealed (sect. 3) ; and the same statute provides that the period of limitation for anything done under such act shall be two years, or, in case of continuing damage, one

year after it shall have ceased (sect. 5). By 13 & 14 Vict. c. 21, s. 7, all acts passed after the commencement of that act are to be taken to be public acts, and judicially noticed as such, unless the contrary be expressly provided. But this does not put an end to the distinction between acts of a local and personal nature and acts of a general nature. The object seems only to be to make it needless to prove such local acts in the way theretofore necessary.

An act for establishing a local court of requests is within the statute 5 & 6 Vict. c. 97; *Cock v. Gent*, 12 M. & W. 234. So the London Building Act; *Richards v. Easto*, 15 M. & W. 244. See also *Sharp v. Sheppard*, 4 Ex. 28. But the protection of justices under the Metropolitan Police Act is preserved; *Barnett v. Cox*, 9 Q. B. 617; *dub. Cur. Sharp v. Sheppard, supra*. The act does not apply to local acts passed after it; *Boden v. Smith*, 18 L. J. (C. P.) 121.

By 11 Geo. 2, c. 19, s. 21, everything lawfully done for the purpose of distraining for rent, as the breaking an outer door by force after having previously entered peaceably and been expelled by the plaintiff, may be shown under Not guilty "by statute;" *Eagleton v. Gutteridge*, 11 M. & W. 465. And see *ante*, p. 564, under *Trespass ab initio*.

As to evidence in mitigation, see cases *ante*, p. 566, *ad calc.*

Evidence on the plea of liberum tenementum.] Where the defendant pleads *liberum tenementum* in himself or a third person by whose command he entered, on which issue is joined, the issue is upon him; *Pearson v. Coles*, 1 Mood. & Rob. 206. It puts the defendant on proof of a freehold interest; 1 Saund. 347, d (n); and denies the plaintiff's right of possession, but has been said to admit the fact of his possession, and to assert the defendant's right to the possession; *Doe v. Wright*, 10 Ad. & E. 763; but see Erle, J., in *Ewer v. Jones*, 9 Q. B. 625. The new rules of pleading have made no alteration in the effect of the plea of *lib. ten.*; *Lempriere v. Humphrey*, 3 Ad. & E. 186; but have rendered the plea less necessary by obliging the plaintiff to describe the *locus in quo* by name or abutments. The declarations of the owner after the trespass are not evidence for the defendant of his authority; *Garr v. Fletcher*, 2 Stark. 71. The defendant pleaded *lib. ten.* in A. and entry as servant by command: issue on the command: Held that, on proof that the defendant was receiver and general agent of A., a minor, in Chancery, the authority ought to be found; and that the plaintiff could not show on this issue that he held the land by an outstanding lease under A., who was thereby precluded from authorising a trespass; *Ewer v. Jones*, 9 Q. B. 623. To trespass *q. c. f.* defendant pleaded *lib. ten.* in A., and entry by his command; on issue joined the jury found that plaintiff and A. were tenants in common of the freehold: It was held, that plaintiff was entitled to judgment; *Bennington v. Bennington*, Cro. Eliz. 157.

It was unsettled whether, on an issue joined on this plea, the plaintiff might show a title under the old Statute of Limitations; *Lowe v. Govet*, 3 B. & Ad. 863. But the later act extinguishes the right of the person barred by it, and therefore seems to be an answer on this issue. See *post*, *Action of Ejectment*. The plea is not supported by proof of acts of ownership for less than twenty years, where it appears that there was a title in a third party within that period; *Brest v. Lever*, 7 M. & W. 593.

Formerly, where the plaintiff declared generally for a trespass to his close in A. without naming the close, and the defendant pleaded *lib. ten.*, upon which the plaintiff took issue, it was sufficient for the defendant to prove a freehold in himself anywhere in A. to entitle him to a verdict; 1 *Saund.* 299, *b* (n). The plaintiff in such case should have new assigned, setting out the name or abutments of the *locus in quo*. But if the plaintiff names the real name of the close in his declaration, and the defendant pleads *lib. ten.* generally, without setting out the abutments of the close, upon which issue is joined, the plaintiff may recover on proving a trespass done to a close in his possession bearing the name stated in the declaration, though the defendant may have a close in the same parish known by the same name; and it will not be necessary for the plaintiff to new assign; *Cocker v. Crompton*, 1 *B. & C.* 489; *Cooke v. Jackson*, 9 *D. & R.* 495. In order to compel a new assignment in such a case, defendant must give a further description of the close; *Cocker v. Crompton*, *supra*. The same rule applies where the close is described by abutments instead of a name; *Lempriere v. Humphrey*, 3 *Ad. & E.* 181. And although the declaration is now required to name or describe the close, this mode of pleading is still admissible; *Harvey v. Brydges*, 14 *M. & W.* 437, 439; *aff. on error*, 1 *Ex.* 261.

The plea of *lib. ten.* is divisible; and if the declaration is for trespass to three closes, to which defendant pleads *lib. ten.* in all, and plaintiff replies a title to all, the verdict may be for plaintiff as to two, and for defendant as to one close; *Phythian v. White*, 1 *M. & W.* 216. The plea only puts the defendant to prove that *that part* of the close, in which the trespass was committed, is his freehold; *Smith v. Royston*, 8 *M. & W.* 381.

Co-tenancy with the plaintiff.] It has been doubted whether this plea should not be specially pleaded, or whether it is evidence under one of the two pleas "Not guilty," or "Not possessed" (as the plea denying the property is often called). See *Wilkinson v. Haygarth*, 12 *Q. B.* 837; *Murray v. Hall*, 7 *C. B.* 441. But these cases show that if the trespass by the co-tenant amounts to an ouster, there is no defence under either of those pleas, and that to remove the surface of the land or expel a person put in by the plaintiff, is such ouster. See *Stedman v. Smith*, 8 *E. & B.* 1; 26 *L. J. (Q. B.)* 314, where the plaintiff had a verdict against a co-tenant for altering and heightening a party wall and building upon it, the pleas being Not guilty and Not possessed. It is certain that, under the old plea of Not guilty, where the trespass was not an ouster, co-tenancy with the plaintiff was a defence; *Rosse's case*, 3 *Leon.* 83, 94. It is no defence, but only ground for reduction of damages, that there is a co-tenant with the plaintiff not joined; *Wilkinson v. Haygarth*, *supra*.

Evidence under a plea denying property or possession.] Under this plea (which is sometimes a simple denial of the close being the close of the plaintiff, and sometimes a denial that plaintiff was "possessed," &c.) the defendant may show lawful title to possession in himself and in another under whom he claims; *Jones v. Chapman*, 2 *Ex.* 803, in *Cam. Scacc.*; and see *Burling v. Read*, 11 *Q. B.* 904. The two pleas of Not guilty and Not possessed make up together the old general issue, Not guilty; *per Curiam* in *Jones v. Chapman*; and there seems to be no difference between the effect of a simple denial of property and of "not possessed," although a

difference of opinion existed as to their effect, before that case. The plea puts in issue mere *possession* where the defendant is a wrong-doer, and *title* where title is in dispute.

Where a mortgagee is not to enter till default, and he brings trespass against a third party before such entry, the defendant is entitled to a verdict on a plea denying that the land is the land of the plaintiff; *Wheeler v. Montefiore*, 2 Q. B. 133.

Under a denial of either property or possession, the abutments, or other description of the close, are put in issue; *Murly v. M'Dermott*, 8 Ad. & E. 138; *Webber v. Richards*, 1 Q. B. 439.

[*Evidence on plea of justification and issue thereon.*] Where to a plea of justification the plaintiff has joined issue, the whole matter of the plea is put in issue, and must be proved so far as it is material to constitute a justification. The plaintiff declared for breaking and entering his dwelling-house, assaulting and imprisoning him, and during his imprisonment striking him in a violent manner; the defendant pleaded a justification of the entry and arrest under a warrant, and because the plaintiff, after he had been so taken into custody, conducted himself in a violent manner, and could not otherwise be kept in custody, the defendant was obliged to give him a few blows, &c.: A battery during the imprisonment was proved, but the defendant, though he proved the arrest, gave no evidence of violent conduct by the plaintiff while in custody: Held that the plea was not proved, and that a new assignment was not necessary; *Phillips v. Howgate*, 5 B. & A. 220. See *ante*, *Action for Assault*, p. 545. In trespass for breaking plaintiff's house, defendant justified entry under civil process, "the outer door being open:" Held that the general replication put in issue the fact of the door being open, without a special replication or new assignment; *Kerbey v. Denby*, 1 M. & W. 336; *Brunswick v. Sloman*, 8 C. B. 317. But where the plea consists of two facts, either of which, if separately pleaded, amounts to a good defence, it will be sufficient for the defendant to prove either of them; *Spilsbury v. Mickethwaite*, 1 Taunt. 146; accord. *Baillie v. Kell*, 4 N. C. 650. It is sufficient to prove so much of the plea as covers the declaration; and other matters, alleged in the plea unnecessarily, need not be proved; *Atkinson v. Warne*, 1 C. M. & R. 827. And it is enough to prove a justification which covers the trespass, although it does not cover mere matter of aggravation. Thus, where the plaintiff declares for breaking, entering, and expelling, and the defendant justifies only the breaking and entering, it is sufficient; for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation; *Taylor v. Cole*, 3 T. R. 292; 1 H. Bl. 555. This case was decided on demurrer to the plea, and has been cited to show that expulsion alone is not a trespass on the land, though it may make an entry a trespass *ab initio*. See *Cubit v. Porter*, 8 B. & C. 257, 259. But in *Meriton v. Coombes*, 9 C. B. 787, it was held that expelling from a house is an injury *in respect of the house*. Even an assault, alleged in a count for trespassing on a close, is said to be covered by a plea to the trespass alone, unless the plaintiff new assigns it; *Kavanagh v. Gudge*, 7 M. & G. 316. So an allegation of entry *manu forti et contra formam statuti*; *Davison v. Wilson*, 11 Q. B. 890. So where to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded a justification as to breaking and entering and staying in the house twenty-four hours,

and it was proved he stayed there more than twenty-four hours, Lord Ellenborough held that the justification was proved, and that if the plaintiff meant to rely upon the excess, he ought to have new assigned; *Monprivatt v. Smith*, 2 Camp. 175. See also *Lambert v. Hodgson*, 1 Bing. 317; 1 Saund. 28, a(n). Declaration for breaking the plaintiff's house and taking his "goods, chattels, and effects;" pleas, Not guilty, and a justification of the taking of the "goods and chattels" for rent due on a tenancy; the replication denied the tenancy: Held, that the plaintiff could not on this issue show that some of the effects taken were for fixtures, and not distrainable; but should have replied it; *Twigg v. Potts*, 1 C. M. & R. 89. But where the plaintiff declared for entering his house and taking his goods and throwing them out of a barn, and the defendant pleaded a justification as to all, expressly excepting the throwing out of the barn: Held, that the plaintiff was entitled to a verdict and damages as to the part excepted, though it was contended that it was mere aggravation; *Neville v. Cooper*, 2 C. & M. 329. So where the action was for breaking into rooms and removing the plaintiff's door-plate from the door, and the defendant put in a separate plea denying the property in the door-plate, it was held that, though it might have been treated as a mere aggravation of the other trespass, yet, on these pleadings, it must be taken as a distinct injury to a personal chattel; *Lane v. Dixon*, 3 C. B. 776. See also *Harvey v. Bridges*, 1 Ex. 261, 263, per Lord Denman, C. J.; *Curlewis v. Laurie*, 12 Q. B. 640.

The plaintiff declared in trespass for breaking his close, and set out the close by abutments; the defendant justified, alleging that the said close in which, &c., was part of an allotment of six acres made by commissioners duly authorised for certain purposes, in execution of which he entered; the plaintiff replied that the said close in which, &c., was not part of the six acres in the plea supposed to have been allotted, and thereupon issue was joined. It appeared that the close set out by abutments was not *all* within the allotment, but that the part in which the actual trespass was committed was within it: Held, that the justification was made out; *Bassett v. Mitchell*, 2 B. & Ad. 99; for the words "close in which, &c." mean that part of the close described, in which the trespass is proved to have been committed; and if the record should be used in a future action, either party might narrow its effect by evidence of the part to which it applied; *Ib.* 104, 105. See *Smith v. Royston*, ante, p. 568; and the cases under the plea of a way, *infra*.

Evidence on plea of right of way.] The cases in which the grant of a way (ante, p. 492), and the dedication of a way to the public (ante, p. 493), will be presumed, have been already stated; and other cases applicable to this head will be found under the head *Action for Disturbance of Way*, ante, p. 485. If the defendant pleads a right of way, and the plaintiff denies the right, the latter may prove that the way has been duly stopped; *Davison v. Gill*, 1 East, 64. But upon a traverse of the right of way, the plaintiff will not be allowed to show that the trespass committed by the defendant was not covered by the alleged right of way. Thus, where the defendant pleaded that he was seised in fee of a messuage, and prescribed for a right of way over the *locus in quo* as appertaining thereto, and the plaintiff traversed the prescriptive right, it was held that proof of the defendant's seisin in fee of an ancient messuage, to which a right of way,

as pleaded, over the *locus in quo* belonged, was sufficient to support his plea, though the message was in the occupation of a tenant, and the defendant only occupied a new-built house in the parish at the time of the trespass committed; *Stott v. Stott*, 16 *East*, 343. If the plaintiff meant to insist that the right stated would not cover the exercise of a right of way to the new house, he should have done so either by a new assignment, or by a special replication to that effect; *Ibid.* 349.

In some cases it is proper both to reply and to new assign. Where the plea, on the face of it, professes to answer the whole matter of the declaration, but in fact only answers part; as where, to a declaration for a trespass to a close called A., the defendant pleads a right of way over A., and in the exercise of such right justifies the act complained of, but in fact the defendant not only entered upon that part of A. over which the way passes, but also on other parts of A., the plea has only "hit some of the places wherein the plaintiff intended the trespass," and the trespasses in the other part of the close remain unanswered; *Prettyman v. Lawrence*, *Cro. Eliz.* 812; *Odiham v. Smith*, *Cro. Eliz.* 589. In such a case the plaintiff may not only traverse the right, but also new assign *extra viam*, and thus entitle himself to give evidence of trespasses committed in every part of the close; 1 *Saund.* 299, b. 300, e. (n. 6). To trespass for breaking and entering, defendant pleaded a right of way in the close; new assignment *extra* the way; pleas, Not guilty, and that the plaintiff had obstructed it, and therefore defendant deviated; replication containing a general traverse, &c.: Held, that plaintiff might show that there was an admitted way over the close which he had not obstructed, and defendant could not obtain a verdict by showing a disputed way over it which had been obstructed; *Ellison v. Isles*, 11 *Ad. & E.* 665. Trespass for breaking and entering and pulling down posts in the close; plea, a public way, and removal of the posts obstructing it; on a traverse of the way, defendant may show *any* public way over the close, and is not bound to show that it crossed the part where the posts stood; *Webber v. Sparkes*, 10 *M. & W.* 485. Declaration contained two counts, each of which alleged trespasses in the same two closes; plea to the whole declaration, right of way over both closes; replication denying the way, and new assignment *extra viam*; payment of money into court on the new assignment and acceptance in satisfaction; the jury found one right of way over both closes: Held, that the defendant was entitled to a verdict, and was not bound to show two rights of way; *Wood v. Wedgewood*, 1 *C. B.* 273. Trespass for breaking and entering in L. close; plea, a right of way; new assignment for trespasses in another part of L. close out of the pretended way; pleas to new assignment, Not guilty, and issue thereon, and also that defendant deviated from the way mentioned in the first plea, because the plaintiff had obstructed it; replication containing a general traverse, &c.: Held, that the right of way was not admitted by the plaintiff on these pleadings, but must be proved by the defendant; *Robertson v. Gantlett*, 16 *M. & W.* 289. To trespass in close B., and cutting down the plaintiff's rails there, the defendant pleaded Not guilty, and that the rails were wrongfully erected, and standing across a public way there, &c.; the replication traversed that the rails were standing across, &c.; it appeared that the defendant had cut down rails of the plaintiff in close B., partly on and partly out of the highway: Held that the defendant was entitled to a verdict, be-

cause there was no new assignment; *Bracegirdle v. Peacock*, 8 Q. B. 174.

Where the defendant pleaded that A. B. was seised in fee, and, being so seised, granted a right of way by non-existing grant, and the plaintiff traversed the grant, it was held not competent for the plaintiff upon that issue to show that A. B. was not seised in fee, though merely for the purpose of rebutting the presumption of the grant, he being estopped by the admission on record; *Cowlshaw v. Cheslyn*, 1 C. & J. 48. But this decision has been doubted (*Blewett v. Tregonning*, 3 Ad. & E. 554), and seems at variance with the doctrine held in some of the cases cited, and it should rather seem that the seisin was only so far admitted as to enable the defendant to have a verdict if he proved the grant. In *Cooke v. Blake*, 1 Ex. 220, 240, the case of *Cowlshaw v. Cheslyn* was considered to have been rightly decided, on the ground that the denial of a grant does not put in issue the seisin of the grantor, where the seisin or title is so stated as to be traversable. No doubt that is so; but the question is, whether seisin may not be disproved with a view to proof of another issue?

A plea of right of way stated a conveyance in fee of a tenement to the defendant, "with all ways then used by the tenants and occupiers thereof;" and that the defendant, "being so seised, and having occasion to use the way," committed the trespass. The plaintiff traversed the user of the way at the time of the conveyance, and newly assigned that the defendant used the way for other purposes, to which the defendant pleaded, Not guilty. A right of way was proved, but it appeared that when the trespass was committed the tenement was in the possession of a tenant, and that the defendant, as landlord, entered to remove an obstruction to the way: Held, that he had a right so to use the way, and that the plea comprehended all the purposes for which a person seised of the tenement might lawfully use the way; *Proud v. Hollis*, 1 B. & C. 8. A plea of footway is supported by proof of a carriage way; for the latter includes the former. Per Lord Denman, C. J., *Davies v. Stephens*, 7 C. & P. 570. The extent of the right is in all cases for the jury, and may be disputed under the traverse without any new assignment; thus, if the defendant pleads a right generally, the plaintiff may show that it is confined to certain purposes, and that the defendant used it for another purpose; and proof of user for farming purposes is evidence of a right for all purposes; *Cowling v. Higginson*, 4 M. & W. 245; *Dare v. Heathcote*, 25 L. J. (Ex.) 245, cited *ante*, p. 490. The grant of a way may be explained by evidence of the state of the premises at the time of the grant; but not by the acts or declarations of the parties before or after, unless there be a doubt which of two ways be intended. Per Parke, B., in *Osborn v. Wise*, 7 C. & P. 761. Proof of a public way is not inconsistent with the fact that it is also a private way; *Brownlow v. Tomlinson*, 1 M. & G. 484. The reservation of a way to an open space, "under a loft, now used as a woodhouse," cannot be extended to the use of it for going to a house subsequently built on the space; *Allan v. Gomme*, 11 Ad. & E. 760. See *ante*, p. 494. There were in this case expressions in the conveyance tending to show that the *locus* was to continue an open space. It was, however, held that the defendant was not bound to use it as a woodhouse only. It was also held that the plaintiff having new assigned the user of the way for unauthorised purposes, to which the defendant pleaded a justification of the user, with a

traverse that he had trespassed *modo et formā*, the plea amounted to Not guilty, and the justification was not admissible under it; *Ib.* See *Skull v. Glenister*, cited *ante*, p. 494.

Where the defendant attempted to prove a public way over the plaintiff's close by showing repairs done by the surveyor of the township, evidence was held admissible that they were done by agreement between the surveyor and plaintiff's steward, and were to be paid for by the steward; and the plaintiff needed not to show the steward's authority; *Ferrand v. Milligan*, 7 Q. B. 730.

By the C. L. Pro. Act, 1852, s. 75, pleadings capable of being construed distributively shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered.

A plea of right of way to fetch water and goods may be found for the defendant as to the water, and for the plaintiff as to the goods; *Knight v. Woore*, 3 N. C. 3. But where the plea claimed a general right of way with carts, horses, &c., in respect of close K., and the proof was of a right to cart timber only from close K.; it was held, under the former rule of II. T., 4 Will. 4, that the plaintiff was entitled to the entire verdict; for the right proved was a qualified right, and not part of the right alleged; *Higham v. Rabett*, 5 N. C. 622. A right to lead manure is not supported by proof of a footway and cattle-way; for "leading" implies the use of a carriage; *Brunton v. Hall*, 1 Q. B. 792. See *ante*, p. 485.

The time of prescription with regard to rights of way is now altered by 2 & 3 Will. 4, c. 71, the provisions of which have been already stated *ante*, p. 488 *et seq.*, where also some of the decided cases will be found. The 5th section relates more particularly to pleadings in actions of trespass. By that section it is enacted that in all pleadings to actions of trespass, and in all other pleadings, wherein before the passing of the act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenements in respect whereof the same is claimed for and during such of the periods mentioned in the act as may be applicable to the case, without claiming in the name or right of the owner of the fee as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter *hereinbefore* mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation. As to the above word "*hereinbefore*," see observations in *Pye v. Mumford*, 11 Q. B. 668, 672, 677. And see the cases cited *ante*, p. 489 *et seq.*

Proof of a licence to the defendant just before the commencement of the period is evidence against him under the common traverse; *Clay v. Shackeray*, 2 Mood. & Rob. 245. On a plea of forty years' user the defendant may go further back in his evidence so as to raise a presumption of user at the beginning of the period of the forty years; *Lawson v. Langley*, 4 Ad. & E. 898. On a traverse of a right of way by user for twenty years, the plaintiff cannot show that it was enjoyed for part of the time under an act of parliament, and that the

right had ceased. A special replication is necessary; *Kinloch v. Neville*, 6 *M. & W.* 795. A plea stated an enjoyment for thirty years next before the action; the replication stated a life-estate in the land for part of the said thirty years; rejoinder, that the life-estate did not continue during any part of the said thirty years; issue thereon: held, that the defendant might support his plea by showing enjoyment for two periods, one next before, the other next after, the life-estate, amounting together to thirty years; *Clayton v. Corby*, 2 *Q. B.* 813. But in the absence of such special replication, thirty consecutive years must be shown; *Ib.* The life-estate must be specially replied, and cannot be shown on a traverse of the enjoyment; for it is a "matter not inconsistent with the simple fact of enjoyment;" *Pye v. Mumford*, 11 *Q. B.* 666. Unity of possession is evidence on a traverse of the way; for it breaks the continuity of enjoyment on the easement *as such*; *Clayton v. Corby*, *suprà*; and see *ante*, pp. 489-90.

Evidence on plea of right of common.] On a right of common pleaded, the plaintiff may either deny the right stated in the plea, or he may traverse the measure of the common, *viz.*, that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises and commonable cattle; *Robinson v. Raley*, 1 *Burr.* 316, *B. N. P.* 23. But under the last replication the plaintiff will fail if it appears that *some* of the cattle were the defendant's commonable cattle levant and couchant; for the number mentioned in the declaration is not material; 1 *Saund.* 346, *e (n)*; *Ellis v. Rowles, Willes*, 638. The plaintiff in such case should new assign; and it will not be enough to deny that *all* the cattle were levant and couchant; for this amounts only to a denial that *any* were so; *Bowen v. Jenkin*, 6 *Ad. & E.* 911.

The plaintiff may reply an approvement of the common, if it be common of pasture; *Glover v. Lane*, 3 *T. R.* 445; 1 *Saund.* 353, *b (n)*; or that the common has been inclosed for upwards of twenty years; and if issue be taken on this replication, and it appear in evidence that *part* of the common has been inclosed for twenty years, and that the trespasses were in fact committed in that part, the plaintiff is entitled to recover for such trespasses, though the rest of the common is uninclosed; *Tapley v. Wainwright*, 5 *B. & Ad.* 395, overruling the dictum of the court in *Hawke v. Bacon*, 2 *Taunt.* 157. And a special replication seems to be needless where the common is claimed by prescription; for it has been held that, upon issue joined on the right of common in the *locus*, the plaintiff may prove a legal extinction of the right over the *locus* before the exercise of it by the defendant; thus he may prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to himself of the *locus in quo* under such custom; *Arlott v. Ellis*, 7 *B. & C.* 346. But if the plea claims title by grant, and alleges an entry in exercise of the right granted, the plaintiff must reply an extinction by inclosure; *Parry v. Thomas*, 5 *Ex.* 37. The difference between these two cases arises out of the difference in the language of the plea.

To prove a prescription for common by cause of vicinage, it is not enough to show the mere contiguity of the districts without any fence, and that cattle often strayed from one to the other, and were driven back. Mutual acquiescence must be shown; *Clarke v. Tinker*, 10 *Q. B.* 604.

In trespass for breaking and entering the plaintiff's close and

throwing down fences, the defendant in his plea prescribed for a right of common of pasture on a down whereof the close was parcel, and justified the trespass because the close in which, &c., was wrongfully inclosed; the plaintiff replied that the close in which, &c., was a close called Burgey Cleave Garden, and had for thirty years and more been separated and inclosed from the down, and been enjoyed all that time in severalty and adversely to the person holding the land in respect of which the right of common was claimed; the defendant rejoined that the close in which, &c., had not been enjoyed for thirty years in severalty or adversely as alleged. The jury found that *part* of the garden had been inclosed *within* the thirty years, and that the trespass was committed in that part of the garden only: held, that the defendant was entitled to the verdict; for if the word "close" was an entire allegation, it comprehended the whole of Burgey Cleave Garden, and then the plaintiff was bound to prove that the whole had been enclosed upwards of thirty years; or, if it was a divisible allegation, it was confined in its meaning to the spot in which the trespass had been committed, and which the jury found had not been inclosed thirty years; *Richards v. Peake*, 2 B. & C. 918. And it has been since settled that the allegation is divisible, and means only the particular place in which the trespass was committed; *Tapley v. Wainwright*, 5 B. & Ad. 398; see *ante*, p. 620. But a prescription is an entire thing, and in general must be proved to its full extent. Thus where the plaintiff declares for a trespass and digging stones in C., and the defendant pleads a prescriptive right to dig in a certain waste containing (among others) close C., and the replication traverses the right generally over the waste, proof that the right does not extend to C. defeats the whole plea; *Merewood v. Wood*, 4 T. R. 157; *Evans v. Ogilvie*, 2 Y. & J. 79. See *Davies v. Williams*, 16 Q. B. 546. So in trespass for breaking the plaintiff's several fishery in four places in a river; plea, that it was a public navigable river; replication, that plaintiff had a prescriptive right to dredge in the four places named in the declaration; rejoinder, traversing the prescription; the plaintiff is bound to show a right in all four places, and not only where the trespass was committed; *Rogers v. Allen*, 1 Camp. 309; and see *Maxwell v. Martin*, 6 Bing. 522; *Peardon v. Underhill*, 16 Q. B. 120. A prescriptive right of common in gross in the defendant and his ancestors is not proved by showing a right gained under Lord Tenterden's Act, and is disproved by showing a grant eighty years ago to an ancestor; *Welcome v. Upton*, 5 M. & W. 398; *Davies v. Williams*, *suprà*. This would now be a case for amendment at *Nisi Prius*. But an ancient grant, without date, is not necessarily at variance with prescription; for it may be anterior to legal memory, or only confirmatory; *Addington v. Clode*, 2 W. Bl. 989; and this is a question for the jury; *Ib.*

As to construing pleadings distributively, see *ante*, p. 573. Under the repealed rule of *H. T.* 4 Will. 4, upon this subject, it was held that where a right of folding cattle without limit was pleaded, and a right of common for cattle levant and couchant, proved, the court would not enter a verdict to the extent of the right proved; *Ivatt v. Mann*, 3 M. & G. 691. An amendment might now be allowed.

See the Act of 2 & 3 Will. 4, c. 71, on the acquisition of rights of common, &c., by long user, cited fully *ante*, p. 483; and see sect. 5, as to pleading such rights, *ante*, p. 573. Under this Act there may

be a substantial enjoyment for thirty years, though the claimant did not use his common for a year or two, whilst he had no commonable cattle; and this is a question for the jury; *Carr v. Foster*, 3 Q. B. 581; see *ante*, p. 483.

Evidence on plea of licence.] The licence proved may be either an express one, or one implied from circumstances. The keeping open of a house, in which there is a public billiard table, is a licence in fact to all persons to enter for the purpose of playing; *Ditcham v. Bond*, 3 Camp. 525. And a plea of licence may be proved by showing an entry against the plaintiff's will under a provision in a lease that the defendant might enter for nonpayment of rent, and plead leave and licence in bar of an action for such entry; *Kavanagh v. Gudge*, 7 M. & G. 316. But there is no implied licence to enter a house and take goods sold by the plaintiff, the owner of the house, to the defendant, and left there by the plaintiff's consent; *Williams v. Morris*, 8 M. & W. 488. If more than a licence is intended, and any interest in the land or permanent easement is meant to be passed, it must be by deed, or other proper conveyance; and a licence to enter on land as such, is not the less revocable because it was given for a valuable consideration; *Wood v. Leadbitter*, 13 M. & W. 340; see also *Roffey v. Henderson*, 17 Q. B. 574; *Taplin v. Florence*, 10 C. B. 744. And a revocation is evidence on a denial of the plea; *Adams v. Andrews*, 15 Q. B. 284. An acquiescence of the plaintiff in the trespass upon an erroneous representation (to which the defendant was a party) of the legal obligation of the plaintiff to submit to it, will not support a plea of licence; *Semb. Roper v. Harper*, 4 N. C. 20; accord. *Gregson v. Ruch*, 4 Q. B. 737. It is not sufficient to show a licence by a servant, unless it be in law the licence of the master; *Holdingsshaw v. Rag*, Cro. Eliz. 876, nor by a wife; *Taylor v. Fisher*, Cro. Eliz. 245; nor by a daughter; *Cock v. Wortham*, Selw. N. P. 1040; unless the circumstances of the case show that the wife or the daughter was the agent of the party for granting such licence. A licence includes, as incident to it, a power to do everything without which the act licensed cannot be done. Thus if A. licenses B. to enter his house to sell goods, B. may take necessary assistance for the purpose of selling the goods; *Dennett v. Grover*, Willes, 195. But an authority from a tenant to his landlord, in the absence of the former, to let the premises, will not justify the landlord in entering the premises (the key being lost) through a window by means of a ladder in order to show the house; *Ancaster v. Milling*, 2 D. & R. 714.

Where there are several trespasses laid in the declaration, and the defendant pleads a licence in the general form, he must prove a licence commensurate with and covering all of the trespasses which are proved, and will fail as to such as are not shown to have been licensed; and it seems that in such case a new assignment is not necessary; *Barnes v. Hunt*, 11 East, 451; *Adams v. Andrews*, *supra*. In *Bracegirdle v. Peacock*, 8 Q. B. 174, Patteson, J., expressed a doubt whether those cases could be supported; and see 1 Saund. 300 f. g.; *Leader v. Purday*, 7 C. B. 4, 9. But they have been constantly acted upon; *Symons v. Hearson*, 12 Price, 369. Matter stated in aggravation in one count must be new assigned, if *prima facie* covered by the plea of licence; *Kavanagh v. Gudge*, 7 M. & G. 316. If a man abuses an authority or licence, which the law gives him, by which he becomes a trespasser *ab initio*, if the

defendant pleads such licence or authority, the plaintiff must reply (not new assign) the abuse; 1 *Saund.* 300, *h.*

Evidence on a new assignment.] The general form of replication by way of traverse given by the C. L. Pro. Act, 1852, puts in issue the facts alleged in the plea; but matters which must have been pleaded by way of new assignment must still be so pleaded; *Glover v. Dixon*, 9 *Ex.* 158. A new assignment waives and abandons the trespass which the defendant has justified; *Greene v. Jones*, 1 *Saund.* 299, *c. (n)*. Therefore, where the defendant pleads *lib. ten.*, and the plaintiff new assigns, the defendant ought not to plead that the place mentioned in the new assignment is the same as that mentioned in the plea; but if they are in fact the same, the defendant should plead not guilty, and the plaintiff will not be allowed to give evidence of any trespasses committed in the place mentioned in the plea; *Pratt v. Groome*, 15 *East*, 235; *B. N. P.* 92. So where the defendant pleaded that the place where, &c., was part of a common which had been allotted to him, to which the plaintiff new assigned that the trespass complained of was in another place; upon its being stated in the opening of the plaintiff's case to the jury that the trespass was in the same place, but that the defendant had no title to it, it was held that the plaintiff could not recover; *anon.*, cited 16 *East*, 86. So if the defendant justifies under legal process, which is in fact irregular, and the plaintiff, instead of traversing the plea, new assigns that the trespass complained of was on another and different occasion, such new assignment admits the justification stated in the plea, and if the plaintiff can only prove one trespass, that trespass will be covered by the plea, and the defendant will be entitled to a verdict; *Oakley v. Davis*, 16 *East*, 82; and see *Atkinson v. Matteson*, 2 *T. R.* 172; see *ante*, *Action for Assault*, p. 546. But a new assignment does not necessarily admit the facts stated in the plea to which it is replied. Thus where the plea justified under a tenancy and entry to distrain for rent on goods fraudulently removed, to which the plaintiff new assigned an entry into the same premises on a different occasion on the same day, to which defendant pleaded Not guilty and a distress for rent as in the former plea; and there was a replication containing a general denial of the plea and issue thereon: It was held, that the defendant must prove the tenancy and other facts; *Norman v. Westcombe*, 2 *M. & W.* 349; and see *Robertson v. Gantlett*, 16 *M. & W.* 289, cited *ante*, p. 571.

When the trespass proved clearly differs in its circumstances from the one justified, the plaintiff is not bound to prove two separate trespasses; but if alike, the jury should presume them to be the same; *Darby v. Smith*, 2 *Mood. & Rob.* 184. On the other hand, if there were in fact two trespasses, but only one count, and the defendant has pleaded a justification which he can prove as to one, the plaintiff must new assign, if he means to rely on the other trespass.

In some cases, as already stated *ante*, p. 571, the plaintiff may both reply and new assign, and will, if he succeeds, be entitled to recover for the trespasses attempted to be justified in the plea, as well as for those covered by the new assignment.

In trespass for making a railroad on the plaintiff's close, the defendant pleaded a grant of sufficient way-leave, &c., to dig for coal, and that the railroad was convenient, proper, and necessary; to which the plaintiff new assigned trespasses for different purposes and to a

greater extent than necessary : Held, that the necessity of some sort of railroad was admitted on this record by the plaintiff, but that he might show it to be constructed in a direction and manner not warranted by the grant ; *Dand v. Kingscote*, 6 M. & W. 174. If denied, it is a question for a jury whether a railway is necessary or expedient for the purpose of effectually working reserved mines ; *Durham and Sunderland Railway Co. v. Walker*, 2 Q. B. 940 ; see also *Whitehead v. Parks*, 2 H. & N. 870.

Where the defendant justifies and the plaintiff relies upon an act which renders the defendant a trespasser *ab initio*, such act should be replied ; for, if the plaintiff new assigns that the trespass is a different trespass, he cannot recover ; since he can only prove one continued act of trespass, the justification of which is admitted by the new assignment ; *Aitkenhead v. Blades*, 5 Taunt. 198. Nor can the plaintiff in such case recover under a replication containing a general traverse of the plea ; *Lambert v. Hodgson*, 1 Bing. 317.

When the defendant lets judgment go by default on the new assignment, but leaves the plea of Not guilty to the declaration on the record without withdrawing it as to the matters newly assigned, the plaintiff must prove the trespass newly assigned ; *Broadbent v. Shaw*, 2 B. & Ad. 940 ; for they are in fact included in the declaration, and are therefore still denied by the plea ; and if withdrawn as to all matters newly assigned, yet if it remains on the record as to the declaration, the plaintiff must be prepared to prove the trespass ; *Bourne v. Alcock*, 4 Q. B. 621.

ACTION FOR MESNE PROFITS.

In an action of trespass for mesne profits, the plaintiff may, by proper pleas, be called upon to prove—1, his title ; 2, his re-entry ; 3, the defendant's liability by reason of possession ; and 4, the amount of damages.

Evidence of title.] Under a denial of title the judgment in ejectment is proof of title for the plaintiff, against all who are parties or privies to the judgment, and whether the judgment in ejectment be upon verdict or by default ; *Aslin v. Parkin*, 2 Burr. 665 ; *Doe v. Whitcomb*, 8 Bing. 46 ; *Wilkinson v. Kirby*, 15 C. B. 430. But it is only evidence of title from the time when the plaintiff claimed to be entitled in the writ in ejectment ; and therefore if the plaintiff seeks to recover mesne profits anterior to that time, it will be necessary for him to give further evidence of his title ; *B. N. P.* 87 ; *Aslin v. Parkin*, 2 Burr. 668 ; *Barnett v. Guildford*, 11 Ex. 19 ; and it is in no case conclusive as evidence on an issue joined on the title to the close. To be conclusive it must be replied ; *Doe v. Huddart*, 2 C. M. & R. 316 ; *Matthew v. Osborne*, 13 C. B. 919. In *Doe v. Wright*, 10 Ad. & E. 763, the recovery was accordingly replied as an estoppel to a traverse of the plaintiff's title ; see also *Doe v.*

Wellsman, 2 *Ex.* 368, 375; *Freeman v. Cooke*, 2 *Ex.* 657; *Wilkinson v. Kirby*, *supra*. As to proof of the judgment, see *ante*, p. 55 *et seq.* A county court order under 19 & 20 Vict. c. 108, ss. 50-1, for giving up possession of premises, made against a person holding under the tenant, and complied with by him, is not conclusive evidence of title in a subsequent action against such person for mesne profits; *Campbell v. Loader*, 34 *L. J.* (*Ex.*) 50.

Before the C. L. Pro. Act, 1852, it was held that a judgment in ejectment on the several demises of two or more persons was evidence of title for them in a joint action of trespass brought by them; for they may be tenants in common; *Chamier v. Clingo*, 5 *M. & S.* 64. The judgment will not be evidence against a stranger; and therefore a judgment in ejectment against a wife cannot be given in evidence against her husband; *Denn v. White*, 7 *T. R.* 112. But it is evidence against a person who comes into possession after the judgment under the defendant in ejectment; *Doe v. Whitcomb*, 8 *Bing.* 46; though not against a person merely shown to be in possession, without further proof of privity to the judgment; *Doe v. Harvey*, *Ib.* 239; and it cannot be shown by parol that the defendant came in under the defendant in the former action, where it appears he came in under a written agreement; *Ib.*; *Doe v. Harlow*, 12 *Ad. & E.* 40. In a case before the C. L. Pro. Act, 1852, where after judgment by default against the casual ejector, an action for the mesne profits was brought against the landlord who had been in the receipt of the rents and profits from the day of the demise, Lord Ellenborough ruled that the judgment was not evidence against him without notice of the ejectment; but that a subsequent promise by him to pay the rent and costs amounted to an admission that he was a trespasser, and that the plaintiff was entitled to the possession; *Hunter v. Britts*, 3 *Camp.* 455. By the C. L. Pro. Act, 1852, every tenant served is bound to give notice to his landlord of the writ of ejectment.

Evidence of plaintiff's re-entry.] The plaintiff should be prepared to show entry into the premises before bringing the action, and this may be proved by showing an actual entry, or by producing an examined copy of the writ of possession and of the sheriff's return. It is however very questionable whether the judgment in ejectment is not, *per se*, sufficient proof of such a possession as to maintain this action as from the date of recovery, or the day named in the writ, without further proof of entry; see *Wilkinson v. Kirby*, 15 *C. B.* 430. The entry has relation to the first acquirer of the title, so as to entitle the plaintiff to mesne profits from that time; *Barnett v. Guildford*, 11 *Ex.* 19; *Litchfield v. Ready*, 5 *Ex.* 939; *B. N. P.* 87-8.

The defendant's possession.] The possession, and length of time during which the defendant has been in such possession, is in issue on Not guilty. The duration of possession must it seems be proved, where the defendant lets judgment go by default; *Ive v. Scott*, 9 *Dowl. P. C.* 993. The action has been said to lie only against the person who is actually in possession and trespassing, and therefore not to lie against a lessee whose under-tenant holds over after the expiration of the lessee's interest; *Burne v. Richardson*, 4 *Taunt.* 720. But this doctrine must be qualified; for, where the defendant in ejectment, K., had previously demised to A., who underlet to B.,

and B. wrongfully held over, paying rent to A., who accepted it under his title from K., it was held that all three might be joined in trespass for the mesne profits; *Doe v. Harlow*, 12 *Ad. & E.* 40; and that the record in ejectment against K. was evidence against A. and B. But *semb.*, it would have been different if the under-tenant had held over against the will of his lessor; *Ib.* The defendant cannot defeat the action by showing that he entered only as agent for, and under the licence of, the defendant in ejectment; *Girdlestone v. Porter, Woodf. Landlord & T.* 511.

The judgment in ejectment is not evidence of the time during which the defendant has been in possession. Before the C. L. Pro. Act, 1852, the consent rule admitted possession by the defendant at the time of the service of the declaration; but if the plaintiff sought damages for an earlier period, he must have given further evidence of the possession; *Dodwell v. Gibbs*, 2 *C. & P.* 615; *Aslin v. Parkin*, 2 *Burr.* 668; *Doe v. Challis*, 17 *Q. B.* 166.

The damages.] The plaintiff must be prepared to prove the value of the mesne profits. The jury are not, in estimating the damages, confined to give the mere rent or annual value of the premises, but may give such extra damages as they may think fit, as a compensation for plaintiff's trouble, &c., *Goodtitle v. Tombs*, 3 *Wils.* 121; *Doe Levy v. Roe*, 6 *C. B.* 275, *per* Cresswell, J. The plaintiff may also recover, as damages, the costs of the action of ejectment; but if that action was defended and the costs taxed, he cannot recover more than such taxed costs; *Doe v. Filliter*, 13 *M. & W.* 47. If judgment went by default, plaintiff may recover his actual reasonable costs in the action for mesne profits, for there is no taxation of costs, there being no defendant who has appeared; *Doe v. Huddart*, 2 *C., M. & R.* 316; and *semble*, the jury are not confined to costs as between party and party; *Ib.* But the costs must be laid as special damage and proved on the trial. The plaintiff may also recover, by way of damages, the costs incurred by him in a Court of error in reversing the judgment in ejectment erroneously obtained by the defendant; *Nowell v. Roake*, 7 *B. & C.* 404. And the plaintiff is not restricted to the time stated in the writ as the time from whence he claimed to be entitled to possession, but may also recover the profits which accrued previously, if he had title to the premises at the time, and the defendant was in possession; *Bull. N. P.* 87. The jury, however, are to give damages only for the time the defendant is proved to have been in possession, and since the plaintiff's title accrued; *Stanynought v. Cosins, Barnes*, 456; *Girdlestone v. Porter, Woodf. Landlord & T.* 419. Ground-rent and other outgoings, which plaintiff himself must have paid if in possession, should be deducted by the jury from the damages; *Doe v. Hare*, 2 *C. & M.* 145.

Other special damage may be recovered if laid in the declaration; as, deterioration of the premises by waste or mismanagement of the defendant, &c.; see *Forms in Cole on Ejectment*, 830; *Dunn v. Large*, 3 *Doug.* 335.

Defence.

The defendant may plead any pleas except those which he is estopped

from pleading by the judgment in Ejectment; *Wilkinson v. Kirby*, 15 C. B. 430. Thus he cannot deny the plaintiff's title during the period covered by the judgment; but he can plead "not possessed," as to any period antecedent to it, and, if no estoppel is replied, he may under that plea try to disprove the title altogether; see further, Cole on Ejectment, *ubi supra*. Under Not guilty, the defendant cannot give in evidence that the plaintiff accepted the rent of the premises for the time in dispute, and agreed to waive the costs of the ejectment; for this admits a trespass; *Doe v. Lee*, 4 Taunt. 459.

[*Statute of Limitations*.] Unless defendant pleads the statute, profits for a longer period may be recovered; *B. N. P.* 88.

Recovery of the mesne profits in ejectment by landlords.

By the C. L. Pro. Act, 1852, s. 214, "Wherever it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided [see s. 185], not only for the recovery of possession and costs, but also for the mesne profits found by the jury. Provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment."

It is unnecessary to state either in the writ or issue, that plaintiff intends to proceed on this statute, in order to recover mesne profits under it; *Smith v. Tett*, 9 Ex. 307.

ACTION FOR CONVERSION OF GOODS.

The action for converting the plaintiff's goods to the defendant's use, or wrongfully depriving him of the use and possession of them, is equivalent to the old action of *trover* (by which name it is still

often, but very inaccurately, called). The form of declaration is altered by omitting the fictitious averments.

The evidence in an action for conversion will depend upon the issue joined. The facts which constitute a complete title for the plaintiff in this action, and which must be proved if denied by the pleadings, are, 1, a general or special property in the goods; or, as against a wrong-doer, a mere possession of them; 2, an actual or constructive possession or right of possession; and, 3, a wrongful conversion by the defendant. In addition to this the plaintiff must prove, 4, the value or damages.

Evidence of general property.] The plea of no property in the plaintiff, means no property as against the defendant; *Nicolls v. Bastard*, 2 C., M. & R. 659. When the property in the goods is put in issue, the evidence for the plaintiff will depend upon the nature of his particular title. Where there is both a general and a special owner, but the general owner has not transferred his right to the possession, he may still maintain this action; thus, where he has delivered the goods to a carrier or other bailee and so parted with the actual possession, he may still maintain trover for a conversion by a stranger; for the owner retains the possession in law, as against a wrong-doer, and the carrier or other bailee is only his servant; *Gordon v. Harper*, 7 T. R. 12; 2 Saund. 47 b, (n); *Nicolls v. Bastard*, 2 C., M. & R. 659. Plaintiffs sold porter in casks to A., and the casks, when empty, were to be returned or kept at invoice price, at the plaintiffs' option: Held, that, when empty, the plaintiffs had such a property and right of possession as to support trover against the sheriff who seized under a *fi. fu.* against A.; *Manders v. Williams*, 4 Ex. 339. And if the bailee of goods for a special purpose transfers them to another in contravention of that purpose, the general owner may maintain trover against the transferee, though he be a *bonâ fide* vendee; unless the goods have been sold in market overt; *Wilkinson v. King*, 2 Camp. 335; *Loeschman v. Machin*, 2 Stark. 311; but see 2 Saund. 47 b, (n). Where railway waggons had been hired from the plaintiffs for a certain term, it was held that the sheriff was not liable to an action for merely selling them under a *fi. fu.*, but that he became liable when it appeared that these waggons had been used by the persons who bought them, and worn by such user; *The Lancashire Waggon Company v. Fitzhugh*, 6 H. & N. 502; 30 L. J., Ex. 231.

This action only lies for goods, and cannot be maintained for fixtures attached to the freehold; *Minshall v. Lloyd*, 2 M. & W. 450.

Evidence of general property—Vesting of the property.] With regard to the time at which the property passes on the sale of goods, it has been laid down, that where goods are sold, and nothing is said as to the time of delivery or of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods; *Tarling v. Baxter*, 6 B. & C. 360; and the seller is liable to deliver them, whenever demanded, upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. If the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is

immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he become insolvent before he obtains possession; *Per Bayley, J., in Bloxam v. Sanders*, 4 B. & C. 948; see *post*, *Stoppage in transitu*, p. 606. Where goods in bulk are sold at so much a ton, and it is part of the contract that they shall be weighed, and the concurrence of the seller in the act of weighing is necessary, the property is not changed till after they are weighed; *Simmons v. Swift*, 5 B. & C. 857. The intention of the parties must be looked to in every case, and the rule as to the ownership of chattels where anything remains to be done by the seller, does not apply when the parties have made it sufficiently clear whether or not they intend the property to pass at once. Where the defendant had purchased from the plaintiff a heap of fire clay at so much per ton, the clay to be weighed by the defendant after its removal by him from the plaintiff's premises, at a weighing machine belonging to a third person, it was held that the property passed on the completion of the bargain; *Turley v. Bates*, 2 H. & C. 200; 33 L. J., *Ex.* 43. If the contract be within the Statute of Frauds, and there is no note or memorandum, acceptance, or earnest, the contract cannot be enforced, and no property passes; *Bloxsome v. Williams*, 3 B. & C. 234; and see *ante*, pp. 282, 284, 305. In the case of a sale of unascertained goods, until both parties have assented to the appropriation of some particular goods to satisfy the contract, the property in them does not pass; *Dixon v. Yates*, 5 B. & Ad. 313; see *Godts v. Rose*, 17 C. B. 229. Plaintiff contracted in writing with a farmer for the purchase of the whole of his next crop of oil of peppermint. After the oil was made, it was bottled and weighed by the farmer in bottles supplied by the plaintiff, who had also made advances to the farmer on account: Held that trover lay by the plaintiff against a subsequent vendee of the oil to whom the farmer had improperly sold it; *Langton v. Higgins*, 4 H. & N. 402; *Aldridge v. Johnson*, 7 E. & B. 885. The assent of the vendee to the appropriation of particular goods may be given by an agent, such as a wharfinger or warehouseman, and may be either expressed or implied; *Per Willes, J., Campbell v. The Mersey Docks and Harbour Board*, 14 C. B., N. S. 412. The property in goods passes on a sale by auction, though they are not to be delivered till certain duties are paid by the seller; *Hinde v. Whitehouse*, 7 East, 558; and though not paid for; *Scott v. England*, 2 Dowl. & L. 520. A quantity of iron was to be delivered under a contract that certain bills outstanding against the seller should be taken out of circulation: A part of the iron had been delivered, but no bills had been taken out of circulation, and the seller brought trover for the part delivered: Held that, it being only a conditional delivery, and the condition being broken, the action might be maintained; and *per Bayley, J.*, if a tradesman sells goods to be paid for on delivery, and his servant, by mistake, delivers them without receiving the money, he may, after demand and refusal to re-deliver or pay, bring trover for his goods against the purchaser; *Bishop v. Shillito*, 2 B. & A. 329 (n); *Brandt v. Boulby*, 2 B. & Ad. 932. But there may be a contract for the sale of goods whereby the property in them passes at once, subject to a right in the vendor to retain possession of them until a bill is paid; *Ex parte Middleton*, 33 L. J. Bank. 36. So the property which passes by the sale may be divested by rescinding the contract. Thus where A. sold goods to B., and afterwards, and before the delivery

to B., C. became possessed of the goods, and, on being informed of the circumstances, declared that he would not deliver them to any person whatever, it was held that A., having repaid B., might maintain trover against C.; the contract between A. and B. being rescinded, and A. being remitted to his former right; *Pattison v. Robinson*, 5 M. & S. 105. Where A. is indebted to C., and B. to A., and it is agreed between them that B. shall deliver goods to C. in satisfaction of A.'s debt, and B. converts them to his own use, C. may maintain trover for the goods, though he never had possession; for by the agreement the right is in him; *B. N. P.* 35.

In general, where goods are ordered to be made, so long as the order is not executed, but only in course of execution, no property passes to the person for whom they are to be made; *Mucklow v. Mangles*, 1 Taunt. 318. In order to pass the property there must in such cases be a completion and an acceptance, or at least an approval, by the buyer; *Atkinson v. Bell*, 8 B. & C. 277, and *ibid.* 282-3. In some cases, however, the property passes before the order is executed. Thus, it has been held that where A. agreed to build a ship for B., and it was part of the terms of the contract that given portions of the price should be paid according to the progress of the work, the court considered that the payment of those instalments appropriated specifically to B. the very ship in progress, and vested in him a property in that ship. It was, however, part of the facts in this case that the builder, by assenting to the registration of the ship by B. as his property, appropriated the ship to B. though not complete; *Woods v. Russell*, 5 B. & A. 942. A ship-builder contracted with P. to build him a ship for a certain sum, to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the ship was completed; afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P. against the assignees for the ship, the Court held that, on the first instalment being paid, the property in the portion then finished became, by virtue of the contract, vested in P., subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price; and that each material subsequently added became, as it was added, the property of P. as the general owner. The judgment of the Court was given with some doubt, and the approval of P.'s agent during the building was regarded as an acceptance of the ship in each stage of the work; *Clarke v. Spence*, 4 Ad. & E. 448. So where the ship-builder gives the plaintiff a bill of sale of the ship (while incomplete) as a security for advances made from time to time, it was held that the property in the ship vests during the progress; *Read v. Fairbanks*, 13 C. B. 692; 22 L. J. (C. P.) 206. In the above case the bill of sale was relied upon as evidence of the intention of both parties; and, generally, it appears that these decisions as to ship-building are not exceptions to the rule of law, but depend on the intention of the parties as shown by the contract, and their acts done under it; see also *Laidler v. Burlinson*, 2 M. & W. 602; *Goss v. Quinton*, 3 M. & G. 825; *Wilkins v. Bromhead*, 6 M. & G. 963.

Where the buyer selected timber from felled trees, and marked the parts purchased, which the seller was to cut and deliver, and the

seller became bankrupt before the cutting, it was held that the whole passed to his assignees; *Acraman v. Morrice*, 8 C. B. 449; *Baker v. Gray*, 17 C. B. 462.

By a gift of goods the property does not pass, unless the gift be by deed or instrument of gift, or be executed by an actual delivery of the thing given to the donee; *Irons v. Smallpiece*, 2 B. & A. 551; even though the thing given was in the possession of the donee at the time of the words of donation; *Shower v. Pilck*, 4 Ex. 478. It is observable that the words in this case rather indicated an executory intention to give, than an executed gift. But if A. in London gives J. S. his goods at York, and another takes them away before J. S. obtains actual possession, J. S. may, it is said, maintain trover or trespass for them; *Br. Ab. Trespass*, 303; *Hudson v. Hudson*, *Latch.* 214; 2 *Saund.* 47 a (n). If A. in his lifetime gives to B. a security (as a railway debenture) for B.'s use and benefit, who takes possession of it, A.'s executors cannot sue for recovery of the deed; for the property in the paper passed, though such a gift was ineffectual at law for transferring any legal interest in the security as such; *Barton v. Gainer*, 3 H. & N. 387. A grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed of grant, is void, until the grantor ratifies the grant by some act done by him with that view after he has acquired the property therein; *Lunn v. Thornton*, 1 C. B. 379. And if a licence is given to take possession of such after-acquired goods, the property passes on possession being so taken, but not before; *Hope v. Hayley*, 5 E. & B. 830. And the property, when so taken, is not subject to the execution creditor of the assignor; *Chidell v. Galsworthy*, 6 C. B. (N. S.) 471. But in equity, a contract which engages to transfer property of which the vendor or mortgagor is not possessed at the time, will transfer the beneficial interest to the mortgagee or purchaser immediately on the property being assigned; *Hobroyd v. Marshall*, 10 H. L. Cas. 191.

By a fraudulent or illegal sale or transfer of goods no property passes; *Wilkinson v. King*, 2 Camp. 335. So a sale of live pheasants passed no property while the 58 Geo. 3, c. 75, prohibiting the sale, was in force; *Helps v. Glenister*, 8 B. & C. 553. So where a person obtains goods upon false pretences, under colour of a purchase, the property is not changed; *Noble v. Adams*, 7 Taunt. 59; *Irving v. Motly*, 7 Bing. 543. A sale of goods effected by the fraud of the buyer is not so absolutely void, but that the seller may elect to treat it as a contract. If he does not treat the sale as void before the buyer has resold the goods to an innocent vendee, the property will pass to the last vendee; *White v. Garden*, 10 C. B. 919; *Higsons v. Burton*, 26 L. J. (Ex.) 342. But to give such rights to a *bonâ fide* pawnee or purchaser from one who has obtained goods by fraud, it is necessary that the relation of vendor and vendee should have subsisted between him and the original seller. In *Kingsford v. Merry*, 1 H. & N. 503, 26 L. J. (Ex.) 83, in *Error*, the plaintiffs (vendors) had sold by a broker goods at a wharf to A., who sold over to B. A third person, X., obtained from B. the broker's delivery order, addressed to the plaintiffs, on pretence of using it only to inspect the goods at the wharf for another purchaser, and he, X., thereupon produced the delivery order to the plaintiffs, and by falsely representing himself to be a sub-purchaser from B., obtained a warrant to the wharfinger to deliver to himself, X., who thereupon got the goods transferred to the name of the defendant as

a security for money *bonâ fide* lent by defendant to X. in ignorance of the circumstances or of any fraud being committed; and it was held that, as there never was any contract as between the plaintiffs and X., it was a mere case of fraud by a stranger, who could convey no title to the defendant by a possession so obtained. In *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. (Ex.) 105, the plaintiffs called at the premises of the firm of G. & Co. E. G., a clerk on the premises, and son to the only member of the firm, bought goods from the plaintiffs in the name of G. & Co., although he had no authority to act on behalf of that firm. Invoices for these goods were made out in the name of E. G. & Co., the plaintiffs fully believing that they were dealing with G. & Co. E. G. pledged the goods to the defendant a few days after they were delivered, and immediately afterwards became bankrupt. It was held that the plaintiffs were entitled to recover, as there had never been a contract of sale to E. G. See also the observations of the Court in *Higsons v. Burton*, *suprà*.

By the common law an agent entrusted with goods cannot convey to a stranger a better right than he himself possesses; but in some cases factors and like agents can now make valid contracts binding their principals, although against their instructions. The acts which give this validity to the sales or pledges of factors, &c., are 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; and 5 & 6 Vict. c. 39. Under these acts factors entrusted with goods or the documents of title to goods, such as bills of lading, &c., can make valid contracts of sale or of pledge in the usual course of business, provided the persons dealing with them be acting *bonâ fide* and had no notice that the factor or agent had no authority so to dispose of the goods. Certificates of railway stock are not "goods" within the meaning of 5 & 6 Vict. c. 39; *Freeman v. Appleyard*, 32 L. J. (Ex.) 175. The acts are for the security of vendees or pawnees dealing with commercial agents, and do not apply to wharfingers, or agents for sale of articles such as household furniture, &c.; *Monk v. Whittenbury*, 2 B. & Ad. 484; *Wood v. Rowcliffe*, 6 Hare, 191. In *Lamb v. Attenborough*, 1 B. & S. 831; 31 L. J. (Q. B.) 41, B., clerk to the plaintiff, a wine merchant, had authority to sign delivery orders in his master's name and receive dock-warrants in his own, which dock-warrants he was authorised to pledge for the purposes of his master's business. He obtained five of these warrants and pledged them with the defendant, a pawnbroker. In an action of trover, the Court decided in favour of the plaintiff. But in *Hayman v. Flewker*, 13 C. B., N. S. 519; 32 L. J. C. P. 132, where the plaintiff deposited pictures for sale on commission with J., who was agent to insurance offices, and whose ordinary business was not to sell goods on commission, it was held that trover could not be brought against the defendant, to whom these pictures had been fraudulently pledged, the Court saying, that all that the former cases had decided was that the term agent did not include a mere servant or care-taker, but that it applied to persons whose employment corresponded to that of some known kind of commercial agent. Therefore, in *Baines v. Swainson*, 4 B. & S. 270; 32 L. J. (Q. B.) 281, where E., a factor and commission agent, obtained goods from the plaintiffs by means of a false statement, that he had obtained an order for them from them, it was held that the plaintiffs could not maintain trover against a *bonâ fide* purchaser of these goods. The statutes do not protect the agent from liability to his principal for excess of authority.

If goods stolen are pawned, the owner may maintain trover against the pawnbroker; *Packer v. Gillies*, 2 Camp. 336 (n). And by stat. 1 Jac. 1, c. 21, s. 5, the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property; and see 39 & 40 Geo. 3, c. 99. If stolen goods are sold in market overt, the property is divested out of the owner; *Horwood v. Smith*, 2 T. R. 750; unless the thief shall have been convicted. Where a man purchases stolen goods not in market overt, and, after notice of their having been stolen, sells them in market overt, the owner may maintain trover against the first buyer. *Peer v. Humphrey*, 2 Ad. & E. 495. Although trover will not lie against the thief or his accomplice until conviction; yet it will lie against an innocent party who has taken or bought them (not in market overt), without showing such conviction; *White v. Spettigue*, 13 M. & W. 603; see *Scattergood v. Sylvester*, 15 Q. B. 506; *Lee v. Bayes*, 18 C. B. 599. In trover for stolen property, it does not seem to be necessary for the plaintiff to show the mode in which it was lost or stolen; *Down v. Hulling*, 4 B. & C. 334. A sale by public auction at a horse repository out of the city of London is not a sale in market overt; *Lee v. Bayes*, 18 C. B. 599. As to what is a market overt, see 2 Steph. Black. Com. 123-4. It is necessary that the goods should be openly exposed for sale in the market during the whole of the time that the bargain is made. C. had two shops in different parts of the City of London. He bought by sample in one shop a quantity of stolen opium, which was delivered to him at the other shop. It was held that he had acquired no title to the opium, the Court expressing a doubt as to whether C.'s shop could be considered market overt for the purchase of opium by him; *Crane v. The London Dock Company*, 33 L. J. (Q. B.) 224.

At common law the goods of an execution debtor are bound by the writ of execution from the time of its teste. But by 29 C. 2, c. 3, s. 16, the goods are only bound from the time of the delivery of the writ to the sheriff, &c. A delivery of the writ to the sheriff's deputy in London is a delivery to the sheriff; *Harris v. Lloyd*, 5 M. & W. 436. As far as relates to the debtor himself and to all others but purchasers for a valuable consideration, writs of execution bind the party's goods from the time of their teste. The *binding*, both in the case of the crown and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt; *Giles v. Grover*, 1 Cl. & F. 74, per Patteson, J.; *Woodland v. Fuller*, 11 Ad. & E. 867. But the property in the goods is not altered by the writ until execution and sale by the sheriff; *Lucas v. Nockells*, 10 Bing. 182. Nor is the property altered even by actual sale under the writ, so long as anything remains to be done to distinguish the goods sold, as by separation and weighing on a sale *per ton*; *Ward v. Dalton*, 7 C. B. 643. The law admits of inquiry into the fraction of a day, whether the writ of execution was delivered to the sheriff or not before the completion of the conveyance or purchase. By the 19 & 20 Vict. c. 97, s. 1, "No writ of *fieri facias*, or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or

attached, had been delivered to and remained unexecuted in, the hands of the sheriff, under-sheriff, or coroner."

A recovery in trover vests the property in the chattel in the defendant as against the plaintiff; *Cooper v. Shepherd*, 3 C. B. 266. And it seems that the property is so vested by relation from the time of the conversion; *Buckland v. Johnson*, 15 C. B. 145. So judgment for the plaintiff in replevin in the *detinet* for damages vests the property of the goods in the defendant; *Moore v. Watts*, 1 Ld. Rayn. 614. See *Holmes v. Wilson*, 10 Ad. & E. 503, 511 (n).

An executor or administrator has the property of the goods of the testator or intestate vested in him before actual possession; *Com. Dig. Administration* (B. 10); and, though administration be not granted for a long time, yet, when it is granted, it vests the property in the administrator by relation from the time of the death of the intestate; *Ibid.* 2 Roll. Ab. 554, l. 15, 25; *R. v. Horsley*, 8 East, 410; and see the cases cited, *post*, *Ejectment—by Executors, &c.* Between the death and grant of administration the personal property now vests in the Judge of the Court of Probate in the same manner as it used to do in the Ordinary. 21 & 22 Vict. c. 95.

The property in goods does not pass by an award; *Hunter v. Rice*, 15 East, 100. It only gives a right of action or attachment (as the case may be) for non-performance of it. Trover lies for a lost bank-note which the defendant has converted, though part of the proceeds have been paid by him to the plaintiff; nor does the acceptance of such part waive the tort; *Burn v. Morris*, 2 C. & M. 579.

Evidence of special property.] It is sufficient for the plaintiff to prove that he has a special property in the goods converted as against the defendant. Thus a bailee (*Nicolls v. Bastard*, 2 C., M. & R. 659); a sheriff who has taken goods in execution (*B. N. P.* 33); the agister of cattle (*Br. Ab. Tresp.* 67); the lord who seizes an estray or wreck before the year and day expired (*B. N. P.* 33); may all maintain this action. So if a house be blown down, and a stranger takes away the timber, the lessee for life may bring trover, for he has a special property to make use of the same in rebuilding; *Ibid.* But where a lord, entitled to five heriots, marked seven and afterwards demanded them, trover was held not to lie upon such general demand and refusal, for the lord ought to demand only the five chosen by him; *Abington v. Lipscomb*, 1 Q. B. 776. In some cases a person who has only a special property may maintain trover, although he has never had actual possession; thus a factor to whom goods have been consigned, but by whom they have never been received, may bring trover for them; *per Eyre, C. J., Fowler v. Down*, 1 B. & P. 47. The consignee of goods, consigned as a mere security to meet bills accepted by him for the consignor, may bring trover, although no bill of lading has been executed; *Evans v. Nichol*, 3 M. & G. 614. And where the consignor of goods, hearing that the consignee had stopped payment, indorsed the bill of lading to the plaintiff without consideration, directing him to take possession of the goods, and the plaintiff demanded the goods from the defendants (wharfingers), who refused to deliver them, it was held that the plaintiff had such a special property as entitled him to maintain trover; *Morison v. Gray*, 2 Bing. 260; *Sargent v. Morris*, 3 B. & A. 277. Special property may be sufficient to support an action even against the owner of the goods; thus, where a person entitled to the temporary

possession of a chattel, delivers it to the general owner for a special purpose, he may, after that purpose is satisfied and on the refusal of the general owner to return it, maintain trover against him for it; *Roberts v. Wyatt*, 2 *Taunt.* 268. But it has been held that a landlord, who distrains and impounds goods, has not such a special property as will enable him to maintain trover; for he has only a pledge, with a power to sell by statute; *Moneux v. Goreham*, *Schw. N. P.* 1303; and the goods when impounded are not in the possession of the landlord, but in the custody of the law between the parties; *R. v. Cotton, Parker*, 121. The proper remedy is by action for pound breach; *Turner v. Ford*, 15 *M. & W.* 212.

Evidence of property—what sufficient against a wrong-doer.] Where the action is brought against a mere wrong-doer, it will be sufficient for the plaintiff to show that he was in possession of the property; *Jeffries v. Great Western Railway Co.*, 5 *E. & B.* 802; 26 *L. J. (Q. B.)* 107. Thus, where a chimney-sweeper's boy found a jewel, and took it to a jeweller, who refused to return it, it was held that the finder had such a property as would enable him to keep it against all but the rightful owner, and that he might maintain trover; *Armory v. Delamirie*, 1 *Stra.* 505. So the finder of goods, though picked up by him in the house of a third person; *Bridges v. Hawkesworth*, 21 *L. J. (Q. B.)* 75. So where the plaintiff bought a stranded vessel, which was not conveyed to him according to the provisions of the Registry Acts, and took possession of her, and part of the wreck, drifting upon the defendant's premises, was seized by him, it was held that plaintiff had a sufficient property to maintain this action; *Sutton v. Buck*, 2 *Taunt.* 302. In *Buckley v. Gross*, 3 *B. & S.* 566; 32 *L. J. (Q. B.)* 129, a fire had broken out in a warehouse containing tallow belonging to different persons, which was melted, and flowed into the Thames. The plaintiff collected a quantity of this tallow, which was taken from him by a constable, and sold by order of the Commissioners of Police to the defendants before the twelve months limited by statute had expired. It was held that the plaintiff had no property entitling him to maintain trover against the defendant. Where the owner of furniture lent it to the plaintiff under a written agreement, and the plaintiff placed it in a house occupied by the wife of C., a bankrupt, it was held that the plaintiff might recover in trover against C.'s assignees, and without producing the agreement; *Burton v. Hughes*, 2 *Bing.* 173. A licensee by parol to mine has possession of the gravel or earth dug up as against a wrongdoer; *Northam v. Bowden*, 24 *L. J. (Ex.)* 237. In trover for ore it was proved that the plaintiff was in possession of land in which he raised the ore in question: Held, that this was *prima facie* evidence of the plaintiff's right to the ore, although the same witness, on cross-examination, proved that the ore was taken by a person who had a shaft in an adjoining close, and was getting the same lode of ore under the plaintiff's land where he had sunk his shaft; *Rowe v. Brenton*, 8 *B. & C.* 737. In such an action it is enough to show occupation without proving the title of the lessors under whom the plaintiff claims; and it is not any answer that some of the lessors named in the lease have not executed it; for this, if material at all, is only evidence in reduction of damages; *Taylor v. Parry*, 1 *M. & G.* 604. The owner of a ship, when the cargo is put on board, is *prima facie* owner of the cargo, so as to sue a wrong-doer in trover; *Brancker v. Molyneux*, 3 *M. & G.* 84. In *Bourne v. Fosbrooke*, 34 *L. J. (C. P.)*

164, the plaintiff received from her aunt, who was housekeeper to F., and a married woman, living separate from her husband, a watch and other articles. The aunt died, and the defendants, the executors of F., took possession of the watch, &c., which had been kept by the testator in a drawer on behalf of the plaintiff, who was absent from the house of the testator at the time of his death. It was held that the plaintiff had a sufficient possessory right to maintain trover against the defendants, though she had perhaps no right as against the husband of her aunt.

Evidence of right of possession.] The plaintiff must show that he has a right to the immediate possession of the goods, in order to recover in this action. Thus, the purchaser of goods, not sold on credit, has no right of possession until he pays or tenders the price; *Bloxam v. Sanders*, 4 B. & C. 941. A quantity of hops was purchased from the defendant, the invoice of which contained the words "on rent." The hops remained in the seller's warehouse, and an acceptance of the buyer was afterwards given them at the seller's request, which he indorsed on getting it discounted. During the running of that bill, part of the hops were delivered, in pursuance of the buyer's order, to his sub-purchaser, who paid the warehouse rent, *pro tanto*, charged by the seller. Afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonoured at maturity. Held, that his assignees could not maintain trover for the hops without actual payment of the price agreed on, the buyer having only the right of property without that of possession; *Miles v. Gorton*, 2 C. & M. 504. The vendor, having a lien for the price, permitted the vendee to have a key of the part of the vendor's premises on which the goods were to remain till payment, the vendor retaining a general control over the premises as before: Held, that this was not such a possession by the vendee as to support trover against the vendor for a wrongful removal of the goods; *Milgate v. Kebble*, 3 M. & G. 100. A made an assignment of goods by deed to secure a debt with a covenant to pay it on demand, and in the meantime to remain in possession till default. It was held that, before demand of the debt, the assignee could not maintain trover; *Bradley v. Copley*, 1 C. B. 685. In *White v. Morris*, 11 C. B. 1015, it was held, upon the construction of a somewhat similar deed, that a right to the immediate possession of the goods passed by the assignment. Where the assignor in a similar case wrongfully sold the goods, so that he could not deliver them on demand, the assignee was held entitled to recover their value in trover even against the *bond fide* purchaser; *Cooper v. Willomatt*, 1 C. B. 672; *Fenn v. Bittleston*, 7 Ex. 152.

A lessor cannot bring trover against the lessee for an indenture of lease containing covenants by the lessor, although the term is expired; *Hall v. Ball*, 3 M. & G. 242; and it is doubtful whether he could do so even if it had contained no such covenants. The freeholder is entitled to possession of the title-deeds. Thus, where A. mortgaged to the plaintiff a freehold estate, and the deed purported to convey "all deeds," &c., and A. afterwards deposited the original deeds with a banker as a security: held, that the plaintiff might recover them from the banker in *detinue*; *Newton v. Beck*, 27 L. J. (Ex.) 272; 3 H. & N. 220. Where a father gave to his son, an infant aged sixteen, a watch and certain books and wearing-apparel, it was ruled that the right of possession was in the son, and that the father could not maintain trover for them, though perhaps it might have

been otherwise in the case of a child of tender age; *Hunter v. Westbrook*, 2 C. & P. 578.

The reversioner, or person entitled to the freehold of lands on lease, may bring trover for fixtures after severance from the demise. Thus, where a certain mill machinery, together with a mill, had been demised for a term to a tenant, who, without permission from his landlord, severed the machinery from the mill, and it was afterwards sold by the sheriff under a *fi. fa.*; it was held that no property passed to the vendee, and that the landlord might bring trover for the machinery even during the continuance of the term; *Farrant v. Thompson*, 5 B. & A. 826. So where lands are leased for years, and a tree is cut down by a stranger during the term, the landlord may maintain trover for it; for, when it is severed, the special property of the lessee is determined; *Berry v. Heard*, Cro. Car. 242. But trover cannot be maintained by a tenant in tail, expectant on the determination of an estate for life without impeachment of waste, for timber which grew upon and was severed from the estate; for the tenant for life has a right to the trees the moment they are cut down; *Pyne v. Dor*, 1 T. R. 55; and see *Williams v. Williams*, 12 East, 209; *Channon v. Patch*, 5 B. & C. 897. A ladder fixed to the ground and to a beam above, and which was the only means of access to a room above; a crank nailed at top and bottom to keep it in its place, but not let into the wall; and a bench nailed to the wall, were all held not to be goods and chattels for which trover would lie after the expiration of the term; *Wilde v. Waters*, 16 C. B. 637. Where the lessee of an unfinished house was restrained from removing looks, keys, bars, bolts, chimney-pieces, slabs, and other fixtures and articles in the nature of fixtures, fixed or fastened during the term, and the premises were afterwards finished and fitted up as a tavern, and an ornamental marble chimney-piece was put up by him, it was held, that he was not restrained from removing the trade fittings, or even tenant's fixtures, or the marble chimney-piece, at the end of the term; for the covenant might be construed to apply only to landlord's fixtures, and introduced *ex majori cautela*; *Bishop v. Elliot*, 11 Ex. 111; 24 L. J. 229, in *Error*.

Evidence of conversion—actual or direct conversion.] The gist of the action for conversion is the wrongful conversion of the plaintiff's goods by the defendant. A conversion, however, does not, *ex vi termini*, imply a transfer of property to the defendant, but rather a deprivation of property to the plaintiff; *Keyworth v. Hill*, 3 B. & A. 687. A conversion may be proved either by evidence of a direct act of conversion, or by showing a demand of the goods by the plaintiff and a refusal by the defendant to deliver them, which is evidence of one.

An unlawful *taking* of goods out of the possession of the owner is itself a conversion, and not mere evidence of it (*B. N. P.* 44, 2 *Saund.* 47g (n.); *Grainger v. Hill*, 4 N. C. 212; *Powell v. Hoyland*, 6 Ex. 67); provided the taking or detention be with intent to convert them to the use of the taker, or of some other person, or has the effect of destroying or altering their quality or nature; for if there be a trespass committed which does not interfere with the owner's general dominion over the property, this is no conversion. Therefore, where a ferryman, refusing to take a passenger's horses, removed them from the boat and put them at large ashore, this was held not to be in itself a conversion; *Fouldes v. Willoughby*, 8 M. & W. 540.

See *per Martin, B.*, in *Crouch v. Great Northern Railway Company*, 11 *Ex.* 742; *Heald v. Carey*, 11 *C. B.* 977. A bankrupt may maintain trover against his assignees in order to try the validity of the bankruptcy without proving a demand and refusal; for the taking of the goods by the assignees is a sufficient conversion, and the plaintiff must be deemed to have delivered them on compulsion; *Summersett v. Jarvis*, 3 *B. & B.* 2. So the using a thing without the licence of the owner may be a conversion; *Mulgrave v. Ogden*, *Cro. Eliz.* 219; *Keyworth v. Hill*, 3 *B. & A.* 687. Thus the wearing of a pearl was held a conversion; *Lord Petre v. Heneage*, 12 *Mod.* 519. And where a person finds a thing and misuses it, it is a conversion; *Mulgrave v. Ogden*, *supra*. And where a person, coming to the possession of land, found there a block of stone belonging to another, and removed it, not to an adjacent place, but to a distance, it was ruled to be a conversion; *Forsdick v. Collins*, 1 *Stark.* 173; but see *Houghton v. Butler*, 4 *T. R.* 364. So drawing part of the wine out of a vessel, and filling it up with water, is a conversion of all the liquor; *Richardson v. Atkinson*, 1 *Stra.* 576. But it has been said by Patteson and Coleridge, JJ., that the conversion of *part* is not the conversion of the *whole*, if the remainder continues in a fit state to be delivered up, and the party offers to deliver it up; *Philpott v. Kelley*, 3 *Ad. & E.* 106. A second distress for rent, for which the landlord has *already* distrained, is a conversion, if the first was abandoned voluntarily, or might have been sufficient to satisfy the rent but for the landlord's default in not taking enough; *Dawson v. Cropp*, 1 *C. B.* 961.

A person in the lawful possession of goods may be guilty of a conversion of them, by dealing with them contrary to the orders of the owner. Thus where the owner of goods on board a vessel directed the captain not to land them on a wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use under an idea that the wharfinger had a lien thereon for the wharfage fees, this was held a conversion; *Syeds v. Hay*, 4 *T. R.* 260.

In order to constitute an actual conversion, it is not necessary that the party should deal with the goods *as his own*. It is enough if it be a dealing, for a third person adversely to the true owner; thus where a bankrupt, being indebted to G., delivered goods to G.'s servant, who gave a receipt for them in G.'s name and sold them for his use, it was held that this sale was a conversion by the servant; *Perkins v. Smith*, 1 *Wils.* 328. So the mis-delivery of goods by a wharfinger; *Devereux v. Barclay*, 2 *B. & A.* 702; or by a carrier; *Youl v. Harbottle*, *Peake Ca.* 49; *Stephenson v. Hart*, 4 *Bing.* 483, is a conversion; though it is otherwise where he loses them by accident; *Ross v. Johnson*, 5 *Burr.* 2825; *Kirkman v. Hargreaves*, 1 *Schw. N. P.* 425. Proof that the carrier asserted he had delivered the goods to the consignee, and that the assertion is false, is not alone evidence of a conversion; *Attersol v. Briant*, 1 *Camp.* 409. But if the plaintiff had also proved a demand and a refusal by the party, whether consignor or consignee, entitled to have them, it would then have been evidence of a conversion. See further the observations of Martin, B., in *Crouch v. Great Northern Railway*, 11 *Ex.* 742. If a landlord before the sale of distrained goods has notice from third persons, the plaintiffs, to deliver up the overplus to them as being the real owners, it is no conversion for him to return the overplus and unsold goods to the tenant instead of the plaintiffs; for as to

overplus, it should be paid to the sheriff and not to the plaintiffs; and as to the goods, they were rightly replaced where they were found; *Evans v. Wright*, 2 H. & N. 527.

Taking the plaintiff's property by assignment from another, who has no right to dispose of it, is a conversion. Therefore where the defendant took an assignment of tobacco in the king's warehouse by way of pledge from a broker who had purchased it in his own name for his principal (the plaintiff), it was held that he had been guilty of a conversion; it being also proved that, when the tobacco was demanded from him by the plaintiff, he refused to deliver it; *M'Combie v. Davies*, 6 East, 538; *Baldwin v. Cole*, 6 Mod. 212; see also *Jackson v. Anderson*, 4 Taunt. 25. But where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds, it was held that the defendants, having sold the goods, could not be sued for them in trover by the original owner; *Stiernel v. Holden*, 4 B. & C. 5. And where the defendant was entrusted by the plaintiff with a bill of exchange to get it discounted, and afterwards misapplied the proceeds, it was held that trover would not lie against him; *Palmer v. Jarman*, 2 M. & W. 282. See *Symonds v. Atkinson*, 1 H. & N. 46. So where a broker, who is authorised to sell goods at a certain price, sells them at an inferior price, it is no conversion; *Dufresne v. Hutchinson*, 3 Taunt. 117.

A wrongful sale of goods is a conversion, and no demand is necessary; *Edwards v. Hooper*, 11 M. & W. 363. But a wrongful sale by one co-tenant is not a conversion as against the other, unless it be in market overt, or under such circumstances as wholly to deprive the other co-tenant of the power of retaking the goods; *Mayhew v. Herrick*, 7 C. B. 229. Where A. consigned the goods of B. to the defendant, who, without notice of the right of B., sold a part, and kept the remainder in his possession, the sale was held to be a conversion as against B.; *Featherstonhaugh v. Johnston*, 8 Taunt. 237. A banker discounted a bill drawn on a customer and accepted, payable at his bank, after notice that it had been lost by the holder: He afterwards debited his customer with the amount of the bill, wrote a discharge on it, and delivered it up to the customer as the voucher of his account: Held that the banker was guilty of an actual conversion, and that a demand was unnecessary; *Lovell v. Martin*, 4 Taunt. 799. If the holder of a bill for a specific purpose gets money on it by discount without authority, this is a conversion of the whole, though he may have received only part of the money due on it; and the jury may give the whole amount as damages; *Alsager v. Close*, 10 M. & W. 576. So where the drawer of a bill deposited it with a creditor, giving him authority to receive the proceeds and apply them in a specific way; and the creditor, after the drawer had committed an act of bankruptcy, gave up the bill to the acceptor, and took another instead, this was held to be a conversion by him as against the assignees; *Robson v. Rolls*, 1 Mood. & Rob. 239. In *Johnson v. Stear*, 15 C. B. N. S. 330; 33 L. J. (C. P.) 130, C. deposited with the defendant the dock-warrant for a quantity of brandy, as a security for the payment of the acceptance of C. due the 29th of January. C. became bankrupt, and the defendant sold the brandy on the 28th, and handed over the warrant on the 29th, the vendee taking possession of the brandy on the 30th. It was held,

that although the sale alone might not have operated as a conversion, yet that the delivery of the warrant interfered with the right of retaking possession of the goods, and afforded ground for an action of trover. In *Pigot v. Cubley*, 15 C. B., N. S. 701; 33 L. J. (C. P.) 134, the defendant made an advance payable at a day certain, upon the security of two pictures. The time for payment was by agreement indefinitely extended, and the defendant afterwards wrote to the plaintiff saying, that if the money were not paid he should sell the pictures, misstating in his letter the amount of his claim. It was held that this inaccurate notice did not end the agreement, and that the defendant was liable in trover for selling the pictures; and see *Alsager v. Close*, 10 M. & W. 576.

Where the defendant took the plaintiff's boat in order to reach his own vessel which was on fire, being under the plaintiff's care, and the boat was accidentally sunk, Lord Ellenborough was of opinion that this was not a conversion; *Drake v. Shorter*, 4 Esp. 165. So it is no conversion if the master of a ship throws goods into the sea to prevent the ship from sinking; *Bird v. Astcock*, 2 Bulstr. 280. Where the defendant has done the act complained of by the licence of the plaintiff it is no conversion. Thus, if a person, against whom a commission of bankrupt has issued, acquiesces in it so far as to take a part in the sale of his own goods by recommending an auctioneer to conduct the sale, it is no conversion; *Clarke v. Clarke*, 6 Esp. 61.

Though the burning or destroying of property by the defendant is a conversion if done with intent to destroy or appropriate, it is no conversion if the goods be burnt by accident, or even by the mere negligence of the bailee, or by the act or negligence of a third person not in privity with the bailee. It is otherwise if destroyed while in the wrongful possession of the defendant, though not with his privity; or if they are damaged while he is exercising a dominion over them inconsistent with the rights of the real owner; *Heald v. Carey*, 11 C. B. 977; 21 L. J. (C. P.) 97. It is no conversion for the defendant to cut away timber improperly fixed or bedded by the plaintiff in the defendant's close, so as not to be easily removeable; *Simmons v. Lillystone*, 8 Ex. 431.

Evidence of conversion—demand and refusal.] A demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the power to deliver them, are evidence of a conversion. But being only presumptive evidence of a conversion, it may be rebutted by evidence to the contrary; 2 Saund. 47e (n.). A demand and refusal are evidence of a prior conversion. *Per Cur.* in *Wilton v. Girdlestone*, 5 B. & A. 847. A refusal must be proved; mere excuses for not delivering the goods will not be sufficient; *Severin v. Keppell*, 4 Esp. 156; *Addison v. Round*, 7 C. & P. 285. But the refusal need not be express; thus where, in trover by assignees of a bankrupt for a landau, it appeared that, after the act of bankruptcy, the bankrupt had sold the landau to the defendant, and that a written demand of it had been left by the plaintiffs at the defendant's house; but it did not appear that the latter had expressly refused to deliver it up, Richardson, J., ruled that the demand, and the non-delivery in pursuance of the demand, were evidence of a conversion; *Watkins v. Woolley, Gow*. 69. The fact that the plaintiff's goods are in the defendant's house from which he has ejected the plaintiff, is not necessarily proof of a conversion; a demand and refusal should be

proved; *Thorogood v. Robinson*, 6 Q. B. 769. See *Wilde v. Waters*, 16 C. B. 637; 24 L. J. (C. P.) 193. If the defendant, being applied to by the holder for a blank acceptance signed by defendant and which had been left with the defendant's brother to get the bill corrected, replies that he cannot return it "because it is burnt;" this answer, coupled with the fact that the defendant is *not* called as a witness for the defence, is evidence of a possession and destruction by him; *McKewen v. Cotching*, 27 L. J. (Ex.) 41.

There are many cases in which a refusal to deliver goods will not be evidence of a conversion. In order to render a demand and refusal evidence of conversion it must appear, that, at the time of the demand made, the party had it in his power to deliver up or retain the article demanded; *Smith v. Young*, 1 Camp. 441. As where one B. had hired a chaise of the plaintiff and placed it at livery with the defendant, in whose possession it was attached by process out of the Sheriff's court in an action against B., and the plaintiff demanded the chaise, which the defendant refused to deliver, alleging that it had been attached: Held that this was no evidence of a conversion; the chaise being at the time of the demand in the custody of the law; *Verrall v. Robinson*, 2 C. M. & R. 495. In *Pillot v. Wilkinson*, 34 L. J. (Ex. Ch.) 32, the plaintiff had purchased and received a warrant for wine deposited with the defendant, a wharfinger. A few weeks afterwards the plaintiff presented his warrant, which was indorsed generally by H. & Co., and demanded the wine. The warehouseman of the defendant said there was a difficulty, that the goods had been stopped by an attachment from the Lord Mayor's Court. The defendant could not be found, but it appeared that he had been served a few days previously with notice of attachment on all the goods of H. & Co. The same day the plaintiff wrote demanding the wine, and threatening immediate proceedings unless an answer was given by eleven o'clock next day. The defendant wrote next day in reply, asking for time, but before his letter was received the plaintiff had issued a writ. It was held, that there was evidence for the jury of a conversion. If a person, who finds goods, refuses to deliver them to the owner until he proves his right to them, such refusal is no evidence of conversion; *Green v. Dunn*, 3 Camp. 215 (n.); *Gunton v. Nurse*, 2 B. & B. 449; *Clark v. Chamberlain*, 2 M. & W. 78. But see *Burroughes v. Bayne*, 5 H. & N. 296; 29 L. J. (Ex.) 185, and in the opinion of Parke, B., the proper question to be left to the jury is whether the defendant had a *bond fide* doubt as to the title to the goods, and if so whether a reasonable time for clearing up that doubt had elapsed. Where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse of which the defendant, a servant of the company, kept the key; and the defendant, on being applied to by the plaintiff, to deliver them up, refused to do so without an order from the company, it was held that this refusal was no evidence of a conversion; *Alexander v. Southey* 5 B. & A. 247. A dishonoured bill was demanded of the defendant, who did not deny the plaintiff's right to it, but said it was in the hands of his attorney, A. B., and that he would get it from him, if the plaintiff would call again. On calling again the defendant had not got it back from A. B.: Held that, if the defendant did not really mean to withhold the bill, this did not prove a conversion; *Towne v. Lewis*, 7 C. B. 603.

But a refusal on the ground of a claim of right by another is evidence of a conversion; *Cuunce v. Spanton*, 7 M. & G. 903; and see

Wansbrough v. Maton, 4 *Ad. & E.* 884. So is a refusal to give up to the plaintiff his title deeds except on payment of charges for which he is not liable; *Davies v. Vernon*, 6 *Q. B.* 443. Where the widow and administratrix of an insolvent, being applied to by his assignees for papers in his possession at his death, answered that they were in the hands of her attorney, it was held, that this was not sufficient evidence of a conversion; *Canot v. Hughes*, 2 *N. C.* 448. But where a person who claimed to have a lien upon goods, delivered them to a bailee, and the real owner demanded them of the latter, who refused to deliver them without the directions of the bailor, it was held that, the bailor not having any lien upon the goods, the refusal by the bailee was evidence of a conversion; and *per* Lord Tenterden, C. J., "A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right of property may, therefore, be tried in an action against the bailee." *Wilson v. Anderton*, 1 *B. & Ad.* 450; *Lee v. Robinson*, 25 *L. J. (C. P.)* 249, cited, *post*, p. 597; *Cheesman v. Exall*, 6 *Ex.* 341. So in trover against a carrier by the bailor of the goods, he may set up the right of the real owner, who has claimed and received them from the carrier; *Sheridan v. New Quay Co.*, 4 *C. B., N. S.*, 618; 28 *L. J.* 58. A refusal by the general agent of a party is not evidence of a conversion by that party; it must be shown that, in the particular act of refusal, the agent acted under the special directions of his principal; *per* Gibbs, C. J., *Pothonier v. Dawson*, *Holt, N. P. C.* 383. But proof of a refusal by the shop servant of a pawnbroker has been held to be evidence of a conversion by the master; *Jones v. Hart*, 2 *Salk.* 441. And where a bailiff wrongfully took the goods of the plaintiff, and lodged them on the defendant's premises, and the defendant's wife, in his absence, refused to deliver them up to the plaintiff, this was held evidence of a conversion by the wife, for which trover lay against husband and wife jointly; *Cutterall v. Kenyon*, 3 *Q. B.* 310. A demand to re-deliver a chattel injured by the defendant "in the same plight as when it came to the defendant's possession," followed by a refusal, is not evidence of a conversion; *Rushworth v. Taylor*, 3 *Q. B.* 699.

A demand of the value of the goods has been held a sufficient demand of the goods; *Thompson v. Shirley*, 1 *Esp.* 31. And service of a written demand by leaving it at the house of the defendant, is good. *Logan v. Houlditch*, 1 *Esp.* 22. Where two independent contemporary demands have been made, one verbal and the other in writing, proof of either will be sufficient; *Smith v. Young*, 1 *Camp.* 440. A demand and refusal of "fixtures," is no evidence of the conversion of articles which are not fixtures; *Colegrave v. Dias Santos*, 2 *B. & C.* 76.

It seems that assignees of a bankrupt cannot recover in trover goods delivered by the bankrupt before his bankruptcy by way of a fraudulent preference, without proof of a demand and refusal; *Stevenson v. Newnham*, 13 *C. B.* 285; *Nixon v. Jenkins*, 2 *H. Bl.* 135.

If the defendant refuses to deliver goods, alleging an insufficient ground of refusal, whereupon the plaintiff brings trover, it has been questioned whether the defendant can set up at the trial another and different ground; *Coles v. Bank of England*, 10 *Ad. & E.* 444, 445, *per* Patteson, J.

Evidence of conversion—by whom.] The action may be brought

against any person who was a party to the conversion, although the goods were actually converted by another; 2 *Saund.* 47m (n.). Thus, if a party sues out an execution against a bankrupt, and the sheriff seizes the goods and sells them, and gives the money to the creditor, the assignees may bring trover against the sheriff or against the party suing out execution, if he can be proved to be a party to the conversion by giving a bond to secure the sheriff, and so making the seizure his own act; *Rush v. Baker*, B. N. P. 41. And the law seems to be the same, though A. should not give the bond, if he receives the money; *Ib.*, 2 *Stra.* 996; 2 *Saund.* 47m (n.); *Nicoll v. Glennie*, 1 M. & S. 592. So where a bankrupt left some plate with his wife, who delivered it to a servant to sell, and the servant delivered it at the door of W.'s shop to the defendant, who went into the shop and pawned it to W. in his own name, and delivered the money to his servant, who paid it to the wife, it was held to be a conversion by the defendant; *Parker v. Godin*, 2 *Stra.* 813; B. N. P. 47.

Trover will lie against a corporation, and it is not necessary to show that the conversion was authorised by an instrument under seal; *Yarborough v. Bank of England*, 16 *East*, 6; *Duncan v. Surrey Canal Co.*, 3 *Stark.* 50. And a corporation is liable for acts done by its agent in the course of his ordinary duty, as in distraining for dues, &c.; *Smith v. Birmingham Gas Co.*, 1 *Ad. & E.* 526. Agency may be inferred from the subsequent adoption of the act by the corporation; *Ib.* Where the conversion is by a contractor for works on a railway, this is not evidence of a conversion by the company; *Glover v. North-Western Railway*, 5 *Ex.* 66, *ante*, p. 63; *post*, *Actions against Companies*.

A servant is liable in an action of trover for a conversion, though for his master's benefit; *Stephens v. Elwell*, 4 M. & S. 259; *Alexander v. Southey*, 5 B. & A. 249. So a clerk, who refuses to re-deliver a bill of exchange wrongfully indorsed to him, which he has carried to his master's account; *Cranch v. White*, 1 N. C. 414; 1 *Scott*, 314. See *Symonds v. Atkinson*, 1 H. & N. 146. But a servant or agent, who has received goods from his master or principal, may, on a demand made by the true owner of the goods, give a qualified refusal to deliver them up, without being liable to an action of trover; as if the ostler at a stable states his unwillingness to give up a horse claimed by a stranger, until his master had been spoken to about it; but where a bailee sets up or relies upon the title of his bailor in answer to such demand, his refusal is evidence of a conversion by him; *Lee v. Robinson*, 25 L. J. (C. P.) 249.

In an action against several, a joint act of conversion must be proved in order to obtain a verdict against all; *Nicoll v. Glennie*, 1 M. & S. 588. Where the master of a ship, unjustifiably, but in the *bonâ fide* exercise of his discretion, sold a cargo at a port short of its destination, and the shipowner adopted the sale and paid over the proceeds to the owner of the cargo; it was held that trover lay against the master and shipowner jointly, and that it was not necessary in such action to produce the charter party, the bill of lading showing on the face of it the contract of carriage; *Ewbank v. Nutting*, 7 C. B. 797.

In *Hilbery v. Hatton*, 2 H. & C. 822; 33 L. J. (Ex.) 190, a ship grounded on the coast of Africa was wrongfully bought for the defendants by their agent there. The agent, who had acted without authority, wrote to the defendants of the purchase. They acknow-

ledged the receipt of the letter, and said: "You do not say from whom you bought her, nor whether you have the register with her. *You had better, for the present, make a hulk of her.*" It was held that there was evidence for the jury of a conversion by authority of the defendants.

Evidence of conversion—tenant in common, &c.] As the possession of one joint-tenant, tenant in common, or parcener, is the possession of the others, trover cannot in general be maintained by one joint-tenant, &c., against his companion; *Co. Litt.* 200 a; 2 *Saund.* 47h (n.). The removal of entire chattels by one tenant in common, without the consent or knowledge of the other, for the purpose of selling them and applying the proceeds to his own use, does not amount to a conversion, even although the removal has created a lien on the chattels by a third party; *Jones v. Brown*, 25 *L. J. (Ex.)* 345. Where the plaintiff and one of the defendants were members of a friendly society, the funds of which were kept in a box deposited with them, and the defendant took away the box and delivered it to the other defendant, who was not a member of the society, it was held that the plaintiff could not maintain trover for the box; *Holliday v. Camself*, 1 *T. R.* 658. So where one tenant in common of a whale refused to deliver a moiety of it to the other, and cut it up and expressed the oil, it was held that this was no conversion; *Fennings v. Grenville*, 1 *Taunt.* 241. But if one tenant in common, &c., destroys the thing in common, trover lies. Thus where one tenant in common of a ship took it away by force and sent and sold it in the West Indies, where it was lost in a storm, it was held to be evidence of a destruction by him; *Barnardiston v. Chapman*, cited 4 *East*, 121; *B. N. P.* 34. So it has been said that the sale of the whole of a chattel by one tenant in common, without authority of his co-tenant either express or implied, is, with respect to the other, a wrongful conversion of his undivided part. *Per* Bayley, J., *Barton v. Williams*, 5 *B. & A.* 403; *Heath v. Hubbard*, 4 *East*, 110, 126. It is, however questionable whether a sale by a co-tenant is a conversion, unless it be one (as in market overt) which deprives the other of his right of enjoyment or interest in it; see *Farrar v. Beswick*, 1 *M. & W.* 688; and *Higgins v. Thomas*, 8 *Q. B.* 908, cited *post*, p. 600; or prevents him from exercising any ownership over it; *Mayhew v. Herrick*, 7 *C. B.* 229.

Damages.] In actions for conversion, the general rule is, that the damages should be the value of the thing converted; *Finch v. Blount*, 7 *C. & P.* 478. Where the defendant wrongfully detained from the plaintiff a bill for £1000, and got £800 upon it, it was held that the plaintiff was entitled to the full amount as damages. But there are some circumstances which may operate in mitigation of damages. In *Chinery v. Viall*, 5 *H. & N.* 288; 29 *L. J. (Ex.)* 180, where an unpaid vendor sold goods, the property in which had been transferred to the vendee, it was held that the vendee could recover only the difference between the price agreed on and the value of the goods. In *Johnson v. Stear*, 15 *C. B., N. S.* 530; 33 *L. J. (C. P.)* 130, where the pledgee of a dock warrant had converted it before the day fixed for the payment of the money advanced, it was held by a majority of the court that the interest of the defendant in the pledge must be taken into account in measuring the damage which the plaintiff had sustained;

Williams, J., thought, however, that as the defendant had abused his lien, the damages ought to be equal to the full value of the goods. In *Edmondson v. Nuttall*, 17 C. B., N. S. 280; 34 L. J. (C. P.) 102, the defendant had on his premises looms belonging to the plaintiff, and on a Friday obtained an order in the county court directing the plaintiff to pay a certain sum on the Monday following. On Saturday the plaintiff came to fetch the looms, but the defendant put him off with an excuse, and on the Monday positively refused to give them up. On the following day he sold them under an execution issued out of the county court upon the judgment which he had there obtained. The court held that the plaintiff was entitled to recover the full value of the looms, without any deduction in respect of what was due to the defendant. In trover for a guarantee the plaintiff is entitled to the sum recoverable on it by him, though mutilated by the defendant; and if unstamped, the expense of stamping must be deducted; *M'Leod v. M'Ghie*, 2 M. & G. 326. Where the executor of A. received money on a policy on the life of A., which A. had conveyed to B. in trust for creditors, B. may recover the money from the executor in trover for the policy; *Watson v. McLean*, 1 E. B. & E. 75. In trover for title deeds, the jury may give the full value of the estate to which they belong by way of damages, although they are generally reduced to 40s. on the deeds being given up; *Loosemore v. Radford*, 9 M. & W. 657, per Alderson, B. Where the defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiffs, assignees of a bankrupt, after trover brought against him by the plaintiffs, and the plaintiffs accepted them without condition, it was held that they could not recover more than nominal damages; at all events, not without alleging special damage; *Moon v. Raphael*, 2 N. C. 310. In trover for coals, the action was brought to try the right to the mines, which had been worked by the defendant, and turned on the effect of an old conveyance; Parke, B., directed the jury, that if there was fraud or negligence in the defendant, they might give the full value of the coal, without deduction for expenses, &c.; but if he acted honestly, in the belief that he was entitled to the mines, the proper damages would be the value, as if the coal-field had been bought by the defendant from the plaintiff. The jury thereupon gave for damages a certain sum per acre on the latter estimate, and the direction was acquiesced in; *Wood v. Morewood*, 3 Q. B. 440. In trover for a cargo improperly sold by the master of a ship before arrival at the port of destination, the jury are justified in giving as damages the cost price and amount of freight paid; and this, it seems, is the *least* that ought to be given, when there is no proof *contra* by the defendants; *Ewbank v. Nutting*, 7 C. B. 797. Where the defendants converted a vessel before she was finished and then finished her, it was held that the plaintiffs were entitled to recover, as damages in trover, the value of the vessel at the time of the conversion, but not her value at a subsequent time, nor, as special damage, the value of freight which the plaintiffs might have earned with her if she had been completed by the person who had contracted to build the same for the plaintiffs, and delivered to them; *Read v. Fairbanks*, 13 C. B. 692. As to the principle on which special damage is to be assessed, see *Wood v. Bell*, 6 E. & B. 355. In trover by assignees of a bankrupt against a creditor of the bankrupt for a wrongful seizure and sale under a *fi. fa.*, the jury are not bound to give the value of the goods if the sale was *bonâ fide*, but may give the amount of the sale only; for the goods must be

sold at all events, either by the plaintiff or the defendant; *Whitmore v. Black*, 13 M. & W. 507. See further as to trover by assignees, *post*, *Action by Assignees of Bankrupt*, *post*, Part III. Special damages are not recoverable in this action unless laid in the declaration; *Davis v. Oswell*, 7 C. & P. 804; *Bodley v. Reynolds*, 8 Q. B. 779.

Defence.

By rule 20, H. T. 1853, "In actions for taking, damaging, or converting the plaintiff's goods, the plea of Not guilty shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein." And, by rule 17, all matters in confession and avoidance shall be pleaded specially as in case of contract.

Since the change made in the effect of the general issue under the old system of pleading, the two pleas of Not guilty and of a denial of the plaintiff's property, together make up the old plea of Not guilty, of which the effect was to deny both property and wrongful conversion; *Whitmore v. Green*, 13 M. & W. 104, 107; *Kynaston v. Crouch*, 14 M. & W. 272. Hence the plea of "Not guilty," denies a wrongful conversion of goods admitted to belong to the plaintiff at the time of the conversion; while the other plea admits an act done which would have been a conversion if the goods had belonged to the plaintiff; but denies the plaintiff's title to them.

Some defences may perhaps be admissible under either plea; but where the defence admits both the property and the wrongful conversion, as in case of a release, or of the Statute of Limitations, there must be a special plea.

Evidence under Not guilty.] After some adverse decisions it is now settled that the plea of Not guilty in an action of trover (or, more properly, for conversion) puts in issue not only the *fact* of the conversion, but also the rightfulness of it; *Young v. Cooper*, 6 Ex. 259; *Muyhew v. Herrick*, 7 C. B. 229. Indeed the word "conversion" in the count *ex vi termini* is taken to imply wrongfulness. *Bac. Ab. Trover (F.)* 2; *Ringham v. Clements*, *arg.* 12 Q. B. 260. Therefore a taking by a tenant in common with the plaintiff, not amounting to a destruction, is evidence for the defendant under that plea; *Higgins v. Thomas*, 8 Q. B. 908; *Jones v. Brown*, 25 L. J. (Ex.) 345. A mere sale of an entire chattel by a co-tenant, so as not wholly to deprive the plaintiff of his power of re-possession, is not a conversion, for it only operates upon the undivided share of the vendee (unless it be a sale in the market overt so as to change the property of the whole); *Mayhew v. Herrick*, 7 C. B. 229; and this is evidence under Not guilty; *Ib.*, *ante*, p. 598. Whether leave and licence can be shown under this plea, or must be specially pleaded, was discussed in *Ringham v. Clements*, *suprà*; but not decided. But no defence which denies the plaintiff's property in the goods, or such a property as will support the action, can be set up under this plea; *Barton v. Brown*, 5 M. & W. 298; *Jones v. Davies*, 6 Ex. 663; *Edwards v. Hooper*, 11 M. & W. 363. In trover by assignees of a bankrupt alleging a conversion after the bankruptcy, it was held, that, under Not guilty, a conversion after the bankruptcy must be shown.

Evidence on a plea that goods are not the plaintiff's.] A plea, that the goods are not the plaintiff's, puts in issue the right of the plaintiff to the possession of them, as against the defendant, at the time of the conversion; *Isaac v. Belcher*, 7 Dowl. 516; 5 M. & W. 139; *Fyson v. Chambers*, 9 M. & W. 463. He may show, under that plea, that he had a lien upon the goods at the time of the conversion. But if the defendant, instead of retaining the goods upon which he has a lien, sells, or enables any other person to sell them, he is guilty of a conversion; *Clarke v. Gilbert*, 2 N. C. 357; *White v. Teal*, 12 Ad. & E. 106; *Brandao v. Barnett*, 3 C. B. 519; *Dorrington v. Carter*, 1 Ex. 566; *White v. Spettigue*, 13 M. & W. 603. Defendant, when he is not a bailee or agent, may set up the title of a third person though he does not claim under that person; *Leake v. Loveday*, 4 M. & G. 972. And an agent may set up a *jus tertii*, where the bailment has been determined by what is equivalent to an eviction by title paramount. The plaintiff and R. stood merely in the relation of vendor and vendee, but the plaintiff seized goods of R. as a distress for rent of a house alleged to have been let by the plaintiff to R. These goods were delivered by the plaintiff to the defendant, an auctioneer, for sale. When the sale was about to begin R. served a notice on the defendant that the distress was void, and required him to retain the proceeds of the sale on his (R.'s) behalf. It was held that the defendant was justified in retaining the proceeds; *Biddle v. Bond*, 34 L. J. (Q. B.) 137. And see *Leake v. Loveday*, 4 M. & G. *suprà*; *Thorne v. Tilbury*, 3 H. & N. 534, *per* Martin, B. Or a gift from the plaintiff; *Ringham v. Clements*, *suprà*. In an action for goods seized under a claim of toll, alleged to be due in respect of landing them at a particular wharf, it is competent for a defendant under this plea to set up his claim to the toll; *Webb v. Tripp*, 1 Dowl. N. S. 589. And where, in trover, it appeared, that, plaintiff being the legal owner of the goods in question, they were seized while in the actual possession of a third party under an execution against such third party, and sold to defendant, it was held, that, under a plea denying the plaintiff's possession, defendant might show that the plaintiff authorised the sale; *Pickard v. Sears*, 6 Ad. & E. 469. And so, where, in trover for goods, the fittings, &c., of a public house, the defence was, that the plaintiff, being the owner of the fittings, &c., demised them to D., who thereupon became tenant of the house to a third party under an agreement which gave his landlord a lien on the fittings; that the plaintiff was present at the execution of such agreement; and that D. afterwards sold the goodwill and fittings, without the plaintiff's knowledge or assent, to the defendant, who, being told by the landlord that D. was his tenant, bought them *bonâ fide*, in ignorance of the plaintiff's title, and was accepted by the landlord as tenant in the place of D.: It was held, that the defence was admissible on the plea of not possessed; *Gregg v. Wells*, 10 Ad. & E. 90. See *ante*, 60. In trover against the assignees of a bankrupt, the defence was, that the goods at the time of the bankruptcy were in the order and disposition of the bankrupt with the consent of the owner, and that the same vested in the assignees by virtue of an order of the Court of Bankruptcy; it was held, that such defence was admissible under the plea of not possessed, although the action was brought before the order was applied for; *Heslop v. Baker*, 8 Ex. 411. It seems, that in trover by the assignees of a bankrupt, a defence that the goods were taken in execution without notice of any act of bankruptcy committed, is admissible, either under this plea or that of Not guilty; *Unwin v. St.*

Quintin, 11 *M. & W.* 277. A defence that the goods were stolen, and that the plaintiff has not prosecuted the thief to conviction, ought to be specially pleaded; *Semble*; *White v. Spettigue*, 13 *M. & W.* 603. Where the plaintiff gave to the defendant a bill to get discounted, in trover for the bill the defendant may show under Not possessed, or, perhaps, Not guilty, that he has discounted it; *Wilkinson v. Whalley*, 5 *M. & G.* 590.

If the defendant pleads not possessed, and it be found that some of the goods belonged to the plaintiff and some to the defendant, the issue is divisible, and the verdict should be entered distributively. *Williams v. Great Western R. W. Co.*, 8 *M. & W.* 856; *Freshney v. Wells*, 26 *L. J. (Ex.)* 228.

Evidence of general lien.] A lien on the goods, either general or special (i. e., in respect of a general balance or of the particular goods), and a right to the possession of them until the claim is satisfied, is a defence in this action under the plea denying property or possession. (See *ante*, p. 601.)

A general lien may be proved either by evidence of an express agreement, or of the mode of dealing between the parties, or of the general usage of other persons engaged in the same employment of such notoriety as that it may fairly be presumed to be known to the owner of the goods; *Rushforth v. Hadfield*, 7 *East*, 228; *Green v. Farmer*, 4 *Burr.* 2220; *Cumpston v. Haigh*, 2 *N. C.* 449. To establish a general lien by evidence of the general usage, the instances ought to be ancient, numerous, and important; *Rushforth v. Hadfield*, 6 *East*, 526. Where a number of tradesmen come to an agreement not to receive the goods of any person who will not consent that the goods shall be retained for a general balance, and a party, having notice of such agreement, sends his goods, without objection, he will be bound by it; *Kirkman v. Shawcross*, 6 *T. R.* 14. So if a carrier gives notice that all goods shall be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from the respective owners, as between the real owner of the goods and the carrier, this may be a binding bargain. But in such a case the carrier has not, as against the real owner, any lien for the balance due to him from the party to whom the goods are addressed, being the mere factor of the owner. *Per Bayley, J.*, *Wright v. Shell*, 5 *B. & A.* 353. A usage for carriers to retain goods as a lien for a general balance of accounts between them and their consignees cannot affect the right of the consignor to stop the goods *in transitu*; *Oppenheim v. Russell*, 3 *B. & P.* 42. So also a carrier, who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor; *Butler v. Woolcott*, 2 *New. Rep.* 64. The lien of wharfingers for their general balance has been proved so often that it is to be considered a settled point. *Per Lord Kenyon*, *Naylor v. Mangles*, 1 *Esp.* 110; *Spears v. Hartly*, 3 *Esp.* 81. So the lien of a banker for his general balance upon the securities of his customers in his hands; *Jourdain v. Lefevre*, 1 *Esp.* 66; *Bolland v. Bygrave*, *Ry. & Mood.* 271. So of calico-printers; *Weldon v. Gould*, 3 *Esp.* 268. A printer employed to print certain numbers, not consecutive, of an entire work, has a lien upon the copies not delivered for his general balance for the whole of those numbers; *Blake v. Nicholson*, 3 *M. & S.* 167. With regard to

dyers, a lien for their general balance has been recognised in several cases; *Savill v. Barchard*, 4 *Esp.* 53; *Humphreys v. Partridge*, *Montagu Bank Law*, 18, (n); *Rose v. Hart*, 8 *Taunt.* 499. But in other cases, in which such a lien was claimed, the evidence was held insufficient to establish it; *Green v. Farmer*, 4 *Burr.* 2214; *Close v. Waterhouse*, 6 *East*, 523 (n). Attorneys have a lien for their general balance on papers of their clients which come to their hands in the course of their business; *Stevenson v. Blakelock*, 1 *M. & S.* 535. Insurance brokers have a lien for their general balance even against agents who do not disclose their principals; *Mann v. Forrester*, 4 *Camp.* 60. But not where they have notice that the party who employs them is merely an agent; *Maanss v. Henderson*, 1 *East*, 335. Factors have a general lien; *Kruger v. Wilcox*, *Ambler*, 252; but only upon goods which come to their hands as factors; *Dixon v. Stansfield*, 10 *C. B.* 399. So packers, who are in the nature of factors, have a general lien; *Green v. Farmer*, 4 *Burr.* 2222; *Savill v. Barchard*, 4 *Esp.* 55. The lien of factors or agents is now regulated by stat. 6 Geo. 4, cap. 94, and 5 & 6 Vict. c. 39. See *ante*, p. 586: and 1 *Smith's L. C.*, 5th ed. 741.

Where a general lien has been judicially ascertained and established, as in the case of a banker's lien on securities deposited with him by customers, it becomes part of the law merchant, and is judicially noticed by the courts; *Brandao v. Barnett*, 3 *C. B.* 519, 530; on error in the House of Lords.

Evidence of a particular lien.] In general, where a person bestows his labour on a particular chattel delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge. Thus a miller has a lien on the corn ground by him; *ex parte Ockenden*, 1 *Atk.* 235; *Chase v. Westmore*, 5 *M. & S.* 180; a shipwright on a ship for repairs; *Franklin v. Hosier*, 4 *B. & A.* 341; a tailor on the cloth delivered to and made up by him. *Hussey v. Christie*, 9 *East*, 433; *Blake v. Nicholson*, 3 *M. & S.* 169. So an inn-keeper, or keeper of a house providing general accommodation for wayfarers, whatever may be its name, has a lien on the goods of his guests; *Thompson v. Lacy*, 3 *B. & A.* 283. But an inn-keeper cannot detain the person of his guest, or take off his clothes in order to secure the payment of his bill; *Sunbolf v. Alford*, 3 *M. & W.* 248. An inn-keeper's lien extends to goods brought to his inn by a guest, though they belong to a third party, provided they are such as a person might ordinarily be expected to travel with; *Snead v. Watkins*, 1 *C. B.*, *N. S.* 267; *Turrell v. Crawley*, 13 *Q. B.* 197. B. lent a pianoforte to a professional artist whilst staying as a guest at an inn, the inn-keeper well knowing that the pianoforte was the property of B.: Held, that the inn-keeper had no lien on the pianoforte for the bill due from the guest; *Broadwood v. Granara*, 10 *Ex.* 417. A master of a vessel has a lien upon the luggage of his passengers for passage money; *Wolf v. Summers*, 2 *Camp.* 631. Where the goods are delivered in separate quantities at different times, yet if the work be done under one entire agreement, the right of lien for the work expended upon the whole attaches upon every part; *Chase v. Westmore*, 5 *M. & S.* 180. But not where there are distinct contracts; *Marks v. Lahee*, 3 *N. C.* 408. A livery-stable keeper has not a lien upon the horses in his stable for their keep or medicine without an express agreement; *Yorke v. Grenaugh*, 2 *Ld. Raym.* 866; *Orchard v. Rackstraw*,

9 C. B. 698; *Judson v. Etheridge*, 1 C. & M. 743; though it is otherwise of an inn-keeper, unless he receives them as a livery-stable keeper only; *Smith v. Dearlove*, 6 C. B. 132. In *Allen v. Smith*, 12 C. B., N. S. 638; 31 L. J. (C. P.) 306, two race-horses were brought by their trainer to the defendant's inn, and kept there for more than six months. The horses were taken out to train on the Downs, and were sometimes absent for days at races at which they ran. The defendant stated that he never took in horses to stand at livery. It was held, that it must be presumed that the horses had remained in the hands of the defendant as those of a guest, and that he was entitled to a lien on them for their keep; and see *Johnson v. Hill*, 3 Stark. 172. A trainer has a lien for his charge in keeping and training a horse; *Bevan v. Waters*, Mood. & M. 236; and see *Scarfe v. Morgan*, 4 M. & W. 270. But not if the usage is, that the horse should be so far under the control of the owner, as to be put under the charge of his servants from time to time during the training; for this shows that a continued possession by the trainer is not contemplated; *Forth v. Simpson*, 13 Q. B. 680. There is no lien for the expense or labour incurred by a party in the exercise of his right of detention: Thus a shipwright cannot charge or detain for the use of his dock after the repairs are done, even though he has given notice of his intention to do so after a certain day; *British Empire Co. v. Somes*, 8 H. L. Cas. 338.

The vendor of goods not sold upon credit, has a lien for the price; and where the purchaser of goods, to be paid for on delivery, obtains possession of them by giving a cheque for which he has made no reasonable provision, the seller has still a right to the possession, and may maintain trover for them; *Hawse v. Crowe, Ry. & Mood.* 414. It is no answer to a special lien that the plaintiff has a set off to a larger amount against the defendant, unless there is an agreement to deduct one debt from the other; *Pinnock v. Harrison*, 3 M. & W. 532.

Evidence of lien.—[Cases in which a lien does not arise.] It was formerly thought that a lien does not arise where there is an express contract between the parties relative to the price, &c., but only in cases of implied contract; but it is now settled that a special agreement does not of itself destroy the right to detain, unless it contains some term inconsistent with that right. Thus where corn is delivered to a miller to be ground at a certain stipulated sum per load, the miller has a lien for that sum; *Chase v. Westmore*, 5 M. & S. 180. As to how far a lien is affected by the special provisions of an act of Parliament, see *Dresser v. Bosanquet*, 4 B. & S. 460; 32 L. J. (Q. B.) 57. In *Kirchner v. Venus*, 12 Moo. P. C. C. 361, the shipper of goods received bills of lading by which they were made deliverable to order or assigns, he or they paying freight for the goods here, as per margin. The margin of the bills of lading contained the memorandum,—Freight payable in Liverpool to M. one month after sailing, ship lost or not lost. The shippers became bankrupt, so that the freight was not paid at Liverpool. Held, that the shipowner had no lien at the port of discharge for the freight upon the goods as against the indorsees of the bills of lading. And see *Bock v. Gorrissen*, 2 De G. F. & J. 434. If by the agreement the purchaser of goods is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain till payment, and the seller will have no lien for the price; *Crawshay*

v. Homfray, 4 B. & A. 52. Where wharfage due upon goods is by the course of trade payable at Christmas, whether the goods are in the meantime removed or not, there arises no lien on the goods for the wharfage, as against one who has purchased them from the importer, and received a delivery order; *Ibid.*

In general a lien cannot arise unless the party claiming it has possession of the goods; *Kinloch v. Craig*, 3 T. R. 119, 783; *Taylor v. Robinson*, 8 Taunt. 648. And where a party obtains the possession of goods by misrepresentation, he cannot claim a lien upon them, though, had they come rightfully to his hands, he might have been entitled to retain them; *Madden v. Kempster*, 1 Camp. 12; *Lempriere v. Pasley*, 2 T. R. 485. Goods may be landed so as to preserve the lien of the shipowner; see 25 & 26 Vict. c. 63, s. 68, cited *ante*, p. 252. The vendor of an estate has at law no lien on the title-deeds after conveyance executed, though the purchase money is unpaid; *Goode v. Burton*, 1 Ex. 189. In order to establish a lien, it must appear that the work, &c., in respect of which it is claimed, was done at the request of the owner of the goods detained; *Hiscox v. Greenwood*, 4 Esp. 174.

Evidence of lien—when waived.] A party entitled to a lien may waive it by not insisting upon it when the goods are demanded from him; as when, instead of relying on a lien, he claims them as his own; *Boardman v. Sill*, 1 Camp. 410 (n); or claims to hold them for a debt due from a third party; *Dirks v. Richards*, 4 M. & G. 574; or where the defendant, having a lien for freight, refused to deliver the goods on the ground that he had signed a bill of lading for delivery to a third person; *Thompson v. Trail*, 6 B. & C. 36; or where the defendant, having a particular lien, refuses to deliver up the goods unless an old balance is paid; in which case an actual tender of the money covered by the particular lien is not necessary; *Jones v. Turlerton*, 9 M. & W. 675; see also *Scarfe v. Morgan*, 4 M. & W. 270; *Weeks v. Goode*, 6 C. B. N. S., 367. So if the defendant claims to hold for two distinct causes of lien, of which only one is good, and conducts himself so that it may be inferred that a tender of the lawful amount would be useless, he thereby dispenses with such a tender; *Kerford v. Mondel*, 28 L. J. (Ex.), 303. So he may waive it by parting with the possession; as where the goods are taken in execution at his own suit; *Jacobs v. Latour*, 5 Bing. 130. Where a coach-maker repaired a carriage and allowed the owner to take it away, it was ruled that he could not retain it for past repairs when again brought to him; *Hartley v. Hitchcock*, 1 Stark. 408; and see *Jones v. Pearle*, 1 Stra. 557. And where the party entitled to a lien wrongfully parts with the goods, the owner may recover them from the holder without tendering what is due on the lien; for a party is only obliged to make a tender where it is necessary to give him the right to the possession of the goods; *Scott v. Newington*, 1 Mood. & Rob. 252; *Jones v. Cliff*, 1 C. & M. 510. Where a bailee of goods who had a lien, delivered them to a carrier on account of the bailor, and afterwards stopped the goods *in transitu* and got possession of them again, it was held that the lien did not revive; *Sweet v. Pym*, 1 East, 4. But the lien of an insurance broker (who has a general lien), revives on re-possession of the policy; *Whitehead v. Vaughan*, Co. Bank Law, 547, 7th ed.; *Levy v. Barnard*, 8 Taunt. 149. And where horses, on which a livery-stable keeper had by agreement a lien, were fraudulently taken out of his

possession by the owner, it was ruled that, the stable-keeper having without force retaken the horses, his lien revived; *Wallace v. Woodgate, Ry. & Mood.* 193. Where the owner of a ship, having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and that his lien on the goods was waived; *Horncastle v. Farran*, 3 B. & A. 497; *Stevenson v. Blakelock*, 1 M. & S. 535. Where the seller of goods recovered a verdict for goods bargained and sold, it was ruled by Lord Ellenborough that he had not thereby waived his lien, though it might have been otherwise had he recovered a verdict for goods sold and delivered; *Houlditch v. Desanges*, 2 Stark. 337. A lien is not destroyed though the demand, in respect of which it arises, is barred by the Statute of Limitations; *Spears v. Hartly*, 3 Esp. 81.

Where goods, upon which the captain of a ship has a lien, are deposited in the king's warehouse in pursuance of the requisition of an act of parliament, the lien is not thereby waived. *Per* Lord Kenyon, C. J., *Ward v. Felton*, 1 East, 512; *Wilson v. Kymer*, 1 M. & S. 167.

[*Stoppage in transitu.*] In trover it frequently happens that the defence arises out of the right of a vendor of goods to stop them *in transitu* upon the insolvency of the vendee. Whether stoppage *in transitu* is only a revesting of the possession, or a rescinding of the contract and a revesting of the property, has not been expressly decided; *Clay v. Harrison*, 10 B. & C. 106; *Wentworth v. Outhwaite*, 10 M. & W. 436. It seems to be the better opinion that the right is of the nature of an equitable lien. See 2 Kent. Comm. Lect. 39, p. 541-2; *Hodgson v. Loy*, 7 T. R. 445, *per* Lord Kenyon, C. J.

In general every unpaid vendor of goods has a right, on the insolvency of the vendee, to stop the goods, if still on their way to the vendee. And he may do so, though he has received the acceptance of the consignee, without tendering back the bill; *Edwards v. Brewer*, 2 M. & W. 375. A person abroad, who in pursuance of orders from a merchant in this country purchases goods on his own credit from persons abroad unknown to the merchant, and consigns them to his principal here charging him a commission, is a vendor within the rule; *Feise v. Wray*, 3 East, 93. So also is a person who sends goods to be sold on the joint account of himself and his consignee; *Newsom v. Thornton*, 6 East, 17. But a third party, who accepts bills drawn for the price of the goods by the vendor, is merely a surety for the price, and is not a vendor or a consignor so as to be entitled to stop the goods *in transitu*; *Siffken v. Wray*, 6 East, 371. The stoppage of part of the goods will not revest the whole, though comprised in one entire contract; *Wentworth v. Outhwaite*, 10 M. & W. 436; see *Jones v. Jones*, 8 M. & W. 431; see *post*, 609.

To make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal whose servant has the custody, it must be given at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery of the goods to the consignee; *Whitehead v. Anderson*, 9 M. & W. 518.

Stoppage *in transitu* by the defendant is sometimes pleaded specially; but whether it operates to rescind the contract, or to give the

defendant only a right of possession, it must, on principle, be admissible on the plea denying the plaintiff's property, as in the case of lien. *Supra*, p. 601. *Sed quære?* see *Valpy v. Gibson*, 4 C. B. 837. The plaintiff's right to stop is admissible upon issue joined on that plea; *Jackson v. Nichol*, 5 N. C. 508.

Stoppage in transitu—continuing transitus.] A *transitus* is said by Lord Mansfield to be "every sort of passage to the hands of the buyer;" *Stokes v. La Riviere*, cited 3 East, 397. Where there is a contract for the sale of goods, and a delivery has been made to a middleman, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer; *Mills v. Ball*, 2 B. & P. 461.

The *transitus* is continuing though the goods have arrived at an intermediate stage. Thus, where goods were ordered by a person at Newcastle from the plaintiff at Birmingham, and were directed to be sent by way of London addressed to the defendant at the Bank Wharf there, with directions to send them by the first vessel to Newcastle, it was ruled that they might be stopped at London; it being merely a stage upon the transit; *Smith v. Goss*, 1 Camp. 282. So where goods were ordered by a trader at North Tawton from the plaintiff in London, and directions were given to send them to Exeter to be forwarded to North Tawton, and they were accordingly put into the hands of a wharfinger at Exeter to be forwarded, it was held that while in his hands they might be stopped by the vendor; *Mills v. Ball*, 2 B. & P. 457. The principle to be deduced from the cases is, that the *transitus* is not at an end until the goods have reached the place named by the buyer to the seller as the place of their destination. *Per Bayley, J., Coates v. Railton*, 6 B. & C. 427; *Edwards v. Brewer*, 2 M. & W. 375. The arrival of the goods at a place where they are to be at the orders of the buyer, in the hands of persons who are to keep them for him, is an end of the *transitus*, although the place be not that of their *ultimate* destination; *Wentworth v. Outhwaite*, 10 M. & W. 436. The *transitus* is not determined by delivery, if it appears that the consignee has not taken possession of the goods as owner; *James v. Griffin*, 2 M. & W. 623.

Lord Kenyon ruled that the possession of the purchaser, to defeat the right, must be a possession obtained on the completion of the voyage; *Holst v. Pownall*, 1 Esp. 240; but a different opinion has been expressed in other and later cases; see Lord Alvanley, in *Mills v. Ball*, 2 B. & P. 461; Chambre, J., in *Oppenheim v. Russell*, 3 B. & P. 54; *Foster v. Frampton*, 6 B. & C. 107; Parke, B., in *James v. Griffin*, 2 M. & W., 633, and 2 Kent. Comment. 543-7. And it seems now considered that if the vendee takes the goods out of the possession of the carrier into his own before their arrival, the right to stop *in transitu* is at an end; *Whitehead v. Anderson*, 9 M. & W. 518. A mere demand by the consignee before the end of the voyage will not defeat the right; *Jackson v. Nichol*, 5 N. C. 508.

Where the goods delivered to a carrier, or other middleman, have been received by the vendee into his own hands, the *transitus* is of course determined. Actual and corporal possession is not necessary. Thus, if a man be in the habit of using the warehouse of a wharfinger as his own, and making it a repository of his goods, and disposing of them there, the journey will be at an end when the goods arrive at

that warehouse; *Richardson v. Goss*, 3 B. & P. 127. Goods were ordered from the plaintiffs at Manchester by M., the agent of G. of Paris, and were directed to be sent to the house of the defendant, a packer in London. M. had some of the goods unpacked there, and the remainder repacked. He had a general power either to forward the goods to G., or to send them to Holland, &c. It was held that the defendant received the goods on account of M., and that, as they were to await his disposal in the defendant's warehouse, the *transitus* was there at an end; *Leeds v. Wright*, 3 B. & P. 320; see *Rowe v. Pickford*, 8 Taunt. 83; *Dodson v. Wentworth*, 4 M. & G. 1080; *Heinekey v. Earle*, 8 E. & B. 410.

Though the goods remain in the actual possession of the carrier, yet, if the purchaser has done any act equivalent to taking possession, the right of the vendor to stop them is determined. Thus where goods were ordered from the plaintiff at Sheffield, and were sent by waggon directed to the purchaser in London, where they were taken to the waggon office, and the provisional assignee of the purchaser, who had become bankrupt, put his mark upon them there, being unable to remove them in consequence of an attachment, the *transitus* was held to be at an end; *Ellis v. Hunt*, 3 T. R. 464; and see *Foster v. Frampton*, 6 B. & C. 107.

Upon the same principle it has been held that where goods were ordered to be sent by sea, and the shipmaster gave a receipt to the vendee purporting that the goods were received from him, the right of stoppage was determined; the vendors, by empowering the carrier to give the receipt, having recognised the right of property in the vendee; *Noble v. Adams, Holt*, N. P. C. 248. On the other hand, where the receipt was given to the vendors, it was held that the captain of the vessel, who had given such receipt and had afterwards delivered up the bill of lading to a purchaser from the vendee, was liable to the vendors who had stopped the goods, on the ground that the person holding the receipt has a control over the goods till he has exchanged it for the bill of lading; *Craven v. Ryder, Holt*, N. P. C. 100; 6 Taunt. 433; *Ruck v. Hatfield*, 5 B. & A. 632. In *Coussjee v. Thompson*, 5 Moo. P. C. C. 165, the plaintiffs had sold lead "free on board" to B. & Co. By the custom of London it is the duty of the seller to ship goods so purchased, although the buyer is considered to be the shipper. The plaintiffs shipped the lead on board a vessel of which the defendant was owner, and had the mate's receipt. B. & Co. became insolvent, and a few days afterwards, before the vessel left the docks, and while the receipt was still in their possession, the plaintiffs demanded back their goods, but without success. It was held that there was no right of stoppage, as the delivery to the buyer was perfect, and the retention of the receipt a mere accident.

A stoppage by an unauthorised person professing to act for the seller is inoperative, though ratified by the seller, if such ratification be after the period during which the seller himself could have stopped *in transitu*; *Bird v. Brown*, 4 Ex. 786; *Whitehead v. Anderson*, 9 M. & W. 518. In *Hutchings v. Nunes*, 1 Moo. P. C. C., N. S. 243, goods were sold and shipped to R. & Co. Before their arrival at the port of discharge, R. & Co. failed. The defendants, who had acted on more than one occasion as agents for the sellers, but had no specific instructions, wrote to them of the failure, and offered to protect their interests on the arrival of the ship. This letter was received by the sellers, who sent out a power of attorney. Some

days after the power was sent, and before its arrival, the vessel reached its destination, and the cargo was taken possession of by the defendants. It was held that there had been a good stoppage *in transitu* on behalf of the sellers.

Stoppage in transitu—how defeated or divested.] The right to stop *in transitu* is defeated by the delivery of part of goods sold under one entire contract, if such delivery of part appears to have been intended as a delivery of the whole. Where eight hundred bushels of wheat, part of an entire cargo, were delivered, it was held that it must be taken to be a delivery of the whole; *Slubey v. Heyward*, 2 H. Bl. 504. So where the goods were in the hands of a wharfinger, and the purchaser weighed the whole and took away twenty-five bales, leaving the remainder on the wharf, it was held that this amounted to taking possession of the whole, and that the privilege of stopping *in transitu* did not attach; *Hammond v. Anderson*, 1 New Rep. 69. "There can be no doubt that, wherever there is a complete delivery of part of one entire cargo to the consignee, the *transitus* is ended, and the consignor cannot stop the remainder." *Per Bayley, J., Crawshaw v. Eades*, 1 B. & C. 183. But where a carrier, having landed a part of the goods on the wharf of the consignee, resumed them, and took the whole to his own premises in order to secure his own demand for freight, this was held not to be such a delivery as to put an end to the consignor's right; *Crawshaw v. Eades*, 1 B. & C. 181. If the act of delivering part is not intended to operate as a delivery of the whole, but as a delivery of a portion only, this will not deprive the vendor of his lien on the goods undelivered; *Dixon v. Yates*, 5 B. & Ad. 313; *Bunney v. Poyntz*, 4 B. & Ad. 570; *Tanner v. Scovell*, 14 M. & W. 28. See *ante*, p. 606.

The most usual way in which the right of a vendor to stop goods *in transitu* is defeated, is by assigning the bill of lading to a *bonâ fide* assignee. This point was established in *Lickbarrow v. Mason*, 2 T. R. 36; 1 H. Bl. 357; 1 Smith's L. C., 5th ed. 681, and *note, Ib.*; *Gurney v. Behrend*, 3 E. & B. 622. The assignment by the vendee must, it seems, be for a valuable consideration in order to defeat the right to stop; for though it has been held that where the vendor of goods assigns the bill of lading to his agent, who stops them, such agent has a sufficient title to sue for them in trover (*Morison v. Gray*, 2 Bing. 260) it has never been held that such an assignment by the vendee will have the effect of divesting the vendor's title to stop; *Waring v. Cox*, 1 Camp. 369; *Coxe v. Harden*, 4 East, 217. Not only must the assignee have given a valuable consideration for the bill of lading, but he must also have acted with fairness and honesty. It is said, by Lord Ellenborough, C. J., that if he assists in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, he will stand in the same situation with the consignee. If, for instance, he knows that the consignee has been in insolvent circumstances, and that no bill has been accepted by him for the price, or that, being accepted, it is not likely to be paid, in such case, the interposition of himself between the consignor and the consignee, to assist the latter in disappointing the just expectations of the former, will be an act done in fraud of the right to stop, and unavailing to the party taking the assignment; *Cuming v. Brown*, 9 East, 514. Therefore, where a person, knowing that the goods are not paid for, takes an assignment of the bill of lading and agrees to pay

for them, the goods not having been paid for, he cannot resist the right of the vendor to stop; *Salomons v. Nissen*, 2 T. R. 674. In *The Marie Joseph*, 13 Weekl. Rep. 112, where the bill of lading had been obtained by the buyer from the seller's agent by means of a false representation, this was held not to defeat the right to stop *in transitu*. But the knowledge that the consignor has not received a money payment, but has taken the acceptance of the consignee, will not prevent the assignment from destroying the right to stop; *Cuming v. Brown*, 9 East, 506; *Jones v. Jones*, 8 M. & W. 431. The criterion in these cases is, does the purchaser take the assignment fairly and honestly? *Salomons v. Nissen*, 2 T. R. 681; *Cuming v. Brown*, 9 East, 516.

An assignment by the consignee of the bill of lading by way of pledge will not defeat the right of the vendor, subject to the pledge. A pledging has not, in this respect, the effect of a sale; *In re Westzinthus*, 5 B. & Ad. 817; *Spalding v. Ruding*, 6 Beav. 376. From the last case it seems that the goods cannot be retained as security for a general balance of account, but only for the specific advance made upon the bill of lading. See 18 & 19 Vict. c. 111, cited *ante*, p. 246. The operation of a *bonâ fide* indorsement to defeat the right to stop *in transitu* is not affected by this statute; *The Tigris*, 32 L. J. P. M. & A. 97; *Kemp v. Canavan*, 15 Ir. C. L. R. 216.

Defendant sold to the plaintiff wheat, to be paid for by draft to be remitted on receipt of the bill of lading and invoice. It was shipped, by order of the plaintiff, for and on account of and at the risk of the plaintiff, and the bill of lading was indorsed by the defendant to the plaintiff. The plaintiff received the bill of lading and invoice, but did not remit any draft: Held, that defendant could not stop *in transitu*; *Wilmshurst v. Bowker*, 7 M. & G. 882, reversing the decision of C. P.

An actual indorsement and delivery of the bill of lading is not essential to defeat the right of stoppage. The property may be transferred by the consignee under circumstances equivalent to an indorsement; *Dick v. Lumsden*, Peake Ca. 189; *Davis v. Reynolds*, 4 Camp. 267.

The rights of the parties may be affected by the state of things between them when the bill of lading was signed and indorsed; thus, where the consignor was indebted to the consignee on the balance of accounts, including bills of exchange accepted by the consignee for him, it was held that goods shipped on account of this balance could not be stopped by the consignor upon the consignee becoming insolvent before the bills were paid; *Vertue v. Jewell*, 4 Camp. 31.

While the goods remain in the hands of the vendor's agent, the right to stop them on the insolvency of the vendee may also be divested in other ways. Thus, where goods in the hands of a warehouseman were sold, and the vendor gave a delivery order to the purchaser, which he lodged with the warehouseman, who transferred the goods in his books into the purchaser's name, this was held to be equivalent to an executed delivery, and to divest the vendor's right; and that, as to a parcel of the goods which had not been transferred, the delivery order alone was sufficient to divest the right; *Harman v. Anderson*, 2 Camp. 243. So where goods are lodged in dock, the indorsement of the dock warrant for a valuable consideration will divest the vendor's right; *Spear v. Travers*, 4 Camp. 251; *Zwinger v. Samuda*, 7 Taunt. 265; and the delivery of the warrant is suffi-

cient without any transfer being made in the books of the dock company; *Keyser v. Suse, Gow.* 58. So where a warehouseman sold goods and received warehouse rent from the purchaser, Lord Ellenborough ruled that this put an end to the right to stop, as much as if the goods had been removed to the purchaser's own warehouse; *Hurry v. Mangles*, 1 *Camp.* 452. So the change of mark on bales of goods in a warehouse was held to operate as an actual delivery of the goods. Lord Ellenborough, C. J., in *Stoveld v. Hughes*, 14 *East*, 308. But where anything is to be previously done on the part of the seller to ascertain and perfect the specific subject of the sale (such as weighing the goods, &c.), an order for delivery may be countermanded before such previous act has been done; *Abbott on Shipping*, 379; and the vendor may consequently stop the goods; *Withers v. Lyss*, 4 *Camp.* 237; *Shepley v. Davis*, 5 *Taunt.* 617; *Swanwick v. Sothern*, 9 *Ad. & E.* 895. When there is no lien for the price, and the goods have once vested in the purchaser, a re-delivery of them to the vendor for repacking will not enable him to stop them; *Valpy v. Gibson*, 4 *C. B.* 837.

[*Statute of Limitations.*] Where the possession was originally legal, the statute runs from the demand and refusal, and no previous demand and refusal will be presumed; *Topham v. Braddick*, 1 *Taunt.* 577, *per* Lawrence, J. It seems, however, that the defendant may, under this plea, show a previous conversion more than six years ago; but a jury will not be directed to presume one from equivocal evidence, as from an earlier demand by the plaintiff; for this would be setting up the defendant's own wrong to defeat the action; *Philpott v. Kelley*, 3 *Ad. & E.* 106. In *Ringham v. Clements*, 12 *Q. B.* 260, 267, it was observed by the court that, after an "actual conversion" by taking, "no subsequent demand and refusal will constitute a second conversion."

[*Mitigation of damages.*] Although the defendant cannot, under the general issue, object that another part owner of the goods has not been joined as plaintiff, so as to defeat the action (see *Bloxham v. Hubbard*, 5 *East*, 420), yet he may give that fact in evidence in order to reduce the plaintiff's damages to the amount of his own share; *Nelthorpe v. Dorrington*, 2 *Lev.* 113. If the defendant only pleads that he did not convert the goods, he cannot cross-examine the plaintiff's witnesses to show, in mitigation of damages, that the goods really belonged to a third person; *Finch v. Blount*, 7 *C. & P.* 478. Whether, in an action by a rightful executor against an executor *de son tort*, the latter may prove, in mitigation of damages, that he has paid the debts of the deceased, see *post*, *tit. Actions by Executors*. Though a conversion cannot be purged, yet the defendant may show, in mitigation of damages, that he has returned the goods; *Countess of Rutland's case*, 1 *Roll. Ab.* 5.

ACTION FOR DETENTION OF GOODS.

As already stated, *suprà*, p. 582, the form substituted for the old declaration in detinue simply alleges a detention from the plaintiff of certain goods. It is enough to show that the plaintiff is entitled to the possession of goods wrongfully withheld by the defendant; *Gledstane v. Hewitt*, 1 *C. & J.* 565. Detinue does not lie against him

who never had possession of the chattel, but it does against him who once had it, but has improperly parted with the possession of it; *Jones v. Dowle*, 9 M. & W. 19; or has by carelessness lost that which it was his duty to keep safely, as title-deeds entrusted to a solicitor; *Reeve v. Palmer*, 5 C. B., N. S. 84, 91. If a document of title (as a coupon) is voluntarily given away by A. to B. "to make the best of it for himself," it cannot be recovered by A.'s executors, though such a transfer by hand may be incomplete for the purpose of transferring any legal interest in the property represented; *Barton v. Guiner*, 3 H. & N. 387; 27 L. J. (Ex.) 390. Where the casual finder of an article afterwards loses it, the owner cannot maintain detinue against him; *Com. Dig. Detinue (D)*. Where two or more jointly interested in a chattel deposit it with a stranger, a demand by one in his own name only, and not on behalf of all, will not entitle him to maintain detinue for it; *Atwood v. Ernest*, 13 C. B. 881.

Many of the cases referred to respecting the evidence in an action for conversion, will apply to this action also.

Plea of non detinet.] By r. 15, H. T. 1853, "In actions for detaining goods, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea."

The effect of the general denial in detinue differs from its effect in an action for a conversion, for this plea absolutely excludes any evidence under it but the denial of detention. So there is a difference between conversion and detention; for detention does not necessarily imply a *wrongful* detention; but it must, at all events, be an adverse and active detention; and therefore even at common law a pledge by the plaintiff to the defendant must have been pleaded; *Co. Lit.* 283, cited in *Richards v. Frankum*, 6 M. & W. 420, where it was held that neither title nor justification can be shown under Not guilty. See also *Clements v. Flight*, 16 M. & W. 42; *Lane v. Tewson*, 12 Ad. & E. 116. It seems that the defendant cannot, under this plea, or under a plea that the goods were not the goods of the plaintiff, set up a tenancy in common with the plaintiff; *Mason v. Farnell*, 12 C. & W. 674. Nor can he under that, or any plea in bar, set up a defence that there are other persons, co-tenants with the plaintiff, who are not joined in the action; *Broadbent v. Ledward*, 11 Ad. & E. 209. See *Austin v. Kolle*, 1 Ex. 586. But a defence, that the defendant has sold the goods under the direction of a person who was tenant in common with the plaintiff, may be given in evidence under non detinet; *Morgan v. Marquis*, 9 Ex. 145; 23 L. J. 21. Where the defendant has lost the plaintiff's goods by negligence (as where an attorney loses his client's title deeds), the mere fact of loss is not a defence; for this is setting up his own wrongful act; and detinue lies though the demand be after the loss; *Reeve v. Palmer*, 5 C. B., N. S. 84, aff. in Cam. Scacc. But a loss by mere accident without negligence is an answer on the plea of non detinet; *Ib.*; *Roux v. Wiseman*, 1 Fost. & Fin. 45; *Com. Dig. Detinue (D)*. A tender of the goods before action may be given in evidence under this plea, for the detention is then not adverse; *Clements v. Flight*, 16 M. & W. 42; and see *Leader v. Rhys*, 10 C. B., N. S. 369; 30 L. J. (C. P.) 345.

Denial of property or possession of the plaintiff.] It is certain that

defendant cannot deny the plaintiff's possession or right of possession under *non detinet*; and we have seen that a tenancy in common with the plaintiff is not evidence under a denial of the plaintiff's title; for the plaintiff's title does not exclude that of the defendant. Such co-tenancy must, it seems, be specially pleaded; *Mason v. Farnell*, *suprà*.

On the whole, the decisions are not clear or satisfactory on the effect of the traverses in detinue since the new rules; and the decisions on actions for conversion cannot be relied on as guides in actions of detinue; for the plea of "*non detinet*" never had, at common law, the same operation as that of "*Not guilty*," nor was the latter plea in use in this form of action.

In *Oliver v. Oliver*, 11 C. B., N. S. 139; 31 L. J. (C. P.) 4, it was held that a plea that the property claimed was not the property of the plaintiff, was not supported by proof that it consisted of letters written by the defendant to the plaintiff. And in *Stubs v. Stubs*, 1 H. & C. 257, 31 L. J. (Ex.) 510, the testator had obtained from Herald's College a grant of arms, to be borne by him and his descendants. By his will he bequeathed to his wife the whole of his household furniture. The widow retained possession of the instrument containing the grant. It was held, that she was not liable to an action of detinue at the suit of the testator's nephews.

Leave and licence.] This plea is not supported by proof of a delivery by the plaintiff to the defendant in the supposed performance of a contract which never existed; *Gregson v. Ruck*, 4 Q. B. 737.

Damages.] In detinue, the damages are in general merely nominal; but the jury find the value of the articles detained, and the common law judgment is, that the plaintiff recover the articles or their value, together with the damages and costs found by the verdict, and the costs of increase. See *Phillips v. Jones*, 15 Q. B. 859. Special damages may, it would seem, be recovered for the detention, if laid in the declaration. See *Williams v. Archer*, 5 C. B. 318; *Crossfield v. Such*, 8 Ex. 159; *Wiley v. Crawford*, 1 E. B. & E. 253; 30 L. J. (Q. B.) 319. Where there are separate parcels of goods, the jury ought to find the value of each; for the defendant may, perhaps, give up some in specie, and pay damages for the rest; *Pawby v. Holly*, 2 W. Bla. 853; *Sandford v. Alcock*, 10 M. & W. 689.

Before the C. L. Pro. Act, 1854, if the defendant, upon a judgment against him in this action, chose to pay the sum assessed as the value of the articles detained, there was no common law process by which he could be compelled to restore them. By section 78 of that act, "The court or a judge shall have power, if they or he see fit so to do upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick till the defendant render such chattel; or at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action." This section does not apply when at the trial the value of the chattel has not been assessed; *Chilton v. Carrington*, 15 C. B. 730.

ACTION OF EJECTMENT.

General Evidence for the Plaintiff.

The proceedings in the action of ejectment have been entirely altered by the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), ss. 168—222. The action is now commenced by a writ instead of a declaration, and the names of fictitious persons are now no longer used in the proceedings, as formerly. Most of the decisions, however, as to the evidence necessary in this action under the former mode of procedure, are applicable to the present.

The plaintiff, or claimant, as he should now be called, must in general prove a legal title in himself to the possession of the premises at the time mentioned in the writ, the question at the trial being (except in the cases hereafter mentioned), whether the statement in the writ of the title of the claimant is true or false; and, if true, then which of the claimants, if more than one, is entitled, and whether to the whole, or to what part; C. L. P. Act, 1852, s. 180. If the claimant appears at the trial, and the defendant does not appear, the claimant will be entitled to a verdict with costs without any proof of title; *id.*, s. 183; R. 114, Practice Rules, H. T. 1853; R. 30, Pleading Rules, H. T. 1853. And if the defendant appears, and the claimant does not appear at the trial, the claimant must be nonsuited with costs; *Ibid.*

Proof of a sufficient title.—By mere possession.] The plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's; *Martin v. Strachan*, 5 T. R. 107, 110 (n). A title gained by the old Statute of Limitations has been held sufficient in ejectment; *Stocker v. Berny*, 1 *Ld. Raym.* 741; *Cholmondeley v. Clinton*, 2 J. & W. 156; although the defendant may have been in possession for several years next before the suit; *Doe v. Cooke*, 7 *Bing.* 346. And the Act 3 & 4 Wm. 4, c. 27, s. 34, by expressly extinguishing all right and title of the party out of possession, gives a clear title to him who has been in possession, or in the receipt of the rent, for twenty years, by himself, or by those through whom he claims; *Cott v. Nixon*, 3 *Dru. & War.* 388; *post*, *Defence*, p. 669. Mere possession for less than twenty years is not, as in trespass, sufficient title even against a wrongdoer, *per* Holroyd, J., in *Harper v. Charlesworth*, 4 *B. & C.* 592. And the latter may set up the title of a third party, or avail himself of any such title appearing in the plaintiff's evidence; *Doe v. Barnard*, 13 *Q. B.* 945. Yet such possession is *prima facie* evidence of title, and (no other interest appearing in proof) evidence of seisin in fee; *Allen v. Rivington*, 2 *Saund.* 111; *Doe v. Webber*, 1 *Ad. & E.* 119; *Doe v. Billyard*, 3 *M. & R.* 111; *B. N. P.* 103. Where the defendant forcibly expelled the plaintiff who had been in possession for a year as tenant, Lord Tenterden, C. J., ruled this to be sufficient proof of title as against the defendant, who showed none; *Doe v. Dyeball*, *Mood. & M.* 346. And plaintiff may, in such a case, recover on proof of prior possession, though he has attempted without success at the trial to show another title; *Davison v. Gent*, 1 *H. & N.* 744. But, after a verdict on the title relied upon, it is then too late to rely on mere possession, on a rule for a new trial; *Doe v. Powell*, 8 *Q. B.* 576. It is no answer to an ejectment founded on twenty years' adverse possession, that such possession was in continuation of that of a sister

who entered by abatement into the land to which her elder brother (whose issue was alive), was entitled as heir, but who died more than twenty years before the ejectment was brought; *Doe v. Lawley*, 3 Nev. & M. 331. The lessee for years of a copyholder may recover as against any one but the lord, without proof of a custom or licence to demise for years; *Doe v. Tresidder*, 1 Q. B. 416.

A tenant who has come in under, or paid rent to another, cannot in general dispute his title, see *post*, p. 621. And a party may be estopped from disputing the title of another in this action by having referred the question of right to an arbitrator, who awarded in favour of the plaintiff; *Doe v. Rosser*, 3 East, 15. So where the question of tenancy and rent has been submitted to the Master of the Rolls by an amicable suit, the tenant cannot dispute the plaintiff's title to rent after acquiescence in the decree of the Master against him; *Allason v. Stark*, 9 Ad. & E. 255.

Title, at what time.] The plaintiff must also show that he had a right of entry at the time mentioned in the writ; *B. N. P.* 105. If his entry is barred by the Statute of Limitations or otherwise, he cannot recover. If his right to enter, therefore, has accrued more than twenty years before the bringing of the action, he must be prepared to show himself within some of the exceptions in the statute. See the statute, *post*, *Defence*, pp. 665 *et seqq.*

An heir-at-law may lay his title on the day on which his ancestor died; *Roe v. Hersey*, 3 Wils. 274. And a posthumous son taking lands by way of remainder under statute 10 & 11 Wm. 3, c. 16, may lay his title on the day of his father's death; *semble* per Lord Hardwicke, *B. N. P.* 105. Where a person came lawfully into possession, so that ejectment cannot be maintained until such possession has been determined by demand or otherwise, the title must be laid after the demand; *Right v. Beard*, 13 East, 210; *Doe v. Clif-ford*, 2 C. & K. 448. So where there has been a tenancy at will, the title cannot be laid on a day antecedent to the determination of the will; *Goodtitle v. Herbert*, 4 T. R. 680. See *post*, p. 623. But in ejectment by a mortgagee against a mortgagor in possession, the title may be laid on a day anterior to the actual determination of the will; per Buller, J., *Birch v. Wright*, 1 T. R. 383. See *post*, *Ejectment by Mortgagee*, p. 659-60. But if a clause is inserted in the mortgage-deed that the mortgagor shall continue in possession until default made in payment on a day fixed, this amounts to a re-demise, and the title must be laid on a day subsequent to the time for payment; *Wilkinson v. Hall*, 3 N. C. 508. Where, in the old form of action, the demise was laid on the 1st of October, without naming any year, it was held enough to prove a title on any 1st of October, and that no amendment was necessary; *Doe v. Heather*, 8 M. & W. 158. But the day mentioned in the writ may be amended at *Nisi Prius* so as to suit the proof of title; *Doe v. Leach*, 3 M. & G. 229; *Doe v. Hall*, 5 M. & G. 795; and see C. L. P. Act, 1852, s. 222.

Title, in whom.] All the persons in whom the title is alleged to be should be named in the writ, and the jury at the trial will find which of them are entitled, and whether to the whole, or to what part; C. L. P. Act, 1852, s. 180. If the defendant defends for the whole of the land mentioned in the writ, and the plaintiff proves title to the possession of part only, the defendant is entitled to have the verdict entered accordingly; *Alcock v. Wil-*

shaw, 29 *L. J. (Q. B.)* 143; 2 *E. & E.* 633. The judge, at the trial, may, under s. 222 (if not under s. 35) of C. L. P. Act, 1852, add the names of any persons, as claimants, in whom it turns out that the legal estate is vested; *Blake v. Done*, 7 *H. & N.* 465; 31 *L. J. (Ex.)* 100. If several joint-tenants or co-parceners join, the whole may be recovered; *Doe v. Read*, 12 *East*, 57; *Doe v. Fenn*, 3 *Camp.* 190. And such is the case now also with tenants in common; *Elliss v. Elliss*, 1 *E. B. & E.* 81; 27 *L. J. (Q. B.)* 316. If a term vests in executors, the whole land may be recovered under a claim by any of them; *Doe v. Wheeler*, 15 *M. & W.* 623. The payment of one entire rent to the common agent of the plaintiffs is *prima facie* evidence of their title as joint tenants; *Doe v. Grant*, 12 *East*, 221. The foregoing authorities, however, do not seem to apply to the case of co-tenants, or other persons having distinct interests or estates, who have actually made a joint lease, and who bring ejectment to recover possession of the demised premises from the lessee, or any one claiming under him. In such a case it seems to be immaterial what interest any co-lessor has, or whether he has any; for the tenant is estopped by the lease. But if the several interests of the joint-lessors appear by recital in the lease, it is doubtful whether they can recover as joint-tenants, although a joint right of re-entry has been reserved; *Doe v. Hamilton*, 13 *Q. B.* 977. See *post*, *Ejectment by Landlord*, p. 621.

Proof of title—Legal Estate.] The plaintiff must prove a legal title, an equitable title is not sufficient; *Doe v. Wroot*, 5 *East*, 138. Thus the assignee of a copyhold by a common law conveyance, without surrender, cannot maintain ejectment even against the widow of the assignor; *Doe v. Webber*, 3 *N. C.* 922.

It is sometimes necessary to consider at Nisi Prius whether a use is executed so as to give the legal estate to the *cestui que use*. The general rule is, that, in the case of passive trusts created by deed or devise, the use must either be reduplicated, if limited on a freehold, or must be limited on a term of years; otherwise a legal estate passes. Thus, if the feoffment is to A. and his heirs, to the use of, or in trust for, B. and his heirs, the estate of B. is a legal seisin in fee. But if the conveyance is to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, then B. has a legal, and C. only an equitable estate. So if the conveyance is to A. and his heirs, to the use of, or in trust for, A. and his heirs, to the use of B. and his heirs, B. has only an equitable interest; *Doe v. Passingham*, 6 *B. & C.* 305; 1 *Steph. Com. B.* 2, Pt. 1, c. 9. Where the estate limited to a use is a leasehold or chattel interest, the Statute of Uses is inoperative, and the use limited is a mere trust; *Ibid*.

With regard to devises, &c., in trust, the rule is, that where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as the payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the beneficial grantee or devisee has only an equitable estate. See the note to *Jeffreson v. Morton*, 2 *Wms. Saund.* 11 b (n), and the cases there collected. See also *Poad v. Watson*, 6 *E. & B.* 606. Where the trustees are to pay debts, they take the legal fee; *Creaton v. Creaton*, 26 *L. J. (Ch.)* 266; 3 *Sm. & Gif.* 386; *Smith v. Smith*, 31 *L. J. (C. P.)* 25; 11 *C. B.*, *N. S.* 121; *Spence v. Spence*, 31 *L. J. (C. P.)* 189; 12 *C. B.*,

N. S. 199. But a mere charge for the payment of debts will not give the trustees the legal estate, unless the testator intends that they shall be active in paying the debts; *Kenrick v. Beauchlerck*, 3 *B. & P.* 175. A trust to receive the rents and profits, and pay them over, vests the legal estate in the trustee; *Doe v. Homfray*, 6 *Ad. & E.* 206. A trust to permit and suffer the *cestui que trusts* to receive the rents and profits, vests it in the *cestui que trust*; *Broughton v. Langley*, 2 *Salk.* 679. A devise to trustees in trust to pay to or permit and suffer to receive, &c., gives the legal estate to the *cestui que trust*; because, being inconsistent, the last words shall prevail in a will; *Doe v. Biggs*, 2 *Taunt.* 109. Yet where the trustees under a like devise were to repair, to let, &c., it was held that they took the legal estate; *White v. Parker*, 1 *N. C.* 573. And where the trust, as to three undivided parts out of four, required the legal estate to be in the trustees, it was held to vest in them as to all; *ibid.* At common law, if an estate be devised to trustees for purposes which are to last only for a certain time, the use of the word "heirs" will not give the fee; the devise will be cut down to the time necessary for the purposes. But if the fee be given in terms with trusts that extend over an indefinite time, it is not so; and if no particular time can be fixed at which the trusts shall end, the estate cannot be cut down; *per* Patteson, J., in *Doe v. Davis*, 1 *Q. B.* 430, 438; and see *per* Bayley, J., in *Houston v. Hughes*, 6 *B. & C.* 421; and in *Doe v. Nicholls*, 1 *B. & C.* 342.

In the case of wills made or revived after the 31st December, 1837, a devise of real estate (not being a presentation to a church) to a trustee or executor, will pass the whole estate which the testator had power to dispose of by will, unless a definite term of years or an estate of freehold be given expressly or by implication; and where any real estate is devised to a trustee without any express limitation of the estate to be taken, and the beneficial interest in it, or in the surplus rents and profits of it, is not given to any person for life,—or is so given, but the purposes of the trust may continue beyond the life of the person,—such devise is to be construed to pass to the trustee the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the trust is satisfied; 1 *Vict. c.* 26, ss. 30, 31.

Proof of legal title.—Presumption of surrender.] The following are a few cases representing the law of presumed surrender before 8 & 9 *Vict. c.* 12. See *post*, p. 618.

Where the legal estate was vested in a trustee, and there was no direct evidence of a conveyance or surrender to the *cestui que trust*, it was held that a jury might sometimes presume such conveyance or surrender; *Lade v. Holford*, *B. N. P.* 110; *Goodtitle v. Jones*, 7 *T. R.* 45. On the same principle, where an estate was directed to be conveyed to A. on his attaining his majority, it was held that a jury might, within four years from that time, presume that it was so conveyed by the trustees; *England v. Slade*, 4 *T. R.* 682. So where it was for the interest of the owner of the inheritance that a satisfied term should be considered as surrendered, and it appeared that no beneficial purpose could be answered by the continuance of the term, a surrender might be presumed; *Doe v. Wrighte*, 2 *B. & A.* 710. See also *Doe v. Hilder*, 2 *B. & A.* 782. But in *Doe v. Plowman*, 2 *B. & Ad.* 573, and in *Aspinal v. Kempson*, *Sugd. V. & P.* 446 (8th ed.), *cor.* Lord Eldon, C., the doctrine held in the above cases

was questioned; and the Court will not presume a surrender, unless there has been a dealing with the estate in a way in which reasonable men and men of business would not have dealt with it unless the term had been put an end to; *Garrard v. Tuck*, 8 C. B. 231; see also *Cottrell v. Hughes*, 15 C. B. 532; and, in the 14th edit. of *V. & P.* 621, *Doe v. Hilder* is considered by Lord St. Leonards as overruled.

The mere fact of a term being satisfied, furnishes no ground from which the jury can presume it surrendered; *Evans v. Bicknell*, 6 Ves. 185. There ought to be some dealing with the term, to authorise such a presumption; *Ibid*; *Doe v. Williams*, 2 M. & W. 749. Where a term has been expressly assigned to attend the inheritance, and there has been no act or omission inconsistent with the existence of the term, there is less ground to presume a surrender from the mere lapse of time and silence of the party who possesses the inheritance; *Doe v. Plowman*, 2 B. & Ad. 573. So the recognition of the term as subsisting at a late period (*Doe v. Scott*, 11 East, 478);—the fact that it would have been contrary to the duty of the trustees to surrender the estate (*Keene v. Deardon*, 8 East, 267);—or that the original enjoyment of the party, who sets up the presumed conveyance, was consistent with the fact of there having been no conveyance (*Doe v. Reed*, 5 B. & A. 237);—are all circumstances from which a jury may infer that no conveyance has taken place. A. devised an estate to trustees for years with remainder to B., who, eighteen years after the death of A., treated the estate as his own freehold, and leased it for lives: it was held that the jury ought not to presume a surrender; and, *per* Bayley, B., “Is there any case where a surrender has been presumed within twenty years? I do not think that a jury ought to be required to presume what they do not believe. In the present case, if a surrender had really taken place, it must have been known to many;” *Day v. Williams*, 2 C. & J. 460. “No case can be put in which any presumption has been made, except where a title has been shown by the party, who calls for the presumption, good in substance but wanting some collateral matter necessary to make it complete in point of form;” *per* Tindal, C. J., *Doe v. Cooke*, 6 Bing. 179.

Attendant Terms, 8 & 9 Vict. c. 112.] Such was the state of the law before the passing of 8 & 9 Vict. c. 112. The first section of that act enacts, that every satisfied term, which was, on 31st December, 1845, either by express declaration or construction of law, attendant on the inheritance of any land, shall on that day cease as to such land; but that the term, so attendant by express declaration, shall notwithstanding afford to every one the same protection against charges, actions, claims, &c., as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after that day; and shall for the purpose of such protection be considered in every court of law and equity to be a subsisting term.

It is not clear whether the effect of the statute is only to afford a protection against claims, or to give a title; it would rather seem, however, that it is the former only; see *Doe v. Price*, 16 M. & W. 603. And in such cases the defendant will, perhaps, only be required to show the existence of the term on the 31st December, 1845, and that it was then attendant by express declaration. If the latter is the effect of the statute, it is not clear what should be the course of proceeding where the real claimant seeks to avail himself of the

statute, more especially where the termor, living in 1845, has since died. As the statute was made for the benefit of persons justly entitled, a defendant would probably not be able to avail himself of the statute, except in cases where equity would not formerly have restrained him from setting up the term; *Doe v. Mouldsdales*, 16 *M. & W.* 689; *Cottrell v. Hughes*, 15 *C. B.* 532; 24 *L. J. (C. P.)* 107.

The second section of the act relates to terms subsisting or thereafter created, and becoming satisfied since 31st December, 1845, and which, after that day, shall become attendant either by express declaration or construction of law; and it enacts that every such term shall, immediately on its becoming so attendant, absolutely cease as to the land upon the reversion whereof it shall become attendant. In order that the term should cease under this section it must have become attendant on the legal inheritance; *Doe v. Jones*, 13 *Q. B.* 774.

Where a term is to attend the inheritance, it can only be dealt with by those who are entitled to the inheritance; and therefore an assignment by a tenant for life is inoperative; *Plant v. Taylor*, 7 *H. & N.* 211; 31 *L. J. (Ex.)* 289.

Proof of legal title.—Estoppel.] The defendant may, in some cases, disprove the legal title of the party through whom both he and the plaintiff claim. Thus, where the plaintiff claims under a conveyance from A. B. in 1818, and the defendant under a conveyance from A. B. in 1824, the defendant may show that, in 1818, A. B. had no legal estate to convey; *Doe v. Powell*, 1 *Ad. & E.* 531. But where A., without title, entered upon land and built a cottage, and afterwards accepted a lease by indenture from B.; and defendant, claiming the land as his own, paid A. 20*l.* to give up possession to him; it was held, in ejectment by B., that A. had estopped himself from controverting the title of B., and that the defendant was bound by the estoppel, having come in under, and received possession from A.; *Doe v. Mills*, 2 *Ad. & E.* 17. So, where the defendant fraudulently got possession by obtaining the licence of the occupier, and then set up an adverse title, it was held that the occupier might maintain ejectment against him without proof of title; *Doe v. Baytop*, 3 *Ad. & E.* 188. So an agreement to purchase by a party in possession is such an acknowledgment of title in the vendor as, in the event of the purchase not being completed, to estop the purchaser from denying the title of the vendor; *Doe v. Burton*, 16 *Q. B.* 807.

As already stated, *ante*, p. 168, a tenant may show that the title of the landlord has expired. Thus, in ejectment for a forfeiture, he may show that the plaintiff has conveyed away all his legal estate by way of mortgage, though the mortgagee has never enforced his rights; *Doe v. Edwards*, 5 *B. & Ad.* 1065. See further as to estoppel, *post*, *Ejectment by Landlord*, p. 621.

In the old action of ejectment it was no answer at *Nisi Prius* that the defendant was the wife of the lessor, or of one of the lessors of the plaintiff; *Doe v. Daly*, 8 *Q. B.* 934.

Title expired.] By sect. 181 of the C. L. P. Act, 1852, in case the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall, notwithstanding, be entitled to a verdict, according to the fact, that he was so entitled at the time of bringing the action and serving

the writ, and to a judgment for his cost of suit. This enactment is in accordance with the old practice; see *Co. Litt.* 285a; *Doe v. Bluck*, 3 *Camp.* 447. But plaintiff cannot sue out and serve a writ after the title has expired; *Doe v. Kennard*, 12 *Q. B.* 244. Where the claimant was assignee of lessee, and the defendant assignee of the sub-lessee of the same term, less ten days, who had held over after the expiration of his term, on which ejectment was brought before the expiration of the ten days, and the original term had expired before the trial, but there was no affirmative evidence that the claimant had no other title; it was held that the claimant was entitled to a verdict in the general form under sect. 180, and to a judgment and writ of possession under s. 185; *Gibbins v. Buckland*, 1 *H. & C.* 736; 32 *L. J. (Ex.)* 156.

The local description of the premises.] A variance in the local situation of the premises was held fatal, unless amended; *Goodtitle v. Lammiman*, 2 *Camp.* 274. But the power of amendment at Nisi Prius, which is given to the same extent as was possessed in the old form of action by the C. L. P. Act, 1852, s. 221, and extended by s. 222, has rendered a variance of little moment, where the merits are not affected by it.

Actual ouster.—Ejectment by tenants in common, &c.] By the C. L. P. Act, 1852, s. 188, "In case of an action being brought by some or one of several persons entitled as joint-tenants, tenants in common, or coparceners, any joint-tenant, tenant in common, or coparcener in possession, may at the time of appearance, or within four days after, give notice, in the same form as in the notice of a limited defence, that he or she defends as such, and admits the right of the claimant to an undivided share of the property (stating what share) but denies any actual ouster of him from the property, and may within the same time file an affidavit stating with reasonable certainty that he or she is such joint-tenant, tenant in common, or coparcener, and the share of such property to which he or she is entitled, and that he or she has not ousted the claimant; and such notice shall be entered on the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue the additional question of, whether an actual ouster has taken place, shall be tried." And by s. 189, "Upon the trial of such issue as last aforesaid, if it shall be found that the defendant is joint-tenant, tenant in common, or coparcener with the claimant, then the question, whether an actual ouster has taken place, shall be tried."

Where a tenant in common had been in the sole and uninterrupted possession for thirty-six years, without account to, or demand by, his companion, this was held to be ground for a jury to presume an actual ouster; *Doe v. Prosser*, *Cowp.* 217. If one tenant in possession claims the whole and denies possession to the other, this, being beyond the mere act of receiving the whole rent, is evidence of an ouster; *Doe v. Bird*, 11 *East*, 49; *Litt.* s. 322; *Co. Litt.* 199 b. So where three of four co-tenants authorised a company to use the land for a railroad, it was held that such user amounted to an ouster of the fourth tenant in common; *Doe v. Horn*, 3 *M. & W.* 340; 5 *M. & W.* 564. Where one of two tenants in common of a wall altered the height of it and built an outhouse, of which the roof extended over it, and put up a tablet on the wall claiming the whole wall, it was held that this was evidence for the jury of an ouster of

the co-tenant; *Stedman v. Smith*, 8 E. & B. 1; 26 L. J. (Q. B.) 314. Before the 3 & 4 Wm. 4, c. 27, a bare perception of the profits by one tenant in common for twenty-six years was no ouster; *Fairclain v. Shackleton*, 5 Burr. 2604. And where one tenant in common levied a fine and took the rents and profits afterwards, without account, for nearly five years, it was held that there was no evidence from which a jury could presume (contrary to the justice of the case) an ouster of the other tenant; *Peaceable v. Read*, 1 East, 568.

By 3 & 4 Wm. 4, c. 27 (for limitation of actions), s. 12, it is enacted, that where any one or more of several persons entitled to any land, or rent, as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share of such land or of the profits or of such rent, for his or their own benefit, or for the benefit of any person other than the person entitled to the other share, such possession or receipt shall not be deemed the possession or receipt of or by such last-mentioned person. This section has been held retrospective, at least for the purposes of the act; *Culley v. Doe*, 11 Ad. & E. 1017; *post*, p. 673.

It would seem that if the defendant does not proceed as pointed out in the 188th section of the C. L. P. Act, 1852, he cannot set up at the trial that he is joint-tenant, &c., with the plaintiff; see *Culley v. Doe*, 11 Ad. & E. 1008, 1015; *Outes v. Brydon*, 3 Burr. 1897. But see sect. 221.

Ejectment by Landlord.

In ejectment by a landlord, the plaintiff in general need not prove his own title, but only the demise, and its expiration either by efflux of time, determination of will, demand of possession, notice to quit, disclaimer, or forfeiture.

The tenant in general cannot dispute the title of his lessor; *Delaney v. Fox*, 2 C. B., N. S. 768; 26 L. J. (C. P.) 248; whether the original lessor or his assignee be plaintiff, *Gouldsworth v. Knights*, 11 M. & W. 337; *Cuthbertson v. Irving*, 6 H. & N. 135; 29 L. J. (Ex.) 485 (Ex. Ch.). Therefore, if a demise be shown, and title be traced from the lessor to the plaintiff, no other evidence of title need be given. And where the defendant, before the expiration of his term, has entered into an agreement for a renewal of his tenancy from a person claiming as devisee of the landlord, and has paid him rent, he cannot dispute the title of the claimant by proving the incapacity of the deviser, if no fraud was practised on the defendant by the claimant; *Doe v. Wiggins*, 4 Q. B. 367. And a person claiming under, or who has received possession by the voluntary act of, the tenant, is equally estopped; *Doe v. Mills*, 2 Ad. & E. 17, cited more fully, *ante*, p. 619. But if the defect of title in the lessor appears on the lease itself, the lessee is not estopped from showing that defect; *Doe v. Goldsmith*, 2 C. & J. 674; *Greenaway v. Hart*, 14 C. B. 340; 23 L. J. (C. P.) 115. Where, however, defendant was lessee to the plaintiff, and had paid rent under a lease, which contained in the habendum a proviso that it was subject to an indenture of lease between defendant, the plaintiff, and W. K., whereby the premises were demised to W. K. for twenty-one years; and at the time of the suit, which was brought for breaches of covenant in

the lease from the plaintiff to the defendant, the term demised to W. K. was outstanding: it was held, that the defendant could not set up this term against the plaintiff; *Duke v. Ashby*, 31 L. J. (Ex.) 168; 7 H. & N. 600.

The doctrine of estoppel has been applied also to encroachments made by the tenant during the term, whether for life or years, out of land belonging to a stranger, either adjoining to the lands held by the tenant, or separated from it by a road; but the principle is scarcely that of an estoppel, but rather proceeds on the ground that if the power to encroach is derived from the occupation of premises held of a landlord, and the encroachment is occupied as if it were part of the holding, the presumption is that it is included in the tenancy, and belongs to the landlord; *Doe v. Jones*, 15 M. & W. 580; *Andrews v. Huiles*, 2 E. & B. 349; 22 L. J. (Q. B.) 409; *Doe v. Tidbury*, 14 C. B. 304; 23 L. J. (C. P.) 57. But this presumption is one of fact only, and may be rebutted by clear evidence that, at the time the encroachment was made, the tenant intended it for himself; see the last cases.

A mere licensee is on the same footing as a tenant; therefore where a person fraudulently obtained leave to enter from a servant of the plaintiff, and then set up a title to the premises, it was held that he could not defend an ejection, but was bound to deliver up possession before he disputed the title; *Doe v. Baytup*, 3 Ad. & E. 188. Where A. conveyed lands in fee with an agreement that he was to remain in possession during his life; it was held, that A.'s widow could not defend her possession against an ejection at the suit of the alienee by setting up the title of a party to whom her husband had previously mortgaged the land; *Doe v. Skirrow*, 7 Ad. & E. 157. The lessor of the plaintiff was devisee of A., and it appeared that A. let the defendant into possession, but was then occupier himself as servant only, or at most tenant at sufferance, to another; still it was held that this was sufficient title as against the defendant; *Doe v. Birchmore*, 9 Ad. & E. 662. In *Doe v. Barton*, 11 Ad. & E. 307, it was held that the defendant might show that the plaintiff, his lessor, was mortgagor in possession with the mortgagee's assent when he let the defendant into possession, and that the mortgagor had since been treated by the mortgagee as a trespasser, whereby the mortgagor's title and the defendant's rightful possession under him have been determined. In that case evidence was tendered (but rejected) to show that the mortgagee had given notice to the defendant to pay the rent to him, and the defendant had paid it accordingly; and the court granted a new trial, as the evidence tendered would have tended to show that the mortgagor had been treated as a trespasser; and *semble*, if communication were shown to have taken place between the mortgagee and mortgagor, would have been sufficient proof. This case has, however, been questioned; see *per Williams, J.*, in *Delaney v. Fox*, 2 C. B., N. S. 777; 26 L. J. (C. P.) 250; where the court held that payment of rent under a threat of distress to a third person, who in fact was the real owner, was not a constructive eviction, so as to open the estoppel; and *quære*, whether any only constructive eviction would be sufficient; S. C.; see, however, *Doe v. Barton*, *suprà*. A payment of rent under a mistake to a person other than the person by whom the possession was given, is no estoppel; *Doe v. Barton*, *suprà*. See further, *ante*, pp. 162-3, *Action for use and occupation*; and *post*, *Action of Replevin*; *Plea, non tenuit*, pp. 677-8.

Proof of the tenancy.] If there is a demise by deed or in writing, it must be proved (unless admitted) by the production of the original, or of the counterpart; *Roe v. Davis*, 7 *East*, 363. If in the defendant's possession, notice to produce it should be given. Where the lease is by parol, it may be proved by a person who was present at the making, or by an admission of the defendant; 2 *Phill. Ev.* 221. And though the terms of the lease have been committed to writing, yet if *not signed* by the parties, they may be proved by parol; *R. v. St. Martin's, Leicester*, 2 *Ad. & E.* 210; see also, *ante*, p. 2. And the terms of a lease in writing may be proved by oral admissions of the opposite party; *Howard v. Smith*, 3 *M. & G.* 254; and see *Slatterie v. Pooley*, 6 *M. & W.* 664.

Tenancy at will.—Demand of possession.] Where a party has been let into possession pending a treaty for a purchase or a lease (*Right v. Beard*, 13 *East*, 210); or under a void or imperfect lease or conveyance (*Litt. s. 70*; *Denn v. Fearnside*, 1 *Wils.* 176; *Doe v. Edgar*, 2 *N. C.* 503); or where, having been tenant for a term which has expired, he continues in possession negotiating for a new one (*Doe v. Stennett*, 2 *Esp.* 717); in these and the like cases the party is either strictly tenant at will, or at all events is in lawful possession, and cannot be ejected until such possession is determined by demand of possession, breaking off the treaty, or other determination of the will; *Denn v. Rawlins*, 10 *East*, 261; *Doe v. Jackson*, 1 *B. & C.* 448. And the demand must be made before the day named in the writ; *Goodtitle v. Herbert*, 4 *T. R.* 680. The principle of these cases is, that "it is not the agreement, but the letting into possession, that creates the tenancy; for the person, so suffered to occupy, cannot on the one hand be considered as a trespasser when he enters, and on the other hand cannot have more than the interest of a tenant at will, the lowest estate known to the law;" *per curiam*, in *Doe v. Stanion*, 1 *M. & W.* 700. A cestui que trust (if in actual occupation, *Melling v. Leak*, 16 *C. B.* 652, 24 *L. J. (C. P.)* 187) is, at law, tenant at will to his trustee; *Garrard v. Tuck*, 8 *C. B.* 231.

Where a tenancy at will is created, any act inconsistent with a tenancy at will, done by either party will amount to a determination of the will, and render unnecessary a formal demand of possession; thus a threat made to the tenant by the agent of the lessor "to take measures to recover possession" is sufficient; *Doe v. Price*, 9 *Bing.* 356. So a feoffment by the lessor to another with livery of seisin made on the land, though in the absence of the tenant, determines the will; *Ball v. Cullimore*, 2 *C. M. & R.* 120. So the granting of a lease, though invalid, by parish officers to another, who thereupon takes possession, is a determination of a previous tenancy at will of the defendant; *Wallis v. Delmar*, 29 *L. J. (Ex.)* 276. An entry by the landlord, and the exercise of an act of ownership, which would otherwise have amounted to a trespass, determines the estate at will, whether done with the intention of determining it or not; *Turner v. Doe*, 9 *M. & W.* 643. An assignment by a tenant at will is a determination of the will; *Co. Litt.* 57 a; *Shaw v. Barbor*, *Cro. Eliz.* 830. See *Birch v. Wright*, 1 *T. R.* 382. So where a purchaser, let into possession, refuses to complete the purchase and assigns his interest, the assignment is a determination of the will without demand; *Doe v. Abbot*; *Winton Sum. As.* 1838, *per Parke, B.* But an assignment, or other act by the tenant, in order to be a determination of the will, as *against* the landlord, must be known

to the landlord; *Pinkhorn v. Souster*, 8 *Ex.* 763; 22 *L. J. (Ex.)* 266. If the landlord becomes insolvent, the vesting order, with knowledge of it by the tenant, determines the tenancy; *Doe v. Thomas*, 6 *Ex.* 854; 20 *L. J. (Ex.)* 367.

Where the vendor of a term, before all the purchase-money was paid, agreed with the vendee that he should have possession of the premises till a given day, paying the reserved rent in the mean time, and that, in case he did not pay the residue of the purchase money on that day, he should forfeit the portion he had already paid and not be entitled to an assignment of the lease, Lord Ellenborough held that this agreement operated like a clause of re-entry on a breach of covenant in a lease, and that, the residue of the purchase money not being paid on the appointed day, the vendee's interest thereupon ceased, and he might be ejected without any notice; *Doe v. Sayer*, 3 *Camp.* 8. And if a third person, under such circumstances, has come in as a tenant to the vendee, though with the vendor's knowledge, ejectment may be maintained against him also without notice; *Doe v. Boulton*, 6 *M. & S.* 148. So where a man got into possession of a house without the privity of the landlord, and the parties afterwards entered into a negotiation for a lease but disagreed about the value of the fixtures, Lord Ellenborough was of opinion that, if this was a tenancy of any sort it was a tenancy at sufferance, and that a notice to quit was unnecessary; *Doe v. Quigley*, 2 *Camp.* 505; and see *Doe v. Lawder*, 1 *Stark.* 308; *Doe v. Pullen*, 2 *N. C.* 749.

A demand of possession may be made upon the wife of the tenant at will on the premises; *Roe v. Street*, 2 *Ad. & E.* 329.

As to the case of mortgagee and mortgagor see *post*, *Ejectment by Mortgagee*, p. 659.

Proof of tenancy from year to year.] Evidence of a demise from year to year, may, in the absence of other proof, be gathered from the payment and receipt of yearly rent; *Doe v. Horn*, 3 *M. & W.* 339. Where payment of rent is the only proof of tenancy, defendant may show that the plaintiff received it as agent for another; *Doe v. Francis*, 2 *Moo. & Rob.* 57. And where the receipt of rent was relied upon by the defendant as evidence of such a tenancy, and of the consequent necessity of notice to quit, the plaintiff was held to have rebutted the presumption by showing that he received it as due on a lease, the expiration of which had been concealed from him by the defendant; *Doe v. Crago*, 6 *C. B.* 90; 17 *L. J. (C. P.)* 263. If a party, having a lease void by the Statute of Frauds (*Doe v. Bell*, 5 *T. R.* 471); or by 8 & 9 *Vict. c.* 106, s. 3 (*Tress v. Savage*, 4 *E. & B.* 36; *Lee v. Smith*, 9 *Ex.* 662); or an agreement for a lease (*Mann v. Lorejoy, Ry. & Mood.* 355; *Doe v. Stratton*, 4 *Bing.* 446; *Braythwayte v. Hitchcock*, 10 *M. & W.* 494)—enters into possession and pays rent at so much a year, the jury may conclude that he entered under a parol demise from year to year on such of the terms of the void lease, or of the agreement, as are not inconsistent with such a holding. So if, being in possession, he acknowledges that half a year's rent at so much is due; *Cox v. Bent*, 5 *Bing.* 185; but if the acknowledgment be not of some certain sum, it may be an admission of a tenancy, but it is no evidence of a tenancy from year to year; see *Regnart v. Porter*, 7 *Bing.* 451. So, too, where a tenant holds over after the determination of his term, and pays rent, the presumption is that he holds as tenant from year to year on the terms of the expired lease; so far as they are applicable to a tenancy from year to year; and

this, too, though the rent be increased by agreement; *Digby v. Atkinson*, 4 Camp. 275; *Hyatt v. Griffiths*, 17 Q. B. 505. Hence, if the lease contained, or by the agreement was to contain, a clause of re-entry for breach of a husbandry covenant (*Doe v. Amey*, 12 Ad. & E. 476); or for non-payment of rent (*Thomas v. Packer*, 1 H. & N. 669; 26 L. J. (Ex.) 207);—the yearly tenancy will be subject to a similar condition. So, if the tenant has entered and paid rent under an agreement for a lease for seven years (*Doe v. Stratton*, 4 Bing. 446); or under a void lease for more than three years (*Doe v. Moffatt*, 15 Q. B. 257; *Tress v. Savage*, 4 E. & B. 36); and has occupied during the whole period, the tenancy ceases by effluxion of time; an agreement that it should cease at the end of seven years not being inconsistent with a tenancy from year to year. The presumption as to the terms of holding is in all these cases one of fact, and not of law; *Hyatt v. Griffiths*, 17 Q. B. 505; though it would seem that where rent is paid, it is a conclusion of law that some tenancy is created; *Bishop v. Howard*, 2 B. & C. 100. Where the yearly tenant of glebe lands remained in possession for eight months after the death of the incumbent, to whom he was tenant, it was held that, after such a lapse of time, it might be presumed that the new incumbent had assented to the continuance of the tenancy on the same terms as before, and that a notice to quit was necessary; *Doe v. Somerville*, 6 B. & C. 126. And a similar presumption would be made against a corporation aggregate; *Doe v. Tanier*, 12 Q. B. 998.

By holding premises for several weeks, paying rent weekly, a tenancy from week to week is created; *Jones v. Mills*, *post*, p. 628.

A letting so long as both parties please, without any reservation or payment of annual rent, makes a tenancy at will; *Richardson v. Langridge*, 4 Taunt. 128. So a letting by deed, expressly “at will,” at the rate of so much per annum payable quarterly, is not converted into a yearly tenancy by payment of the annual rent; *Doe v. Cox*, 11 Q. B. 122.

[*Lease, or agreement for a lease.*] A question frequently occurs, whether the instrument produced operates as an actual demise, or is merely an agreement to demise. The intention of the parties, as declared by the words of the instrument, must govern the construction. Upon a review of the cases, it seems that words of present demise, as, “I demise,”—or words conferring a right of enjoyment, as that the party “shall hold and enjoy,”—are evidence of an intention to make an actual lease; *Harrington v. Wise*, Cro. Eliz. 486; *Baxter v. Browne*, 2 W. Bl. 973; *Poole v. Bentley*, 12 East, 168; *Barry v. Nugent*, cited 5 T. R. 165. The word *agree* will not of itself exclude the inference of a present demise, where there is nothing else to show that such a demise was not intended, *per* Tindal, C. J., *Staniforth v. Fox*, 7 Bing. 592. Where, on the face of the instrument, it was evident that a future lease was contemplated, though not expressly provided for, and at the same time various terms of the tenancy remained to be ascertained, though there were words of present demise, the instrument was held to operate as an agreement only; *Morgan v. Bissell*, 3 Taunt. 65. But in *Doe v. Benjamin*, 9 A. & E. 644, a stipulation for a future lease “on the usual terms,” was held compatible with an intent to make a present demise. See also *Curling v. Mills*, 6 M. & G. 173; *Poole v. Bentley*, *supra*. A landlord and tenant, between whom

there was a subsisting tenancy, agreed in writing for the letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the tenant to find sureties for his paying the rent. The amount was not settled, and the sureties were not given: Held, that the instrument, though it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy; *John v. Jenkins*, 1 C. & M. 227. But if the terms of the lease are ascertained by the agreement, and there are words of present demise, it will operate as a lease; *Doe v. Ries*, 8 Bing. 178. And though the preparation of a future lease is provided for, yet if it be agreed that in the mean time the lessee shall enter and pay the stipulated rent, &c., that amounts to a present demise; *Pinero v. Judson*, 6 Bing. 206; *Warman v. Faithfull*, 5 B. & Ad. 1042; *Pearce v. Cheslyn*, 4 Ad. & E. 225; *Anderson v. Midland Railway Company*, 30 L. J. (Q. B.) 94. Again, where it is stipulated that the lessee shall do some act upon the premises before the execution of a formal lease, this has been considered as evidence of a present demise; *Poole v. Bentley*, 12 East, 168. And a stipulation that the agreement shall be considered binding until one fully prepared can be produced, is evidence of the same intent; *S. C.*; *Doe v. Groves*, 15 East, 244. On the other hand, if a forfeiture would be incurred by holding the instrument to be a lease, it is to be presumed that the intention of the parties was to make an agreement only; *Doe v. Clare*, 2 T. R. 739. And any words which show that a future act is to be done before the relation of landlord and tenant commences (as the purchase and addition of another piece of land to the premises) are ground for holding that the instrument was not intended to operate as a lease; *Doe v. Ashburner*, 5 T. R. 163. And see *Gore v. Lloyd*, 12 M. & W. 463; *Doe v. Clarke*, 7 Q. B. 211. So where a stipulation is contained in the instrument, importing that something ulterior to the agreement is to be done by way of a regular lease, this is evidence of an agreement merely; *Doe v. Smith*, 6 East, 530; *Rawson v. Eicke*, 7 Ad. & E. 451. And an express stipulation for a power of distress, until the lease is granted, does not necessarily make the instrument operate as a present demise; *Bicknell v. Hood*, 5 M. & W. 104. If the party, who agrees to demise, appears on the face of the agreement to have no present power to lease, it will not be construed to be a present demise; *Hayward v. Haswell*, 6 Ad. & E. 265. And see *Doe v. Foster*, 3 C. B. 215. The inference of a present demise may be prevented by an express provision that the agreement shall not operate as such; *Perring v. Brook*, 1 Mood. & Rob. 510.

An actual demise may be created by letters interchanged between lessor and lessee; *Chapman v. Bluck*, 4 N. C. 187, 193, 195; and the subsequent acts of the parties are said to be admissible to show their intention; *S. C.* But see *Doe v. Powell*, *post*. But, as in other cases, where the agreement was to be collected from mutual letters, which left some of the terms for future settlement, and contained no provision for possession before the date of the future lease, it was held that there was no present demise; *Jones v. Reynolds*, 1 Q. B. 506.

The law is well settled, that where there is any doubt as to the operation of the contract, the court must endeavour to discover the intention of the parties from the contents of the instrument; and if they see a paramount intention that the instrument shall operate as a lease, they must hold it to be such, although it may contain

conflicting expressions; *per* Tindal, C. J., *Pinero v. Judson*, 6 Bing. 210. And in forming its judgment, the court will consider the nature of the property, and look at the instrument in connection with surrounding circumstances, but will not regard *subsequent* acts of the parties; *Doe v. Powell*, 7 M. & G. 980, 988, 992. The marginal note of the last case also excludes "extrinsic circumstances," but the report itself does not bear this out.

By the 8 & 9 Vict. c. 106, s. 3 (repealing a previous act, 7 & 8 Vict. c. 76), a lease, for which, before 1st October, 1845, a writing was required, is, if made since that date, void unless made by deed. The Statute of Frauds, which is referred to in the above enactment, requires a writing for every lease, except leases not exceeding the term of three years from the making, on which the reserved rent is two-thirds of the improved value of the premises. A lease which does not conform to the Statute of Frauds, has, by that act, only the force of a lease at will; *ante*, p. 171.

Since the 8 & 9 Vict. c. 106, the same construction must be put on an instrument as before the act; and it will depend upon the terms used, whether or not it amounts to a lease; *Stratton v. Pettit*, 16 C. B. 420, 24 L. J. (C. P.) 182; but it may be as well to observe, that, though void as a lease, it may be good as an agreement; *Bond v. Rosling*, 30 L. J. (Q. B.) 227; 1 B. & S. 371; *Parker v. Taswell*, 2 De Gex & J. 559; 27 L. J. (Ch.) 812; and see *Rollason v. Leon*, 31 L. J. (Ex.) 96; 7 H. & N. 73; *Tidey v. Mollett*, 33 L. J. (C. P.) 235; 16 C. B., N. S. 298. And where a person had entered into possession and paid rent under an instrument that is void as a lease, not being by deed, the instrument may be used as an agreement to show on what terms he holds as a tenant from year to year; *Tress v. Savage*, 4 E. & B. 36; 23 L. J. (Q. B.) 339.

Tenancy, when determinable.] A demise from year to year so long as both parties please, is determinable at the end of the first year, and therefore if a tenant hold over after the end of his term, and pay rent, the yearly tenancy may be determined at the end of the first year; *Doe v. Smaridge*, 7 Q. B. 957; but a demise "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least; *Denn v. Cartright*, 4 East, 29. So a demise "for a year, and afterwards from year to year;" *Belasyse v. Burbridge*, Lut. 213; and see 1 T. R. 380; although there be a stipulation for less than a half year's notice to quit; *Doe v. Green*, 9 Ad. & E. 658. But where the demise was "for twelve months *certain*, and six months' notice afterwards," Lord Ellenborough held that the tenant was at liberty to quit at the end of twelve months, giving six months' previous notice; *Thompson v. Maberley*, 2 Camp. 573. And this decision, as explained in *Doe v. Green*, *supra*, was recognised in *Brown v. Symons*, 29 L. J. (C. P.) 251; 8 C. B., N. S. 208; and applied to a contract in similar terms as to service. A lease for six months, and "so on for six months to six months, giving six calendar months' notice," is a demise for a year at least; *R. v. Chawton*, 1 Q. B. 247. So a demise for the term of three years, "determinable on a six months' previous notice to quit by either lessor or lessee, otherwise to continue from year to year until the term shall cease by notice to quit at the usual time," is a demise for three years certain, and cannot be determined sooner than by a notice ending with the third year; *Jones v. Nixon*, 31 L. J. (Ex.) 505; 1 H. & C. 48. An agreement by which the tenant "is always to

be subject to quit at three months' notice," is a quarterly tenancy, determinable at any quarter-day calculated from the day of commencement; *Kemp v. Derrett*, 3 *Camp.* 510. And an agreement by which a house was let at a "yearly rent of 42*l.*, payable quarterly, the first payment of 7*l.* 13*s.* 6*d.* to be made on the 24th of June next, being the proportion of rent from the 19th of April to that date," and which stipulated that the tenant should hold and enjoy possession "until one of the parties should give to the other six calendar months' notice to quit at the expiration of such notice," does not create a yearly tenancy, but one determinable by six months' notice, expiring at any of the usual quarter days; *Doe v. Grafton*, 18 *Q. B.* 496; 21 *L. J. (Q. B.)* 276. And see *Doe v. Roe*, 10 *M. & W.* 670. And see further, *post*, *Notice to quit, at what time.*

Notice to quit, when necessary.] In the ordinary case of a tenancy from year to year, in order to determine the tenancy a notice to quit must be given; but where a person had entered under an agreement for a lease for seven years (*Doe v. Stratton*, 4 *Bing.* 446), or under an instrument void as a lease, as being for more than three years and not under seal (*Doe v. Moffatt*, 15 *Q. B.* 257; *Tress v. Sarage*, 4 *E. & B.* 36; 23 *L. J. (Q. B.)* 339), and paid rent so as to create a tenancy from year to year, and had occupied during the whole period mentioned in the instrument, the tenancy ceases by the agreement of the parties, and no notice to quit is necessary to determine it. See also Maule, J.'s, judgment in *Berrey v. Lindley*, 3 *M. & G.* 514. See also the cases cited *ante*, p. 625.

Notice to quit, how proved.] A notice to quit, if in writing, may be proved by a duplicate original, or examined copy, without a notice to produce the original; *Doe v. Somerton*, 7 *Q. B.* 58; see *ante*, p. 14.

Notice to quit, at what time it must be given.] The notice to quit, in order to determine a tenancy from year to year, must be proved to have been given half a-year before the end of the current year of the tenancy; except where the rent is payable on the usual quarterly feast-days, when notice on one feast-day to quit on the next but one is sufficient; *Right v. Darby*, 1 *T. R.* 159, 163; *Doe v. Kightley*, 7 *T. R.* 63. Thus, notice on the 28th of September to quit on the ensuing 25th of March is sufficient; *Roe v. Doe*, 6 *Bing.* 574. But the period may be controlled by special agreement or local custom; *Roe v. Charnock*, *Peake, N. P.* 4; *Doe v. Snowdon*, 2 *W. Bl.* 1225. The notice to determine a yearly tenancy must expire at the expiration of the current year, so that the tenant may go out on the anniversary of his entry; *Right v. Darby*, 1 *T. R.* 159; *Doe v. Matthews*, 11 *C. B.* 675; or where the tenancy is for less than a year, at the end of such shorter period, or some future corresponding period, calculated from the day of commencement; *Kemp v. Derrett*, 3 *Camp.* 510. Where the tenancy is for less than a year, the length of the notice must be regulated by the letting; as a month's notice, for a monthly letting, &c.; *Doe v. Hazell*, 1 *Esp.* 94. In *Jones v. Mills*, 10 *C. B.*, *N. S.* 788, 31 *L. J. (C. P.)* 66, it was held that some reasonable notice to quit was necessary to determine a tenancy from week to week; Williams, J., being of opinion that a week's notice was necessary, citing *Kemp v. Derrett*, *supra*; and Lord Mansfield's judgment in *Doe v. Darby*,

1 *T. R.* 162; Willes, J., inclining to think half a week's notice would be sufficient, citing Parke, B., in *Huffell v. Armistead*, 7 *C. & P.* 57. On a letting from year to year to quit at a quarter's notice, the notice must expire with the current year, unless otherwise expressly provided; *Doe v. Donovan*, 1 *Tuunt.* 555; 2 *Camp.* 78. But a letting at a yearly rent, payable quarterly, to hold until one party shall give the other six months' notice to quit, may be determined by a six months' notice ending on any of the quarter-days; *Doe v. Grafton*, 18 *Q. B.* 496; 21 *L. J. (Q. B.)* 276. The tenancy will be taken *primâ facie* to commence from the day of the tenant's entry, and not with reference to any particular quarter-day; *Kemp v. Derrett*, 3 *Camp.* 510. But where a tenant entered in the middle of a quarter, and afterwards paid for that half-quarter, and thenceforth paid from quarter to quarter, he was held to be a tenant from the first quarter-day; *Doe v. Johnson*, 6 *Esp.* 10; *Doe v. Stapleton*, 3 *C. & P.* 275. In another case where the tenant entered in the middle of a quarter, upon an agreement "to pay rent quarterly, and for the half-quarter," it was left to the jury to say whether the party was tenant from the quarter-day prior to the time when he entered, or from the succeeding quarter-day; *Doe v. Selwyn, Adams Eject.* 107. Where a tenant for life granted a lease to commence on one of the usual quarter-days, void as to the remainderman, and died during the term in the middle of a quarter, and the remainderman received rent from the tenant for two years at the quarter days mentioned in the demise; it was held that this was evidence on which a jury ought to find that there was an agreement that the tenant should continue to hold as tenant from year to year as from the day of the commencement of the original demise; and that a notice to quit on that day was therefore good; *Roe v. Ward*, 1 *II. Bl.* 97; *Doe v. Weller*, 7 *T. R.* 478, *accord.* So where a tenant from year to year lets in another in his place from whom the landlord receives rent as before, the year of the tenancy of the second tenant runs from the commencement of the original tenancy, and not from the time he entered; *Doe v. Samuel*, 5 *Esp.* 173. Where there was a demise for one year and six months certain from 13th August, 1838, at a yearly rent, to be paid quarterly, the first payment to be on the 29th September next, with a proportionate abatement to the tenant, three months' notice to be given previous to the determination of the tenancy; and the tenant continued to occupy beyond the year and six months, it was held that the tenancy could be determined by a three months' notice, expiring the 13th August, 1840; *Doe v. Dobell*, 1 *Q. B.* 806. See also *Berrey v. Lindley*, 3 *M. & G.* 498. These cases have been cited as deciding the general proposition that a yearly tenancy, created by holding over and payment of rent, ran from the original entry of the lessee and not from the determination of the previous term; but they were each really determined on the peculiar circumstances of the case; and where the lease was for fourteen years and a half, which began at Christmas and ended at Midsummer and the assignee of the lessee held over and paid rent to the assignee of the lessor, the yearly tenancy was held to begin at Midsummer; *Doe v. Lines*, 11 *Q. B.* 402; 17 *L. J. (Q. B.)* 108. A. held premises of B. as tenant for a year, and so on from year to year, the tenancy commencing at Christmas. A. having died one June, his widow, by agreement with B., continued to occupy the premises at the same rent, nothing being said about the commencement of her tenancy, and so occupied for some years: Held, that there was evidence enough to warrant the

jury in assuming that the widow's tenancy was a mere continuation of the original tenancy of A., and therefore properly determined by a notice expiring at Christmas; *Humphreys v. Franks*, 18 C. B. 323. A lease made and dated in 1851, *habendum* for fourteen years from Christmas, 1849, with a proviso that the demise should be determinable by notice at the end of the first seven years thereof, is determinable at Christmas, 1856; *Bird v. Baker*, 28 L. J. (Q. B.) 7; 1 E. & E. 12. Where a tenancy from year to year arises on payment of rent by a tenant holding under a lease void by the Statute of Frauds, the void lease will regulate the time of the notice; thus the terms of a parol lease for seven years being that the tenant should enter at Lady-day and quit at Candlemas, and the tenant having entered accordingly and paid rent, it was held that the tenancy could only be determined by a notice to quit at Candlemas; *Doe v. Bell*, 5 T. R. 471; and see *ante*, p. 624.

A variation in the rent, agreed upon during the tenancy, does not alone make a new tenancy; *Doe v. Kendrick*, *Adams Eject.* 107; *Doe v. Geekie*, 5 Q. B. 841.

Where the tenant enters upon different parts of the premises at different times, it is sufficient to give half a-year's notice to quit with reference to the original time of entry on the *substantial part* of the premises demised; *Doe v. Snowdon*, 2 W. Bl. 1224; *Doe v. Spence*, 6 East, 120; *Doe v. Watkins*, 7 East, 551. And it seems it is a question for the jury, which is the principal, and which the accessorial subject of demise; *Doe v. Howard*, 11 East, 498. But *quare*, whether the landlord can recover the whole, as from a day before the right of entry on the *whole* has accrued; *Doe v. Rhodes*, 11 M. & W. 600.

A holding from Michaelmas *primâ facie* signifies Michaelmas new style; *Doe v. Lea*, 11 East, 312. But where the tenancy is by parol from Michaelmas to Michaelmas, evidence may be given that by the custom of the country such a tenancy was considered to be from old Michaelmas; *Furley v. Wood*, 1 Esp. 198; *Doe v. Benson*, 4 B. & A. 588; *Smith v. Walton*, 8 Bing. 238. And evidence of the intention of the parties is admissible; *Den v. Hopkinson*, 3 D. & R. 507. But where, in a lease by deed, the tenancy was "from the feast of St. Michael," it was held that these words imported *new* Michaelmas, and could not be shown by extrinsic evidence to refer to *old* Michaelmas; *Doe v. Lea*, 11 East, 312; *Smith v. Walton*, 8 Bing. 235.

A notice to quit is of course no evidence *per se* to prove the commencement of the tenancy; *Doe v. Calvert*, 2 Camp. 388; but if a notice to quit be personally served upon the tenant, who reads it, or has it read to him, and does not object to it, his conduct amounts to an admission, and the notice is *primâ facie* evidence of the commencement of the tenancy, if a specific time for quitting be mentioned in it; *Thomas v. Thomas*, 2 Camp. 648; *Doe v. Forster*, 13 East, 405. But at most this is only *primâ facie* evidence for the jury, and may be rebutted by showing the period when the tenancy did in fact commence; *Oakapple v. Copous*, 4 T. R. 361. Where no specific time to quit was mentioned, but the notice was to quit "at the expiration of the current year," and a declaration in ejectment was served nearly a year afterwards, laying the demise half a year after the notice, and the tenant, on being served with the declaration, made no objection to the notice to quit, nor set up any right to a longer possession, but said he would go out as soon as he could suit himself with another house, Lord Ellenborough held that it was a question

for the jury whether the tenant must not be understood as having admitted that the tenancy was determined by the notice; *Doe v. Woombwell*, 2 *Camp.* 559. So where a notice was delivered on September 27th to quit "at the expiration of the term for which you hold the same," and the tenant on being served observed, "I hope Mr. M. does not mean to turn me out," evidence was admitted by Holroyd, J. of a general custom in that part of the country to let from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively, and he directed the jury to presume that this tenancy like other tenancies in that part of the country was from Lady-day to Lady-day; *Doe v. Lumb, Adams Eject.* 272. If the tenant, upon application by his landlord, states his tenancy to have commenced on a particular day, being the day named in the notice, he is concluded from disputing the accuracy of such statement; *Doe v. Lambly*, 2 *Esp.* 635. A receipt for rent, as a year's rent up to a particular day, is *primâ facie* evidence of the commencement of the tenancy as on that day; *Doe v. Samuel*, 5 *Esp.* 173.

A tenant of premises in London, between nine and ten o'clock of the morning of 25th March, posted in London a notice to quit at the next Michaelmas, addressed to the place of business in London of the landlord's agent, the landlord himself living in the country. The agent was there till between six and seven in the evening, and did not receive the letter before he left, but found it there on his arrival the next morning. The jury having found that the letter was delivered on the evening of the 25th, it was held a good six months' notice; *Papillon v. Brunton*, 5 *H. & N.* 518; 29 *L. J. (Ex.)* 265.

Notice to quit, by whom to be given.] One of several joint-tenants may give notice, and recover his share; *Doe v. Chaplin*, 3 *Taunt.* 120. Notice by one joint-tenant on behalf of all, whether with the authority of the others or not, determines the tenancy as to all; *Doe v. Summersett*, 1 *B. & Ad.* 135, 140. So a notice by one, where the tenant holds under the joint demise of all; see 2 *Man. & Ryl.* 434(n). So where an agent gives the notice in the name of all, but by the authority of one only, it is good for all; for *per* Parke, B., the lessee holds only so long as all agree; *Doe v. Hughes*, 7 *M. & W.* 139, 141. But a notice, required to be "under the hands" of the joint-lessors, is not good, if signed by two only out of three; *Right v. Cuthell*, 5 *East*, 491. A notice signed by a stranger professing to be an agent for all the joint-tenants, ratified before ejectment brought, was held to be sufficient; *Goodtitle v. Woodward*, 3 *B. & A.* 689; but the authority of this case has been questioned, and it has been held that a subsequent ratification is not sufficient, unless given before the notice begins to run; *Doe v. Walters*, 10 *B. & C.* 626. Nor is the bringing an action a sufficient recognition; *S. C.*; for the notice must be one on which the lessee can safely act when given; *Doe v. Goldwin*, 2 *Q. B.* 143. Where the landlord is partner in a firm to which he has let the premises, he may eject upon a notice to himself and co-tenants; *per* Patteson, J., *Doe v. Francis, Cornwall Sum. As.* 1837; *S. C.*, 4 *M. & W.* 331. Where there was a proviso in a lease (made by tenant in fee), that if either party should be desirous to determine it, it should be lawful for him, "his executors or administrators," so to do upon twelve months' notice to the other of them, "his heirs, executors," &c.; it was held that the devisee of the lessor might give such notice; *Roe v. Hayley*, 12 *East*,

464. A receiver appointed by the Court of Chancery with authority to let lands, has also authority to give a notice to quit; *Doe v. Read*, 12 *East*, 57. But a mere private receiver of rent, as such, has no power to determine a tenancy; *per Parke, J., Doe v. Walters*, 10 *B. & C.* 633. An agent to receive and let has authority to determine a tenancy; *per Patteson, J., Doe v. Mizem*, 2 *Mood. & Rob.* 56. But the agent of such an agent cannot give a notice; *Doe v. Robinson*, 3 *N. C.* 677. A verbal notice from the steward of a corporation is sufficient, without showing an authority granted to him under seal; *Roe v. Pierce*, 2 *Camp.* 96; see *Smith v. Birmingham Gas Co.*, 1 *Ad. & E.* 531. Where the demise was by persons who were described in the agreement as "the churchwardens of the parish of M." (not naming them), a notice, given by an agent for these persons is sufficient, though they had ceased to be in office when the notice was given, and it professed to be given on behalf of "the churchwardens of M.;" the property not being vested in them in a corporate character; *Doe v. Foster*, 3 *C. B.* 215.

Notice to quit, to whom to be given.] Where the premises have been underlet, the tenancy must be determined by a notice from the lessor to the lessee; a notice from the lessor to the sub-lessee is inoperative; *Pleasant v. Benson*, 14 *East*, 234; and unnecessary; *Roe v. Wiggs*, 2 *N. R.* 330. Where A. had been tenant of certain premises and paid rent, and upon A. leaving them, B. took possession, after which neither A. nor B. had paid any rent, it was held, in the absence of any evidence to the contrary, it might be presumed that B. came in as assignee of A.; and that notice to quit was therefore rightly given to B.; *Doe v. Williams*, 6 *B. & C.* 41. Where a corporation is tenant, the notice to quit should be addressed to the corporation, and served upon its proper officers; *semble, Doe v. Woodman*, 8 *East*, 228. But it seems doubtful whether a notice to quit is necessary by or to a corporation where there is no demise under seal. In *Doe v. Taniere*, 12 *Q. B.* 998, the acceptance of rent by a corporation was held to create the presumption of a tenancy from year to year, and render a notice to quit necessary; but *Finlay v. Bristol and Exeter Railway Co.*, 7 *Ex.* 409; 21 *L. J. (Ex.)* 117; cited ante, p. 167, seems directly contrary; *Doe v. Taniere* was not however cited.

Notice to quit, form of.] In ordinary cases, the notice may be by parol; *Timmings v. Rowlinson*, 3 *Burr.* 1603; *Roe v. Pierce*, 2 *Camp.* 96; *Doe v. Crick*, 5 *Esp.* 196. The form of notice is not material. It must, however, refer to some distinct time; therefore a notice to quit "forthwith," or "from henceforth," or "to quit" generally, would be bad; *Goode v. Howells*, 4 *M. & W.* 199, 201. But *semble*, a notice to quit given by a tenant "as soon as by law he might," would be good; *per Lord Abinger, C. B., S. C.* A notice to quit "at the expiration of the present year's tenancy," is sufficient; *Doe v. Timothy*, 2 *C. & K.* 351. Though the courts listen with reluctance to objections to the form of the notice (*Doe v. Archer*, 14 *East*, 245), it must yet be explicit and positive, and not give the tenant an option of continuing under a new agreement; but a notice to quit "or I shall insist on double rent," was held good, because the latter part of the notice evidently referred only to the penalty inflicted by 4 *Geo. 2, c. 28*, though the terms of that statute (which gives double the annual value) were mistaken; *Doe v. Jackson*, 1 *Doug.* 175. If the notice had really contained the option of a new agreement, and said, for instance, "or else that you agree to pay

double rent," Lord Mansfield, C. J., was of opinion that it would not have been good, *S. C.* Where the notice stated that the tenant, on failure, would be required to pay double rent or value so long as he retained possession, it was held good; *Doe v. Goldwin*, 2 Q. B. 143. Where the notice was to quit "on the 25th March, or 8th April next ensuing," and was delivered before new Michaelmas-day, it was held good, as intended to meet a holding commencing either at new or old Lady-day, and not to give an alternative; *Doe v. Wrightman*, 4 Esp. 5. And a notice to quit at "Michaelmas," if in time, will do either for old or new Michaelmas-day, according to the period of the commencement of the tenancy; *Doe v. Vince*, 2 Camp. 256; *Denn v. Walker, Peake Ad. Ca.* 194. But a notice to quit on the 11th October (old Michaelmas-day), though served in time, will not determine a holding from new Michaelmas-day; *Doe v. Lea*, 11 East, 312. So a notice by the lessee to quit on the 24th of June, "agreeably to covenant," the covenant requiring a notice expiring at Michaelmas, is bad; and evidence is not admissible to show that the landlord understood it to mean Michaelmas; *Cadby v. Martinez*, 11 Ad. & E. 720.

An obvious mistake will not vitiate the notice; as, where a notice was given at Michaelmas, 1795, to quit at Lady-day, "which will be in the year 1795," and the defendant was told at the time of the service of the notice that he must quit at *next* Lady-day; *Doe v. Kightley*, 7 T. R. 63. A notice dated 27th September, and served on the 28th, requiring the tenant to quit at "Lady-day next, or at the end of your current year," (which was Michaelmas,) will be understood to mean Michaelmas in the succeeding year; *Doe v. Culliford*, 4 D. & R. 248. But three of the judges dissented from this case in *Doe v. Morphet*, 7 Q. B. 577; cited *infra*. Where a tenancy of land began on 2nd of February, and of a house on 1st May, a notice dated and served on 22nd October, 1833, to quit both land and house, "at the expiration of half a year from this notice or at such other time or times as your *present* year's holding of the premises or any part thereof respectively shall expire after the expiration of half a year from this notice," was held a sufficient notice to determine the tenancy of the house on 1st May, 1834, and of the lands on 2nd February, 1835; *Doe v. Smith*, 5 Ad. & E. 350. So a notice to a weekly tenant to quit "on Friday, provided your tenancy expires on that day, or otherwise at the end of your tenancy, next after one week from the date of this notice," was held sufficient to determine a tenancy beginning on a Wednesday; *Doe v. Scott*, 6 Bing. 362. But where a notice to quit "on 11th October now next or such other day as your tenancy may expire on," was delivered in June, 1840: it was held that this was not a good notice for 11th October, 1841; *Mills v. Goff*, 14 M. & W. 72. So a notice served in October, to quit "on 13th May next, or such other day as the *current year*, for which you now hold, will expire," was held not to terminate a Martinmas (November) holding; *Doe v. Morphet*, 7 Q. B. 577.

A misdescription of the premises, which can lead to no mistake, will not be fatal; as where the notice was to quit "the premises which you hold of me, commonly called The Waterman's Arms," when, in fact, the house was called "The Bricklayers' Arms," there being no sign called The Waterman's Arms in the parish; *Doe dem. Cox v. —*, 4 Esp. 185. So where the parish was misnamed in the notice; *Doe v. Wilkinson*, 12 Ad. & E. 743.

As a lessor cannot determine the tenancy as to part of the things demised, the notice must include all the premises held under the same demise; and the courts will, if possible, give effect to the notice so as to determine the tenancy altogether; as where it mentions the chief part of the holding by its name or description; *Doe v. Archer*, 14 *East*, 245; *Doe v. Church*, 3 *Camp.* 71. Where the notice is directed to the tenant by a wrong Christian name, and he keeps it, the irregularity is waived; *Doe v. Spiller*, 6 *Esp.* 70. A notice to quit to a tenant of lands originally devised to the rector and churchwardens of a parish and their successors in trust, signed by the now rector and churchwardens, requiring the tenant to deliver up the premises "to the rector and churchwardens for the time being" (there being no such corporation), is bad; *Doe v. Fairclough*, 6 *M. & S.* 40. See *Doe v. Foster*, 3 *C. B.* 215; *ante*, p. 632.

Notice to quit, service of.] When the notice is in writing, in the absence of any special terms in the holding, it is not necessary that it should be served upon the tenant *personally*. It is sufficient if the notice is delivered and explained to the servant of the tenant at his dwelling-house, though the dwelling-house be not on the demised premises; such service affording presumptive evidence that the notice came to the hands of the tenant, the servant not being called; *Jones v. Marsh*, 4 *T. R.* 464; and it is sufficient, though the tenant, by reason of absence, is not informed of it till within half a year of its expiration; *Doe v. Dunbar*, *Mood. & M.* 10. It seems that service at the tenant's dwelling-house is sufficient without proof that he received it, and whether he got it or not; *Doe v. Dunbar*, *supra* (and see *S. C.*, note (a)); *Smith v. Clark*, 9 *Dowl.* 202. But it is not sufficient that the notice was merely left at the tenant's dwelling-house without showing that it was delivered to a servant, or that it came to the tenant's hands; *Doe v. Lucas*, 5 *Esp.* 153. Service of the notice upon a relation of the undertenant upon the premises, is not sufficient, though the notice was properly addressed to the tenant, *per* Lord Ellenborough, *Doe v. Levi*, *Adams Eject.*, 92. Service of the notice on the premises upon one of two joint-tenants, who resides on them, is presumptive evidence of the notice having reached the other joint-tenant; *Doe v. Watkins*, 7 *East*, 551; *Doe v. Crick*, 5 *Esp.* 196.

Notice to quit, waiver of.] The notice may be waived by the acceptance of rent, due after the expiration of the notice; but the money must be received *qua* rent; and it is a question for the jury whether it was so received; *Goodright v. Cordwent*, 6 *T. R.* 219; *Doe v. Batten*, *Cowp.* 243. Where a quarter's rent, due after the expiration of the notice, had been received by the landlord's banker without any special authority, though the rent was usually paid to him, it was held, in the absence of any proof that the rent had come to the landlord's hands, to be no waiver; *Doe v. Culvert*, 2 *Camp.* 387. A distress for rent accruing after the expiration of the notice is a waiver; *Zouch v. Willingale*, 1 *H. Bl.* 311. But if the distress be only for rent due *at* or *before* the expiration of the notice, it will not be a waiver, if taken within six months of the expiration of the notice, by reason of the 8 *Ann.*, c. 14, ss. 6 & 7, which gives the landlord power to distrain within six months of the determination of the tenancy; *Semble*, *per* Wilson, J., *S. C.* And see *post*, pp.

640-641, *Forfeiture waived*. A demand of subsequent rent does not necessarily operate as a waiver, but it is evidence for the jury; *Blyth v. Dennett*, 13 C. B. 178. The notice may be waived by a subsequent notice, for it recognises a tenancy subsisting after the expiration of the former; *Doe v. Palmer*, 16 East, 53. But where a second notice was given after the expiration of the first, and after the commencement of an ejectment in which the landlord continued to proceed notwithstanding the second notice, it was held no waiver; for it was not possible for the defendant to suppose that the plaintiff intended to waive the first notice, when he knew that the plaintiff was proceeding on it by ejectment; *Doe v. Humphreys*, 2 East, 237. So where, after the expiration of a notice, the landlord gave a second notice, "I do hereby require you to quit the premises which you now hold of me within fourteen days from this date, otherwise I shall require double value," it was ruled that the latter notice, having for its object only the recovery of the double value, did not operate as a waiver; *Doe v. Steel*, 3 Camp. 117. So where no notice to quit was necessary, and a notice was given "to quit the premises which you hold under me, your term therein having long since expired," the court considered it a mere demand of possession, and not a recognition of a tenancy; *Doe v. Inglis*, 3 Taunt. 54. And where a landlord gave his tenant notice to quit, but promised not to turn him out unless the premises were sold, and after the expiration of the notice to quit the premises were sold, but the tenant refused to deliver up the possession; it was held, that the promise was no waiver of the notice, and that the refusal of the tenant made him a trespasser from the expiration of the notice; *Whiteacre v. Symonds*, 10 East, 13. A notice may be waived by a tenant who gives it, as well as by a landlord; and where the tenant continues in possession after the expiration of the notice, under an alleged custom, it is a question for the jury whether he intended to waive the notice, or merely acted in pursuance of the supposed custom; *Jones v. Shears*, 4 Ad. & E. 832.

Notice to quit, when dispensed with by disclaimer.] When a tenant from year to year has attorned to another person, or done any act disclaiming to hold of his landlord, or has in any way put him at defiance, the landlord may treat him as a trespasser, and no notice to quit will be necessary; *Throgmorton v. Whelpdale*, B. N. P. 96; *Doe v. Whittick*, Gow, 195. The act must be one necessarily inconsistent with the relation of landlord and tenant; thus, where a tenant from year to year, who had concluded a bargain for the purchase of the property from his landlord, provided a good title could be made, refused to deliver it up to the landlord on demand, saying, "he had bought it and would keep it, and was ready to pay the money;" it was held that this was no disclaimer, as it was a claim to purchase consistent with the continuance of the tenancy from year to year in the meantime; *Doe v. Stanion*, 1 M. & W. 695; where see the previous cases reviewed. So a refusal to pay rent to a devisee under a contested will, the tenant declaring that he was ready to pay the rent to any person entitled to it, was held no disclaimer; *Doe v. Pasquali*, Peake, N. P. 196. So where rent is demanded by the assignee of the lessor, it is no disclaimer if the defendant withholds rent while he is honestly inquiring into the assignee's title, or because he believes himself liable to the assignor; *Doe v. Cooper*, 1 M. & G. 135. Where the defendant, who had been a weekly

tenant of a cottage to M. up to his death, paid rent for a short time afterwards to a person who claimed to be M.'s devisee, but ceased to do so when he received notice of the plaintiff's claim to it as heir-at-law, and on being applied to for rent by the plaintiff's agent, said he would pay no more rent till he knew who was the real owner;—this was held no disclaimer; *Jones v. Mills*, 31 *L. J. (C. P.)* 66; 10 *C. B.*, *N. S.* 788. But a refusal by letter to pay rent, accompanied with a statement that all connection between the claimant and the tenant has ceased, and that he now pays rent to another, is a disclaimer; *Doe v. Grubb*, 10 *B. & C.* 824. So where the tenant says to the landlord, "I have no rent for you, for P. has ordered me to pay none," it is a disclaimer; *Doe v. Pittman*, 2 *Nev. & M.* 673.

Where the defendant, who held under a tenant for life, received, on his death, a letter from the plaintiff claiming as heir and demanding rent, to which the defendant answered that he held the premises as tenant to S., that he had never considered the plaintiff as his landlord, that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that, without disputing the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim without more satisfactory proof in a legal manner;—it was held the plaintiff could maintain ejectment without any further demand or notice; *Doe v. Frowd*, 4 *Bing.* 557. The lessee for years, under a lease made by tenant in tail, which was not binding on the remainderman, C., refused on demand to pay rent to C. after the lessor's death, alleging that another person was entitled whom he was willing to pay; and it was held that this disclaimer enabled C. to bring ejectment without notice or demand of possession; and that the mere demand of rent did not make a tenancy between the defendant and C.; *Doe v. Rollings*, 4 *C. B.* 188. Tenant at will died, and his heir entered and claimed the land as his own; it was held that the devisees of the lessor might eject without notice or demand; *Doe v. Thompson*, 5 *Ad. & E.* 532.

Though a mere verbal disavowal by the tenant of the holding under the particular landlord has been held sufficient disclaimer to dispense with a notice to quit in the case of a tenancy from year to year; see *per Curiam*, *Doe v. Stanion*, 1 *M. & W.* 702; a verbal disclaimer is not sufficient to work a forfeiture of a definite term of years under a lease by deed; *Doe v. Wells*, 10 *Ad. & E.* 427; nor does the mere act of paying the rent to a third person operate as a forfeiture of a lease; *Doe v. Parker*, *Gow*, 180; for that purpose some act, such as delivering up possession of the premises and the lease in fraud of the landlord, to one claiming under a hostile title, may be sufficient; *Doe v. Flynn*, 1 *C.*, *M. & R.* 137. But that case was put as proceeding expressly on the fraud in *Doe v. Wells*, 10 *Ad. & E.* 427; in which last case it was held that a definite term of years was not forfeited by an oral refusal to pay rent, on the ground that the land belonged to the tenant and not to his lessor; and the court there considered a disclaimer by a yearly tenant to be rather evidence of a determination of the will, and so a dispensing with a notice to quit, than a forfeiture of the estate; and *per Maule, J.*, in *Doe v. Rollings*, 4 *C. B.* 192-3, "A disclaimer dispenses with a notice to quit in the case of a tenant from year to year, who is otherwise entitled to such notice. Where a term of years is vested in a party, it is contrary to the Statute of Frauds to allow the term to be divested by matter of parol."

The disclaimer relied upon must not be after the day mentioned in the writ from which the plaintiff claims to be entitled; *Doe v. Cawdor*, 1 C., M. & R. 398. An admission of a disclaimer by the tenant in possession is evidence against one who defends as his landlord; *Doe v. Litherland*, 4 Ad. & E. 784.

Proof of forfeiture of the lease.] Where the lessor proceeds on a forfeiture of the lease, he must prove the demise and the forfeiture incurred.

As to how far a disclaimer may work a forfeiture, see *supra*, p. 636.

The right of re-entry will appear on proof of the lease. The general rule is, that a clause of re-entry is to be construed strictly, per Lord Tenterden, C. J., *Doe v. Marchetti*, 1 B. & Ad. 720. Where the forfeiture is for the non-performance of a covenant, the burden of proof, although negative, is on the plaintiff; *Doe v. Robson*, 2 C. & P. 245. In an agreement of demise it was "stipulated and conditioned that the tenant should not assign," &c.; this was held to be a condition for the breach of which the lessor might maintain an ejectment; *Doe v. Watt*, 8 B. & C. 308, 316; where see cases cited as to what words create a condition. Where the lessee underlet, and in the underlease there was a proviso that, in case of a breach of covenant the lessee and lessor might enter, it was held that this proviso gave a separate right of re-entry to the lessee or lessor; *Doe v. White*, 4 Bing. 276. And where, before the C. L. P. Act, 1852, a mortgagor and mortgagee joined in a lease reserving a power of re-entry to them, or either of them, for a breach of covenant, it was held that a joint demise in the declaration was improper, because the estate vested in the mortgagee only; *Doe v. Adams*, 2 C. & J. 232. See *Greenaway v. Hart*, 14 C. B. 340, cited *ante*, p. 428.

The lessor cannot re-enter after he has parted with his reversion; *Fenn v. Smart*, 12 East, 444; *Doe v. Edwards*, 5 B. & Ad. 1065. But where a termor demised for the whole of his term, it was held that he could enter on a forfeiture for a breach of condition; *Doe v. Bateman*, 2 B. & A. 168; *Litt. s. 325, accord.*

By the 32 Hen. 8, c. 34, grantees or assignees of reversions may take advantage of conditions of re-entry against lessees, their assigns, &c., "for non-payment of rent, for waste, and other forfeiture." The condition must be *ejusdem generis* as those mentioned; *Co. Litt.* 215; where see further on this statute. A condition not to assign is collateral; *Pennant's case*, 3 Rep. 64 a; *Collins v. Sillje*, *Styles*, 265; and therefore not within the statute; though in *Lucas v. How*, *Sir T. Raym.* 250, this was doubted. A grantee of part of the reversion was not within this statute; but by 22 & 23 Vict. c. 35, s. 3, where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall in respect of the apportioned rent, &c. allotted or belonging to him, have the benefit of all conditions of re-entry for non-payment of the original rent, &c., as if such conditions had been reserved to him as incident to his part of the reversion, in respect of the apportioned rent, &c.

Re-entry for non-payment of rent.] If the proceeding be at common law on a condition of re-entry for non-payment of rent, there must be a demand of the precise rent due, on the exact day

on which it became due and payable to save the forfeiture, at the proper place of payment, at a convenient hour before sunset; 1 *Wms. Saund.* 287, n (16); *Hill v. Kempshall*, 7 *C. B.* 975; *Acocks v. Phillips*, 5 *H. & N.* 183; *Barry v. Glover*, 10 *Ir. C. L. Rep.* 113 (*C. P.*). These formalities may, however, be dispensed with by express stipulation in the lease; *Doe v. Masters*, 2 *B. & C.* 490. And by the Common Law Procedure Act, 1852' (15 & 16 *Vict. c.* 76), s. 210, (making similar provisions to those contained in 4 *Geo. 2, c.* 28, s. 2), where *half a-year's rent shall be in arrear*, and the landlord to whom the same is due hath right by law to re-enter for the non-payment, the landlord may, without any formal demand or re-entry, serve a writ in ejectment; or in case it cannot be served, or no tenant be in possession, affix a copy thereof upon the door of the messuage, or, if the ejectment be not for a messuage, upon some notorious place of the lands, &c.; and such affixing shall be deemed legal service thereof; which service or affixing shall stand in the place of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made appear to the court where the said action is pending by affidavit, or be proved upon the trial, if the defendant appears, that half a-year's rent was due *before* the said writ was served, and that no sufficient distress was to be found upon the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, in such case the lessor shall recover judgment and execution, as if the rent in arrear had been legally demanded and a re-entry made.

Under this statute the landlord must be prepared with evidence of the right of re-entry; the service of the writ, or the affixing of a copy of it, &c.; that half a-year's rent was in arrear; and that no sufficient distress was found on the premises. The plaintiff's title accrues on the day when the forfeiture would have been complete at common law; *Doe v. Shawcross*, 3 *B. & C.* 752; but half a-year's rent must be in arrear at the time the writ was served; *semble*, *Cotesworth v. Spokes*, 30 *L. J. (C. P.)* 220; 10 *C. B., N. S.* 103; cited at length, *post*, p. 641. It is sufficient, *prima facie*, to prove that there was no sufficient distress on the premises on a certain day between the day when the rent became in arrear and the service of the writ; *Doe v. Fuchau*, 15 *East*, 286. And no sufficient distress is "to be found on the premises," unless the goods are so visibly there that a broker, using reasonable diligence, would find them, so as to be able to distrain; *Doe v. Franks*, 2 *C. & K.* 678. It must appear that every part of the premises has been searched; *Rees v. King*, cited 2 *B. & B.* 514; *Forrest*, 19; unless the tenant has prevented the landlord from having access to the premises, as by locking the doors; for a distress, which cannot be made without a trespass, is no available distress within the Act; *per* Lord Tenterden, *C. J.*, *Doe v. Dyson*, *Mood. & M.* 77; and *per* Martin, *B.*, *Hammond v. Mather*, 3 *F. & F.* 151. In such a case it will be enough to swear to a belief that there was no sufficient distress on the premises; *Doe v. Roe*, 5 *D. & L.* 272. So if part of the premises has been deserted by the tenant, and a person has been put in by the landlord to take care of it, proof that there was no available distress on that part of the premises when so taken possession of by the landlord, and no sufficient distress on the rest of the premises at the time of the distress, is sufficient evidence to maintain the action; *Wheeler v. Stevenson*, 30 *L. J. (Ex.)* 46; 6 *H. & N.* 155. And it would seem that proof that *more* than half a-year's

rent is due, and that no sufficient distress countervailing *all* the arrears is to be found, will enable the landlord to avail himself of the statute; *Cross v. Jordan*, 8 *Ex.* 149; 22 *L. J. (Ex.)* 70; overruling *Doe d. Powell v. Roe*, 9 *Dowl.* 548.

Where a lease contained a proviso for re-entry in case the rent was in arrear twenty-one days after the day on which it was due, "being lawfully demanded," it was held to be within the statute, and that it was unnecessary to prove an actual demand; *Doe v. Alexander*, 2 *M. & S.* 525; accord. *Doe v. Wilson*, 5 *B. & A.* 363. But if the proviso in the lease does not avoid it, as where the right of re-entry is to hold till the arrears are paid, the statute does not apply, and the common law forms must be adhered to; *Doe v. Bowditch*, 8 *Q. B.* 973. But *quære* whether any demand was there necessary at common law, as it was not a case of forfeiture; see *Doe v. Horsley*, 1 *Ad. & E.* 766. In that case a rent-charge was granted, with power to the grantee, in case the rent should be in arrear for a certain time, to enter and enjoy the lands charged, and to receive the rents, &c., for his own use, until satisfaction of the arrears, and it was held that the grantee might upon the rent becoming in arrear, maintain ejectment against the terretenant without proof of a previous demand of the rent.

Re-entry for other breaches of covenant.] See *ante*, pp. 432, *et seqq.* tit. *Action on Covenants relating to land*, where the most usual breaches of covenant, and proofs of them, are noticed.

Where the action is brought on a proviso of re-entry in case of breach of covenant, the court will compel delivery of a particular of the covenants and breaches intended to be relied on at the trial; *Doe v. Philips*, 6 *T. R.* 597. And the proof must be according to the terms of the particular; and where the particular relies on non-cultivation, it is not enough to prove an improper course of husbandry; *Doe v. Broad*, 2 *M. & G.* 523. A variance between the amount of rent proved to be due, and that demanded in the plaintiff's particular, is immaterial; *Tenny v. Moody*, 3 *Bing.* 3.

Where a licence had been granted to assign, &c., all or any part of the demised premises, this formerly put an end entirely to the condition not to assign and clause of re-entry; *Dumpon's case*, 4 *Rep.* 119 *b*; 1 *Sm. L. C.* 15, 18; but by the 22 & 23 *Vict. c.* 35, ss. 1 & 2, a licence to assign or do any other act only operates for the particular purpose expressed in it, and the condition and right of re-entry remain as to all other or subsequent breaches.

Forfeiture waived.] Where the lease is voidable on breach of covenant or condition, at election, and not absolutely void, the defendant may show that the forfeiture has been waived. A lease conditioned to be void for the benefit of one party is voidable only at the election of that party; therefore a lease, with condition that upon the breach of some covenant by the lessee, it "shall be to all intents and purposes void," is voidable only at the option of the lessor; *Rede v. Farr*, 6 *M. & S.* 121; *Doe v. Buncks*, 4 *B. & A.* 401. And this option must be manifested by some act; *Roberts v. Davey*, 4 *B. & Ad.* 664. And, in the case of a freehold (1 *Wms. Saund.* 287 *d.*), or of a lease for years, where the proviso making the lease void contains in addition the words, "and it shall be lawful for the landlord to re-enter" (*Arnsby v. Woodward*, 6 *B. & C.* 519), that act must be a re-entry. But

no actual entry is necessary, the bringing ejection is sufficient; see cases cited 1 *Wms. Saund.* 287, n. (16). If, before declaring such option, the landlord, with notice of the forfeiture, accepts rent accruing since the forfeiture, it is a waiver; *Goodright v. Davids, Cowp.* 803; *Arnsby v. Woodward, ante.* And this, although he declares that he accepts the money, not as rent, but as compensation, provided the lessee declares that he pays it as rent; and a protest, that he does not take it as a waiver, is inoperative; *Croft v. Lumley, 5 E. & B.* 648. And it is not necessary that he should know of every specific act; for a waiver as to one act specifically known will be a waiver as to all of the same class; *S. C.* But if at the time he accepted the rent he was ignorant of the forfeiture, the acceptance is no waiver; *Roe v. Harrison, 2 T. R.* 425. Notice of the forfeiture is, therefore, a material and issuable fact; *Pennant's case, 3 Rep.* 64 b.

In *Doe v. Birch, 1 M. & W.* 408, Parke, B. expressed a decided opinion, (though it was not necessary for the decision of the case,) that an absolute unqualified demand of subsequent rent would amount to a waiver of the forfeiture; and this was cited with approbation in *Dendy v. Nicholl, 4 C. B., N. S.* 376; 27 *L. J. (C. P.)* 220; in which it was held that bringing an action for such rent is a waiver, as was held also in *Roe v. Minshall, B. N. P.* 96 c. See also *Green's case, infra.* The acceptance of rent from an insolvent after his discharge is a waiver of the forfeiture by insolvency; and the non-payment of a scheduled debt due to the lessor is not a continuing insolvency; *Doe v. Rees, 4 N. C.* 384. The acceptance, after the forfeiture, of rent due before, is not a waiver; *Green's case, Cro. Eliz.* 3; but if the receipt for such rent describe the lessee as tenant, that is sufficient evidence of waiver; *S. C.* And though some positive act is necessary, and merely lying by and witnessing a forfeiture is not a waiver; *Doe v. Allen, 3 Taunt.* 78; yet if the landlord by thus lying by or by other act or word causes the lessee to believe that the tenancy is treated as still subsisting, the landlord cannot afterwards avail himself of the forfeiture, see *per Mansfield, C. J.*; *S. C.* the judgments in *Ward v. Day, infra*; and *Green's case, supra.* Where the proviso avoided the lease by neglect of repairs three months after notice to do them, and notice was given accordingly on 6th of January, receipt of rent due on 25th March was held no waiver; *Doe v. Brindley, 4 B. & Ad.* 84, 86.

At common law a distinction has been taken between the effect of a receipt of rent and a distress as a waiver of a forfeiture; and a distress made after the forfeiture had accrued, whether for rent due before or after the forfeiture, was a waiver, inasmuch as a distress could not be made at common law after the tenancy had determined; and therefore by distraining, the lessor affirmed the continuance of the tenancy up to the time of taking the distress; see 14 *Ass. pl.* 10; *Co. Litt.* 211 b; *Green's case, Cro. Eliz.* 3; 3 *Rep.* 64 b; *Plowd.* 133; and *Rolle, Ab. tit. Confirmation (B) 2. (Viner, Ab. Confirmation (B) 2.)*

Since the statute of 14 Ann. c. 8, which (ss. 6 and 7) allows a distress within six months of the determination of the tenancy if the tenant remain in possession, it would seem that taking a distress within six months of the forfeiture accruing, for rent due before the forfeiture, would not *ipso facto* be a waiver; see *per Wilson, J.*, in *Zouch v. Willingale, 1 H. Bl.* 312, *ante*, p. 634; and *Ward v. Day,*

33 *L. J. (Q. B.)* 3; 4 *B. & S.* 337; and *per Erle, C.J., and Williams, J.; S. C.* in *Ex. Ch.*, 33 *L. J. (Q. B.)* 255; 5 *B. & S.* 562.

Where the lessor proceeds for a forfeiture by non-payment of rent, under the C. L. Pro. Act, 1852, *ante*, p. 638, he does not waive his right of re-entry by taking an insufficient distress for the rent by the non-payment of which the lease was forfeited; *Brewer v. Eaton*, 3 *Doug.* 230; for "the distress affords no presumption that the landlord has waived the forfeiture, because as the statute" "requires him to prove that no sufficient distress was to be found on the premises, he only distrained to complete the title given him by the statute;" *per Lord Mansfield, C. J., S. C.* In that case six months' rent remained in arrear after what was obtained by the distress. In *Cotesworth v. Spokes*, 10 *C. B., N. S.* 103, 112, 30 *L. J. (C. P.)* 220, 222, under a lease with a clause of re-entry on rent being in arrear twenty-one days after any quarter-day, three quarters' rent up to Michaelmas being in arrear, the lessee distrained on the 2nd October for all three quarters, and realised on the 16th October by the distress more than one quarter's rent, and on 2nd November served a writ of ejectment under the statute. Half a year's rent due at Michaelmas was never in arrear twenty-one days; and the court inclined to the opinion that the plaintiff could not recover, on the ground that the six months' rent due at Midsummer which had been in arrear twenty-one days must be in arrear at the time of the service of the writ. But they held that the plaintiff had waived the right of re-entry which had accrued earlier than Michaelmas by distraining for the Michaelmas rent. "Had the distress been confined to the Midsummer rent, it would not have waived the forfeiture for the non-payment of that rent, as appears by the case of *Brewer v. Eaton*, (*supra*). But the distinction is plain, that though a distress in respect of rent accruing before the breach of condition is no waiver, yet a distress for rent accruing after such breach, with notice of it, is a waiver; because such a distress affirms and admits the continuance of the tenancy up to the day when the rent so distrained for became due." It is to be observed that the court were speaking only of the effect of a distress taken with a view to proceeding under the C. L. Proc. Act, 1852.

Where a lease contained a clause of re-entry in case the rent should be in arrear twenty-one days, and there should be no sufficient distress, Lord Ellenborough held that the landlord, having distrained within the twenty-one days and continued in possession after, did not waive his right of re-entry; *Doe v. Johnson*, 1 *Stark.* 411. In the case of a proviso to re-enter after three months' notice to repair, an agreement to allow the tenant more than three months' time to repair, is a suspension and not a waiver of the forfeiture; *Doe v. Brindley*, 4 *B. & Ad.* 84.

Where a lease contained a general covenant to repair, and also a covenant to repair upon three months' notice, Lord Ellenborough held that the landlord, by giving a notice "to repair forthwith," did not waive his right of re-entry for the breach of the general covenant; *Roe v. Paine*, 2 *Camp.* 520. But where the lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for the breach of any covenant, and the landlord gave a notice to repair within three months; it was held that this was a waiver of the forfeiture incurred by the breach of the general covenant, and that the landlord could not bring ejectment until the expiration of the three months; *Doe*

v. *Meux*, 4 B. & C. 606. "In *Roe v. Paine* the language of the notice was very different; the tenant was required to put the premises in repair *forthwith*; that did not prevent the landlord from bringing his ejectment at any time;" per Bayley, J., *Id.* 609. So where, besides the general covenant to repair, with right of re-entry on breach, there was a proviso that if the lessee did not repair within two months after notice, the lessor might enter and do the repairs himself at the tenant's expense, it was held that the lessor could not proceed to eject on the general covenant after giving the tenant notice to repair under the above proviso; *Doe v. Lewis*, 5 Ad. & E. 277.

A waiver of a forfeiture incurred by a breach of a continuing covenant, as not to underlet (*Doe v. Bliss*, 4 Taunt. 735); or not to use rooms in a particular manner (*Doe v. Woodbridge*, 9 B. & C. 376); or to keep insured (*Doe v. Gladwin*, 6 Q. B. 953); or to repair, *Doe v. Jones*, 5 Ex. 498;—is no waiver of a forfeiture for a subsequent breach, although merely a continuance of the original breach; and where the covenant was to repair within a reasonable time, and after breach the lessor received rent, he may bring ejectment immediately afterwards; *Doe v. Jones*, *supra*. And it seems that if an act of waiver takes place on one day, the landlord may sue out a writ for a continuing breach on the next day; *Price v. Worwood*, 4 H. & N. 512, per Curiam. Though the breach may be a continuing one (e. g. user as a shop without licence), yet if it has been continued for twenty years with knowledge of the lessor, a licence will be presumed, and neither lessor nor his assignee can re-enter; *Gibson v. Doeg*, 27 L. J. (Ex.) 37; 2 H. & N. 615.

It would seem that, except by deed, there cannot at law be any dispensation with performance of a covenant, so as to prevent the lessor taking advantage of a forfeiture by a subsequent breach; *Doe v. Gladwin*, 6 Q. B. 963; and *Doe v. Rowe*, Ry. & Mood. 343, is not to the contrary, for there the landlord had misled the tenant by delivering to him a deficient abstract of the lease, and he was therefore held precluded by his own act from enforcing the forfeiture.

Where the forfeiture is for non-payment of rent, the tenant, by C. L. Pro. Act, 1852, s. 212, may stop the proceedings by tendering or paying into court the rent and costs. But no other breach of covenant could be cured by a subsequent performance; therefore, if a covenant to insure had been broken by omitting to insure for any time, no subsequent insurance could save the forfeiture; *Wilson v. Wilson*, 14 C. B. 616; 23 L. J. (C. P.) 137. But Equity can now relieve in some cases. And by 23 & 24 Vict. c. 126, s. 1, on ejectment for forfeiture for non-payment of rent, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as provided by ss. 4—11, up to and within the like time after execution issued, and subject to the same terms and conditions as to payment of rent, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, &c., shall be relieved, they shall hold the demised land according to the lease without any fresh lease. By sec. 2, the court or judge may give the same relief against forfeiture for not insuring, as a court of equity can give under the 22 & 23 Vict. c. 35, ss. 4 & 6, viz., where no loss by fire has happened, and the breach has been committed, in the opinion of the court, through accident, or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of application in conformity with the covenant; but this

relief is not to be granted more than once to the same person in respect of the same covenant or condition, nor after a forfeiture has already been waived under the same covenant. By s. 5, a minute of the relief is to be made by direction of the court or judge on the lease or otherwise.

By the 23 & 24 Vict. c. 38, s. 6, where any actual waiver of the benefit of any covenant or condition in any lease on the part of the lessor, his heirs, &c., shall be proved to have taken place (after 23rd July, 1860), in any one particular instance, such actual waiver shall not be assumed nor deemed to extend to any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

When the proceeding is under the C. L. Pro. Act, 1852, s. 217 (which authorises service upon tenants within ten days after right of entry accrued, in or after Hilary or Trinity Term), it is no objection at *Nisi Prius* that the writ was not served within ten days; *Doe v. Brindley*, 4 B. & Ad. 84.

Ejectment by Heir-at-Law.

Where the plaintiff claimed as heir-at-law, he must, at common law, have proved that the ancestor from whom he claims was actually seised of the land; or, if he claimed as heir to a remainderman, that his ancestor was the person in whom the remainder first vested by purchase; *Ratcliff's case*, 3 Rep. 42 a; *Watk. on Desc.* 120; and also, that he was heir to such ancestor. The necessity of this proof is founded on the rule of law *seisina facit stipitem*; but the 3 & 4 Wm. 4, c. 106, has altered this rule in all descents since 1833.

By sect. 2 of that act, "in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and nature of the title require, the person last entitled to the land shall, for the purpose of that act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited shall be considered to have been the purchaser, unless it shall be proved that he inherited; and in like manner the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

By sect. 1 of the same act its provisions are made to extend to all hereditaments, corporeal or incorporeal, freehold, copyhold, or customary, and to any possibility, right, or title of entry or action, and to any other interest capable of being inherited, whether in possession, reversion, remainder, or contingency; and the word "purchaser" is explained to mean the person who last acquired the land otherwise than by descent, &c.; and the "person last entitled" extends to the last person who had a right to the land, whether he did or did not obtain the possession or receipt of the rents and profits.

By sect. 4, when any one shall acquire land by purchase under a limitation to the heir or heirs of the body of any of his ancestors, in any assurance executed after the 31st December, 1833, or in any will of a testator dying after that day, the land shall descend and the descent be traced as if his ancestor had been the purchaser.

By sect. 10, an heir may trace his descent through an attainted per-

son who died before the descent took place, unless the land escheated in consequence of the attainer before 1st January, 1834.

The act does not extend to any descent taking place on a death before 1st January, 1834; sect. 11.

In consequence of a decision shortly after this act, in the case of the grand-child of a foundling (*Doe v. Blackburn*, 1 *Mood. & Rob.* 547), a provision has since been made by sect. 19 of 22 & 23 Vict. c. 35, 13th August, 1859, that, when there shall be a total failure of heirs of the purchaser, or where land shall be descendible as if an ancestor had been purchaser, and there is a total failure of his heirs, the land shall descend and the descent be traced from the person last entitled, as if he had been purchaser.

*As the effect of the statute has not yet been fully developed by the decisions of the courts, and the old law must for some time continue to be a subject of inquiry in actions of ejectment, the cases on the latter head have been retained.

Proof of seisin.] Actual possession, or receipt of the rent from the person in possession, is *prima facie* evidence of seisin in fee; *Co. Litt.* 15 a; *B. N. P.* 103; *Jayne v. Price*, 5 *Taunt.* 326. So is payment of the costs of repairs and building; *Doe v. Clifford*, 2 *C. & K.* 448. The possession of a tenant for years gives an actual seisin to the owner of the inheritance; *Co. Litt.* 243 a; *Bushby v. Dixon*, 3 *B. & C.* 298. So the possession of guardian in socage confers an actual seisin upon the infant; *Goodtitle v. Newman*, 3 *Wils.* 516. Evidence of shooting and appointing a gamekeeper by the lord of a manor is not properly referrible to a right of soil; *per* Bayley, J., *Tyrwhitt v. Wynne*, 2 *B. & A.* 560; though it is evidence that the locus is within the limits of the manor; *Doe v. Langton*, 2 *B. & Ad.* 680. Holding courts and appointing keepers is proof of the existence and seisin of a manor; *Doe v. Heukin*, 6 *Ad. & E.* 495; see *ante*, p. 40, and the cases there cited. And as the presumption from mere possession is that of seisin in fee, the declarations of a deceased person, shown to have been then in occupation, or in receipt of the rents, that he held under A. B., being against interest, are admissible, to prove the seisin of A. B., though offered in evidence against a stranger by a party claiming under A. B.; *Doe v. Coulthred*, 7 *Ad. & E.* 235; *Peaceable v. Watson*, 4 *Taunt.* 16; *Carne v. Nicoll*, 1 *N. C.* 430; see *ante*, pp. 45-6.

Proof of descent.] The plaintiff must prove that all the intermediate heirs between himself and the ancestor under whom he claims are dead without issue; *Richards v. Richards*, 15 *East*, 294 (n). Evidence by one of the family that one of the intermediate parties went abroad, and was reputed to have died there, and that the witness had never heard of his being married, is *prima facie* evidence that the party is dead without issue; *Doe v. Griffin*, 15 *East*, 293. As to the presumption of the duration of life, and of death without issue, see *ante*, p. 36. If the plaintiff claims as collateral heir, he must prove the descent of himself and the person last seised from a common ancestor; or at least from two brothers or sisters; *Roe v. Lord*, 2 *W. Bl.* 1099. See 3 & 4 Wm. 4, c. 106, s. 5. Proof of births, marriages, and deaths has already been noticed to some extent, *ante*, pp. 89-92. For other evidence usually adduced in cases of pedigree, see *ante*, title *Hearsay*, pp. 37-40. *

Proof of Marriage—By reputation, &c.] Marriage may be proved by reputation; *Reed v. Passer*, *Peake N. P.* 233; 1 *Esp.* 214; *B. N. P.* 114. Even where the parents are alive, proof that the mother was received in society as the wife of the father is sufficient evidence of the marriage in ejectment by the son; *Doe v. Fleming*, 4 *Bing.* 266.

Marriage may be also *prima facie* proved by a witness who was present, and it is not necessary in the first instance to prove that the proper preliminary formalities were gone through, for the presumptive proof of marriage was not altered by the marriage acts; *St. Devereux v. Much Dew Church*, 1 *W. Bl.* 367; *B. N. P.* 114; *Reed v. Passer*, *supra*. Either of the alleged married parties is competent to prove or disprove the marriage; *Goodright v. Moss*, *Coup.* 593; and so are their declarations after their decease; *S. C.*

The most frequent course of *prima facie* proof of a marriage is by the official registers, with some evidence of the identity of the parties; as to this see *ante*, pp. 89-92.

Such is the usual and less formal evidence of marriage; but occasions still arise, especially in suits for establishing a title by descent, in which it is necessary to inquire into the strict and formal requisites of a legal marriage. For this purpose the following references may be useful.

Proof of Marriage, before 26 Geo. 2, c. 33.] Before the Marriage Act, 26 Geo. 2, c. 33 (1754), a marriage by sufficient words of present espousal constituted a binding marriage, though not celebrated in *facie ecclesiæ*. See *Lantour v. Teesdale*, 8 *Taunt.* 830; 2 *Marsh.* 243; and the cases there cited. According to *R. v. Millis*, 10 *Cl. & F.* 534, the presence of a priest in orders was essential at common law; but that case has been since questioned; see observations in *R. v. Mainwaring*, 1 *Dear. & B.* 139. But it was considered a binding authority in *Beamish v. Beamish*, *post*, p. 647.

Proof of Marriage, under 26 G. 2, c. 33.] The Marriage Act, 26 Geo. 2, c. 33 (1754), put an end to irregular marriages, and required certain forms to be adopted in English marriages, whether by banns or licence; and this act continued in force until the act 3 Geo. 4, c. 75, which partly repealed it, and thence until 4 Geo. 4, c. 76 (1st November, 1823), which wholly repealed it.

When the marriage took place under stat. 26 Geo. 2, c. 33, s. 1, in a chapel, it was necessary to prove that it was a chapel in which banns had been usually published at the time of the passing of the act; *R. v. Northfield*, 2 *Doug.* 659. And where a register of marriages going back to the year 1578, and a register of the publication of banns from the year 1754 (when the act passed), were produced from the chapel royal in the Tower, it was held sufficient evidence upon which to found a presumption that banns had usually been published before the act in that chapel; *Taunton v. Wyborn*, 2 *Camp.* 297.

Marriages in chapels erected and consecrated since the 26 Geo. 2, c. 33, were rendered valid by various retrospective statutes; see 21 Geo. 3, c. 53; 44 Geo. 3, c. 77; 48 Geo. 3, c. 127; and 6 Geo. 4, c. 92. And by these statutes the registers, or copies of the registers, of such marriages are to be received in evidence. By 6

Geo. 4, c. 92, s. 2, it was made lawful for marriages to be *in future* solemnised in all churches and chapels erected since the passing of 26 Geo. 2, and consecrated, in which churches and chapels it had been customary and usual, before the passing of that act (6 Geo. 4), to solemnise marriages; and the registers of such marriages, or copies thereof, are declared to be evidence.

Under the 26 Geo. 2, c. 33, where the banns were published in wrong names of the parties, and there was no evidence to show that they had ever been known by such names, the marriage was held void; *Mather v. Ney*, 3 M. & S. 265 (n); see also *Stanhope v. Baldwin*, 1 Addams, 93; *Green v. Dalton*, Id. 289. So where a wrong name was fraudulently assumed for the purpose of the marriage; *Frankland v. Nicholson*, 3 M. & S. 259 (n); *Fellowes v. Stewart*, 2 Phillim. 257; *Meddowcraft v. Gregory*, Id. 365. The rules on the subject of banns were thus laid down by Lord Tenterden, C. J., in *R. v. Tibshelf*, 1 B. & Ad. 195: "First, if there be a total variation of name or names,—that is, if the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known,—the marriage, in pursuance of that publication, is invalid, and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not. But, secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names have been such as the parties have used, and been known by at one time and not at another, in such cases the publication may or may not be void; the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. It is in this class of cases only that it is material to inquire into the motives of the parties." A licence in a wrong name, not fraudulently assumed, was held not to avoid a marriage; *Lane v. Goodwin*, 4 Q. B. 361.

Proof of Marriage, under 4 Geo. 4, c. 76; 6 & 7 Wm. 4, c. 85; &c.] By the act of 4 Geo. 4, c. 76 (the act in force for marriages according to the rites of the Church of England, after 1st November, 1823), s. 2, "All banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to the parish or chapelry wherein the persons to be married shall dwell according to the rubrick; and by sect. 3, the bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorise by writing under his hand and seal the publication of banns and the solemnisation of marriages in such chapels for persons residing in such chapelry or extra-parochial place; and such consent, together with the written authority, shall be registered in the registry of the diocese."

By the 6 & 7 Will. 4, c. 85, s. 26, the bishop may, with consent of patron and incumbent of a parish or a district church (or, in certain cases, without such consent), license under his hand and seal, the celebration of marriages in any public chapel in the parish or district, or in any chapel licensed for divine service, or any chapel, the minister

whereof is duly licensed to officiate therein, according to the rites of the Church of England. And, by 7 W. 4 & 1 Vict. c. 22, s. 33, the words "Banns may be published, and marriages solemnised, in this chapel," are to be placed in a conspicuous part of the inside of the chapel. By 7 & 8 Vict. c. 56, s. 2, the bishop's certificate shall be conclusive evidence that marriages may be lawfully solemnised therein. Whether the certificate proves itself, and requires no proof of signature or seal; or whether the certificate may be proved by an examined or certified copy, is not provided by the act; but see the Official Documents' Evidence Act, 8 & 9 Vict. c. 113, s. 1, *ante*, p. 70, and the act 14 & 15 Vict. c. 99, s. 14, *ante*, p. 72.

By sect. 10 of 4 Geo. 4, c. 76, no licence is to be granted except for the church or chapel belonging to the parish, or chapelry where one of the persons shall have had his usual place of abode for the 15 days preceding; which licence, by ss. 14 & 16, is not to be obtained without consent of the father or guardian of a minor; but a marriage without such consent is not invalid; *R. v. Birmingham*, 8 B. & C. 29. And by sect. 26 of 4 Geo. 4, c. 76, the validity of a marriage under it, whether by banns or licence, cannot be impeached by proof, after its celebration, of the non-residence of parties within the proper parish or chapelry.

By sect. 22 of 4 Geo. 4, c. 76, marriages *under it* will be void if the parties knowingly and wilfully intermarry in a place not a church or public chapel wherein banns may be published (unless by special licence); or knowingly and wilfully intermarry without due publication of banns or licence; or knowingly and wilfully consent or acquiesce in a marriage by a person not in holy orders. The language of this act differs from the old marriage act, and only avoids the marriage where *both* parties knowingly contravene its provisions; *R. v. Wroxtton*, 4 B. & Ad. 640. There the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but without her knowledge, and it was held a valid marriage. See also *Wiltshire v. Prince*, 3 Hag. Ecc. R. 332.

By the later act, 6 & 7 W. 4, c. 85, s. 1, a registrar's certificate obtained under that act is made equivalent to banns, and will warrant celebration of marriage according to the rites of the Church of England.

It would seem that where a marriage in a parish church is shown to have been celebrated with the usual forms, and by a person acting as minister, this is presumptive evidence of a regular and legal marriage without the aid of any statute; and so (before the 19 & 20 Vict. c. 119, s. 17, *post*, p. 648) if the marriage were in the presence of a superintendent registrar in a dissenting chapel, it was presumed that the chapel was duly registered for marriages; *Mainwaring's case*, 26 L. J. (M. C.) 10; 1 Dear. & B. 132, and cases there cited.

So proof that a marriage was solemnised in a Roman Catholic chapel according to the rites of that church, and that the parties afterwards cohabited, is *prima facie* evidence to show a valid marriage under the 6 & 7 W. 4, c. 85; as it will be presumed that the chapel was registered pursuant to sect. 18, and that the registrar was present as required by sect. 20; *Sichell v. Lambert*, 33 L. J. (C. P.) 137; 15 C. B., N. S. 781. The marriage must be by a clergyman who is a third person, and not the bridegroom himself; *Beamish v. Beamish*, 9 H. L. C. 274; 8 Jur., N. S. 770.

Marriages of Dissenters.] Under the preceding acts there was no exception as to the marriage of dissenters (other than Jews or Quakers); but the 6 & 7 W. 4, c. 85, provides means of legal marriage for dissenters and others who object to the rites of the Church of England. By this act, after 30th June, 1837, a superintendent registrar may grant licences to be married in a building registered under the act, or in his offices; sect. 11.

Sects. 18, 19, and 34, provide for the registration of chapels, &c., and the formation, every year, of the lists of registered chapels.

By sect. 42, if any persons shall knowingly and wilfully intermarry in any place other than the church, chapel, registered building, office, or other place specified in the notice and certificate required by that act, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without licence when a licence is necessary under the act, or in the presence of a registrar or superintendent registrar when his presence is necessary, the marriage shall be null and void: Provided that nothing therein shall annul a marriage solemnised under the Marriage Act, 4 Geo. 4, c. 76. As to proof of the registers, see *ante*, pp. 89-91.

This act of Wm. 4 has been amended by the 7 Wm. 4 & 1 Vict. c. 22, the 3 & 4 Vict. c. 72, and the 19 & 20 Vict. c. 119. By sect. 17 of the last act, after a marriage has taken place under any of these acts, proof of residence in the district stated in the notice; of consent of third persons; that the building has been certified as registered; or that it is either of the parties' usual place of worship, is unnecessary; and proof to the contrary in any proceedings touching the validity of the marriage shall not be given. This provision obviates the doubts expressed in *Mainwaring's case*, 1 Dear. & B. 132, cited *supra*, p. 647. By sect. 24 of the last act, every certified copy or extract sealed or stamped with the seal of the General Register Office, shall be received as evidence of the place of meeting therein mentioned having been, at the time therein stated, duly certified and registered or recorded as by law required, without any further or other proof of the same.

Marriage of Jews and Quakers.] The Marriage Acts, 26 Geo. 2, c. 33, and 4 Geo. 4, c. 76, do not extend to the marriages of *Jews* and *Quakers*, such marriages being expressly excepted; and they may therefore be proved in the same manner as marriages before the passing of those acts. But by 6 & 7 Wm. 4, c. 85, ss. 2, 4, such marriages were to be good only if both parties are Jews or Quakers respectively, and notice be given to the registrar of the intended marriage, and a certificate be issued by the registrar agreeably to the provisions of that act. See also 3 & 4 Vict. c. 72, s. 5, and 10 & 11 Vict. c. 58. By the 23 Vict. c. 18, this act of Wm. 4, and the Irish act (7 & 8 Vict. c. 81) are extended to cases where only one or neither of the parties is a member of the Society of Friends, provided they shall profess with or be of the persuasion of the Society.

In order to prove a Jewish marriage (in support of a plea of coverture) two witnesses were called, who swore they were present at the marriage in the synagogue; but upon an objection made that what took place at the synagogue was merely a ratification of a previous written contract, and that, as that contract was essential to the validity of the marriage, it ought to be produced and proved, the contract was put in; *Horn v. Noel*, 1 Camp. 61. As to the form of the Jewish contract, see *Lindo v. Belisario*, 1 Hag.

Con. 225, 247, *App.* p. 9, and *Goldsmid v. Bromer*, 1 *Hag. Con.* 324. If the plaintiff is a Quaker, the marriage must be proved to have taken place according to the ceremonies of that sect; 1 *Hag. Con. Appendix*, p. 9 (n); *Deane v. Thomas*, *Mood. & M.* 361.

Marriages abroad.] The Marriage Acts (except the 12 & 13 Vict. c. 68, *post*, p. 650) do not extend to marriages abroad, and a marriage celebrated abroad according to the law of the foreign state is generally recognised in this country as a valid marriage. In proving a foreign marriage evidence must be given of the law of the foreign state. As to the proof of foreign laws, see *ante*, p. 76.

Marriages in Scotland.] A marriage in Scotland between English subjects according to the Scotch law is good in our courts; *Dalrymple v. Dalrymple*, 2 *Hag. Con.* 54; *Harford v. Morris*, *Id.* 430. In order to establish the fact of a marriage in Scotland, it is necessary that some person, conversant with the law of Scotland as to marriage, should be called; *Povey's case*, *Dear. C. C.* 32. By the 19 & 20 Vict. c. 96 (an act for amending the law of marriage in Scotland), s. 1, "After the 31st of December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for 21 days next preceeding such marriage." By s. 2, the registrar of the parish or burgh in which an irregular marriage has been contracted is, upon receiving a certain warrant from the sheriff or sheriff-substitute, granted on the joint petition of the parties, to enter the marriage in a register, and a certified copy of such entry signed by the registrar is to be received in evidence of such marriage, and of such residence or of such previous living 21 days in Scotland, in all courts in the United Kingdom and dominions thereunto belonging.

Marriages in Ireland.] The marriage law in Ireland conforms to the general marriage law of England before the act 26 Geo. 2, but has been modified by acts applicable to Ireland; see especially 3 & 4 Wm. 4, c. 102, and 7 & 8 Vict. c. 81 which extends to marriages by the rites of the Church of England, by Roman Catholics, and by dissenters. A marriage in Ireland by a clergyman of the Church of England, or a dissenting minister, in a private room was, before the 7 & 8 Vict. c. 81 came into operation, good; *R. v. Anon.*, 1 *Russ. Crim.* 214, 3rd ed.; *Smith v. Maxwell*, *Ry. & Mood.* 80; and the *Irish Act*, 21 & 22 Geo. 3, c. 25. But the opinion of the judges in *R. v. Mills*, mentioned *post*, p. 650, seems at variance with this, as to a dissenting minister. By s. 71 of 7 & 8 Vict. c. 81, certified copies of entries given at the register office in Dublin, purporting to be sealed or stamped with the seal of the office, are made evidence of the marriage to which they relate without any further proof of such entry. By s. 32 of the same act, proof of residence of the parties, or of consent, &c., is not necessary for the purpose of establishing the marriage.

Marriages abroad in British dominions.] A marriage between British subjects in a British settlement is valid, if it be such a marriage as would have been valid in this country before the passing of

the marriage act, 26 Geo. 2, c. 33, *ante*, p. 645; or be in conformity with any local law established by competent authority. Thus a marriage between two protestant British subjects, solemnised by a Roman Catholic priest at Madras and followed by cohabitation, but without the licence of the governor, (which it had been the uniform custom to obtain, though there was no law requiring it,) was held valid; *Lautour v. Teesdale*, 8 Taunt. 830; 2 Marsh. 243. So, in the case of *R. v. Brampton*, 10 East, 282, Lord Ellenborough was of opinion that, where the parties had accompanied the king's forces abroad, they might be considered to have carried with them the law of England, and that therefore a marriage, according to the English forms in a public chapel by a person apparently a priest, was valid. It has been decided by the House of Lords that the presence of a priest in holy orders was essential to a good marriage at common law; *R. v. Millis*, 10 Cl. & F. 534. And accordingly a marriage celebrated by a missionary, not in holy orders, but otherwise according to the rites of the English Church, in a foreign country, was held not even *prima facie* evidence to support an action for adultery; *Catherwood v. Caslon*, 13 M. & W. 261. See, however, the remarks on *R. v. Millis*, in *R. v. Mainwaring*, 1 Dears. & B. 139; 26 L. J. (M. C.) 10, already noticed, p. 645; and in *Beamish v. Beamish*, *ante*, p. 647.

The 14 & 15 Vict. c. 40, intituled, "An Act for Marriages in India," provides, s. 12, for the transmission of certificates of marriages there to the Registrar-General of Births, Deaths, and Marriages, in England, and, s. 22, certified copies thereof purporting to be sealed or stamped with the seal of the General Register Office, are to be received as evidence of the marriage to which they relate, without further proof of such certificate, or of any entry therein. By s. 13, proof of residence or consent is not necessary in order to establish a marriage, nor can any evidence be given to prove the contrary.

Marriages abroad at a British Embassy.] The marriage of English subjects by a priest of the Church of England in the chapel of the English ambassador abroad appears to have been always held valid; see *R. v. Brampton*, 10 East, 286; and now by statute 4 Geo. 4, c. 91, s. 1, reciting that it is expedient to relieve the minds of his Majesty's subjects from any doubt concerning the validity of a marriage solemnised by a minister of the Church of England in the chapel or house of any British ambassador or minister, residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, as well as from any possibility of doubt concerning the validity of marriages solemnised within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, it is declared and enacted that all such marriages shall be deemed and held to be as valid in law as if the same had been solemnised within his Majesty's dominions with a due observance of all forms required by law. This act renders the marriage valid, although one party be not a British subject; *Re Wright*, 25 L. J. (Ch.) 621; 2 K. & J. 595. See also *Waldegrave Peerage*, 4 Cl. & F. 649; *Este v. Smythe*, 23 L. J. (Ch.) 705; 18 Beav. 112.

By the act 12 & 13 Vict. c. 68, s. 1, marriages abroad, where one party is a British subject, are valid if solemnised as provided by the act; and the act 6 & 7 W. 4, c. 86, as to registration, is incorporated therewith, and every consul is made a registrar under the last-men-

tioned act (sect. 18); and by sect. 13, after the marriage, proof of residence and consent of necessary parties is dispensed with, and negative evidence is excluded.

See further cases; *Chitty's Statutes*, title "*Marriage.*"

Defences.] In ejectment by heir-at-law the most common defences are illegitimacy and a will.

Proof of illegitimacy.] The defendant may prove that the marriage was invalid, and the plaintiff therefore illegitimate.

A declaration by a deceased person, that shows her illegitimacy, is admissible in evidence in a suit in which the defendant claimed as her nephew; *Procurator-General v. Williams*, 31 *L. J. (Prob.)* 157.

The plaintiff's title in ejectment depending on the illegitimacy of the defendants, and they having been proved to be the issue of T. and their mother, after a marriage contracted when T.'s first wife was alive, it was held, that declarations by T., that his first wife was a married woman when he married her, were inadmissible for the defendants, on the ground that T.'s legal relationship to the defendants was not established except by the declarations themselves; and, *semble*, also, because, on the facts disclosed to have existed at the time they were made, T. was an interested person; *Plant v. Taylor*, 7 *H. & N.* 211; 31 *L. J. (Ex.)* 289.

To prove the illegitimacy of a child born in wedlock, want of access or any other circumstances which tend to show that the husband could not, in the course of nature, have been the father of his wife's child, are good evidence; *R. v. Luffe*, 8 *East*, 204; where see Lord Ellenborough's judgment, and the cases cited. And presumptive evidence of non-access is admissible; *Goodright v. Saul*, 4 *T. R.* 356. Whenever a husband and wife are proved to have been together at a time when, in the order of nature, the husband might have been the father of the child, sexual intercourse is to be presumed, and it is incumbent on those who dispute the legitimacy of the child to disprove the fact of such intercourse by evidence affording an irresistible inference that it could not have taken place, and not by mere evidence of circumstances which may afford a balance of probabilities against the fact; *per* Sir J. Leach, M. R., *Head v. Head*, 1 *Sim. & Stu.* 152; *S. C.* affirmed, *Turn. & R.* 138; and see *Banbury Peerage*, 1 *Sim. & Stu.* 153; *Legge v. Edmonds*, 25 *L. J. (Ch.)* 125. If a husband had access, or the access be not clearly negatived, and others at the same time were carrying on a criminal intercourse with his wife, a child born under such circumstances is legitimate; *Legge v. Edmonds*, *supra*; *R. v. Mansfield*, 1 *Q. B.* 444. But if the husband and wife are living separately, and the wife is notoriously living in open adultery, the mere fact that the husband had one opportunity of access, is not conclusive evidence of legitimacy. Such a state of things rather tends to rebut the presumption of intercourse; *per* Alderson, J., in *Cope v. Cope*, 1 *Mood. & Rob.* 269; and see the comments on this case in *R. v. Mansfield*, 1 *Q. B.* 450-2.

Neither husband nor wife will be permitted to prove, directly or indirectly, the non-access, on the ground of public policy; *R. v. Sourton*, 5 *Ad. & E.* 180. See *Legge v. Edmonds*, *supra*. And in a suit in which the legitimacy was questioned of a child proved to have been born three months after marriage, the Master of the Rolls

allowed the wife to be asked how long she had known the husband before marriage, and on her answering more than a year, refused to allow any further question as to access; *A—— v. A——*, 25 *L. J. (Ch.)* 136, *n.* In an action to try the legitimacy of a son born of a married woman since dead, her declarations that he was not the son of her husband, but of another man, are not admissible; nor are similar declarations of the husband; *Cope v. Cope*, *supra*; see also *Legge v. Edmonds*, *supra*.

But though the declarations of the parents are not admissible to bastardize a child born after marriage, they are admissible to prove that the child was born before marriage; *Goodright v. Moss*, *Cowp.* 591.

Children born after a divorce *a mensâ et thoro*, will be presumed to be bastards, unless access be proved; *St. George and St. Margaret*, 1 *Salk.* 123.

The issue of an Englishman domiciled in Scotland, born in Scotland before marriage, and made legitimate by subsequent marriage there, cannot inherit real estate in England; *Doe v. Vardill*, 5 *B. & C.* 438; affirmed in *H. L.*, 6 *N. C.* 395; see also 2 *Cl. & F.* 571. So the father under the same circumstances cannot inherit from the son, under the 3 & 4 *Wm. 4*, c. 106; *In re Don*, 27 *L. J. (Ch.)* 98; 4 *Drew.* 194.

By the 21 & 22 *Vict. c. 93* (ss. 1 and 8), any natural born subject, &c., may petition the Court of Divorce and Matrimonial Causes, and obtain a decree declaring his legitimacy, and that the marriage of his father and mother, or grandfather and grandmother, was valid, or that his own marriage was valid; and such decree declaring the legitimacy or validity, or the contrary, shall be binding on any person cited or made a party, and his real or personal representative, or any person claiming title through him.

Proof of a will.] The defendant may defeat the claim of the heir by showing a will. The proof of the due execution of a will has been already treated of *ante*, pp. 81 *et seqq.*

The 20 & 21 *Vict. c. 77*, "An Act to amend the Law relating to Probates and Letters of Administration in England," after providing, by *sect. 61*, that where a will affecting real estate is proved in solemn form, or is the subject of any contentious proceeding, the heir and persons interested in the real estate shall be cited, enacts—(*sect. 62*) that "where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter, the probate, &c., shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her Majesty's Court of Probate, shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this act, such decree or order shall enure for the benefit of the heir at law, or other persons against whose interest in real estate such will

might operate, and such will shall not be received in evidence in any suit or proceeding relating to real estate, save in any proceeding by way of appeal from such decrees or orders." The 63rd section provides, "That the probate, decree, or order of the court shall not in any case affect the heir or any other person in respect of his interest in real estate, unless such heir or person has been cited or made a party to the proceedings, or derives title under or through a person so cited or made party." And see sections 64 and 65, *ante*, pp. 85, 86.

Where the plaintiff claimed as heir at law, and the defendant relied on a will, Lord Denman, C. J., allowed the plaintiff to prove in reply a subsequent will devising the land to him; for such a will operated only as a revocation of the first and left the plaintiff entitled as heir; *Doe v. Gosley*, 2 Mood. & Rob. 243. But since 31st December, 1833, the heir at law would take as devisee under such will; see *infra*.

Ejectment by Devisee of a Freehold Interest.

Where the plaintiff claims a freehold interest by a devise, he must prove: (1) The seisin in fee of the testator (see *ante*, p. 644) or that he was "entitled" under 1 Vict. c. 26, s. 3: (2) The regular execution of the will; see *ante*, pp. 81 *et seqq.*, or in certain cases a probate under 20 & 21 Vict. c. 77, s. 61, *ante*, p. 652: (3) The death of the testator: and (4), in case there are any estates limited by the will prior to the devise to himself, the determination of such prior estates.

By 3 & 4 Wm. 4, c. 106, s. 3, when land, &c., shall be devised by any testator who died since the 31st of December, 1833, to his own heir, such heir shall be considered as taking by devise and not by descent. Before this act, a devise to any one of the *same estate* as he would otherwise have taken as heir-at-law of the devisor, was inoperative, and the devisee took by descent and not by devise.

Defences.] The defendant may show a disclaimer on the part of the plaintiff to take under the will; or he may impeach the will by showing that it is a forgery; or has been obtained by fraud or duress; or that the devise is an interlineation; or by proving the incapacity of the testator to make a will; or a revocation of it.

Disclaimer.] The disclaimer is good if by deed; *Townson v. Tickell*, 3 B. & A. 31; *Begbie v. Crook*, 2 N. C. 70; and see *Nicloson v. Wordsworth*, 2 Swanst. 371, where the earlier cases on disclaimer are collected. And it would seem that a parol disclaimer is sufficient; *Shep. Touch.* 452; *per* Holroyd, J., in *Townson v. Tickell*, *supra*; *Doe v. Smyth*, *infra*; and see *Xenos v. Wickham*, 31 L. J. (C. P.) 364, 13 C. B., N. S. 381. But the disclaimer must be absolute of *any estate* in the land; and therefore where the devisee of an estate refused to take it *as devisee*, saying he was entitled as heir-at-law, and would not accept any benefit by the will of the devisor, it was held that this was no such disclaimer as prevented him from afterwards bringing ejectment, and relying on his title as devisee; *Doe v. Smyth*, 6 B. & C. 112. Acting as executor or

under the trusts of a will, does not affect the power to disclaim real estate devised; *Wellesley v. Withers*, 4 E. & B. 750.

Forgery and fraud.] To impeach the will on this ground, declarations of intention, &c., by the testator are admitted, and other collateral circumstances may be proved to show the probability of fraud and concoction; *Doe v. Allen*, 8 T. R. 147. And like declarations of the testator are admissible in support of the will, where it is impugned as having been fraudulently made for, and in the name of an incapable testator; *Doe v. Stevens*, per Williams, J., *Bodmin Spr. Ass.*, 1849; confirmed in Q. B. on motion for new trial. Where the inequitable treatment of some children by the will was urged by counsel in support of the charge of fraudulent concoction made against the favoured children, the judge refused to explain to the jury, when requested by them, the legal operation of the will as regarded the children, and the court refused a new trial moved on the ground of such refusal; *Doe v. Stevens*, *supra*.

Interlineation.] Alterations apparent on the face of a will are to be presumed, without evidence to the contrary, to have been made after execution; but declarations of the testator, if made *before* execution, are admissible to rebut this presumption; *Doe v. Palmer*, 16 Q. B. 747; 20 L. J. (Q. B.) 367.

Incapacity from infancy or coverture.] Both before and since stat. 1 Vict. c. 26, an infant under twenty-one years of age was and is disqualified from making a will. See 34 & 35 Hen. 8, c. 5, s. 14, and the last act s. 7. Nor can a feme covert make one except under a power, or where her husband has abjured the realm, or is otherwise civilly dead; *Co. Litt.* 133 a.

Incapacity from idiocy, or non-sane memory.] It is not enough that the testator, when he makes his will, has sufficient memory to answer familiar and usual questions; he ought to have a disposing memory so as to be able to make a disposition of his lands with understanding and reason; *Marquess of Winchester's case*, 6 Rep. 23 a. If the defendant succeeds in proving that the testator has been affected by habitual mental derangement, then it is for the other party who claims under the will, to show sanity and competency at the period when the act was done; *Atty.-Gen. v. Parnter*, 3 Bro. Ch. C. 441. But where the case is one of temporary delirium arising from transient causes, as fever, &c., slight evidence of restored sanity will be sufficient; *Brogden v. Brown*, 2 Addams, 445. The will itself may be evidence of a sound mind, or lucid interval; and one made by a person, while confined in an asylum, has been established by the reasonableness of its provisions; per Lord Eldon, C., in *M'Adam v. Walker*, 1 Dow, 178; *Cartwright v. Cartwright*, 1 Phillim. 90. Where the evidence is conflicting, the safest course is to try the question by the evidence of collateral facts; as by correspondence, acts done with relation to property, and the circumstances attending the preparation and execution of the will itself; *Tatham v. Wright*, 2 Russ. & Myl. 21, 22. Letters written to the testator by deceased persons, and not acted upon, or indorsed, or answered by him, are not admissible as evidence of his sanity; *Wright v. Doe*, 4 N. C. 489.

Imbecility produced by age or sickness, of which the devisee has

taken advantage, will be enough to avoid a will; 1 *Wms. Exors.* 36, 5th ed.; *Hacker v. Newborn, Style*, 427; *Money Penny v. Brown*, 8 *Vin. Ab.* 167. But not mere age or weakness of intellect; see the authorities in *Williams on Exors.*, *ubi supra*.

A party propounding a will is bound to show that it was executed by the testator, and that he was of a sound and disposing mind. If a will, not irrational on the face of it, is produced, and the execution of it is proved, and no other evidence is offered, the presumption is that it is the will of a person of competent understanding; but if there are circumstances in evidence tending to counterbalance this presumption, it lies on the party propounding the will to establish affirmatively the competency of the testator; *Sutton v. Sadler*, 3 *C. B.*, *N. S.* 87; *Symes v. Green*, 1 *S. & T.* 401; 28 *L. J. (Prob.)* 83.

Revocation of one will by another.—Statute of Frauds.] Under the Statute of Frauds, s. 6, the defendant may show the will revoked "by some other will or codicil in writing." Such second will, to operate as a revocation, must be executed and attested according to the requisitions of the 5th section of the statute; *Eccleston v. Petty, Curth.* 80. If the second devise does not expressly revoke, it revokes only as far as it is clearly inconsistent with the former devise; *Harwood v. Goodright, Cowp.* 87; *Doe v. Hicks*, 1 *Cl. & F.* 20; 8 *Bing.* 475. See *Robertson v. Powell*, *post*, p. 657.

Revocation of will by cancelling, &c.—Statute of Frauds.] By the 6th section of the Statute of Frauds, a will may be revoked "by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent." The act must be done with an intention of revoking; and though the burning or tearing be incomplete, yet, if done with an intention to revoke, it will operate as a revocation; *Bibb v. Thomas*, 2 *W. Bl.* 1043; see *Winsor v. Pratt*, 2 *B. & B.* 650. Where the testator threw his will on the fire in an envelope, with intent to destroy it, and another person snatched it off before more was burnt than the corner of the envelope, and afterwards promised the testator that he would burn the will, and pretended to have done so,—this was held no revocation; *Doe v. Harris*, 6 *Ad. & E.* 209. But it was held otherwise in the case of copyhold, not being within the Statute of Frauds; *S. C.*, 8 *Ad. & E.* 1. It is a question for the jury, whether the testator had completed the intended act of revocation; *Doe v. Perkes*, 3 *B. & A.* 489; or whether, in cases of erasure, the acts were merely deliberative; *Doe v. Strickland*, 8 *C. B.* 724. The declarations of the testator at the time of doing the act, and his subsequent declarations respecting it, are admissible evidence of his intentions; *Burtonshaw v. Gilbert, Coup.* 53; and see 2 *East*, 534, note (b); *Doe v. Perkes*, 3 *B. & A.* 489. In the last case the testator being angry with a devisee tore his will twice through, but his arm being arrested by a by-stander and his anger appeased, he fitted the pieces together and said "It is a good job it is no worse." It was left to the jury to say whether the testator had or had not completed the cancelling he at first intended; and the jury having found in the negative, the *K. B.* upheld their verdict. If there be several instruments, it is a question for the jury whether they were intended to form but one will; and in the case of duplicates, if they find they were so intended, an alteration of one instrument found by the jury to have

been final, will, in law, be an alteration of the corresponding duplicate, and the will so altered becomes the last will of the testator; *Doe v. Strickland, supra*.

A codicil, whereby the testator confirms his will, gives validity to an unattested alteration in a devise of lands made after the execution of the will; and to a testamentary paper purporting to be a devise of lands unattested and unannexed to the will, if distinctly referred to by such codicil; *Utterton v. Robins, 1 Ad. & E. 423*.

Implied revocations, before the present Wills Act.] Implied revocations were considered as excepted out of the Statute of Frauds. They took place—1. Where a subsequent disposition of the property was made by the testator inconsistent with the will; as by leasing for years, to commence at the testator's death, to the person to whom he had devised them in fee; *Coke v. Bullock, Cro. Jac. 49*. 2. Where the seisin of the testator was altered by some conveyance between the date of the will and his death. This might operate as a total or partial revocation according to circumstances, and could not be rebutted by proof of a contrary intention; *Goodtitle v. Otway, 2 H. Bl. 516*. 3. Where there had been a material change in the circumstances of the testator since the publication of the will. Thus, the subsequent marriage of the testator and the birth of a child, without provision made for the wife or child, were held to operate as a revocation; *Doe v. Lancashire, 5 T. R. 49, 58*. It was a disputed question whether parol evidence was admissible to show that the testator intended his will to stand good; but in *Marston v. Roe, 8 Ad. & E. 14*, such evidence, short of republication of the will, was held (in *Ex. Ch.*) to be inadmissible; and the implication was not prevented by a provision in the will for a future wife only, without providing for the children; nor, *semble*, although such children had in fact been provided for by the descent of property acquired by the testator after the date of the will; *S. C.* In the case of a woman, her marriage alone operated as a revocation; *Forse and Hembling's case, 4 Rep. 60 b*.

Revocation under the present Statute of Wills, 1 Vict. c. 26.] The 1 Vict. c. 26 applies (s. 34) to any will made, or re-executed, or republished, or revived by any codicil, on or after 1st of January, 1838.

By section 18, a will shall be revoked by marriage, except a will made under a power, when the property would not, in default of appointment, go to the representatives of the testator.

By section 19, no will shall be revoked by any presumption of intention on the ground of alteration of circumstances.

By section 20, no will or codicil, or any part thereof, shall be revoked otherwise than by another will or codicil executed in the manner required by section 9 (*ante*, p. 82); or by some writing, declaring an intention to revoke, executed in like manner; or by burning, tearing, or otherwise destroying it, by the testator, or some person in his presence and by his direction, with the intention of revoking the same.

By section 23, no conveyance or other act subsequent to the execution of the will (except an act by which a will may be revoked as above) shall prevent the operation of the will with respect to such estate or interest as the testator shall have power to dispose of by will at the time of his death.

By section 24, every will shall take effect as if executed imme-

diately before the death of the testator, unless a contrary intention appear by the will. This does not refer to the objects of the testator's bounty, but only to the real and personal estate comprised in the will; *Bullock v. Bennett*, 24 L. J. (Chan.) 512.

By section 21, no obliteration, interlineation, or alteration made after execution, shall have any effect (except so far as the words before alteration shall not be apparent), unless such alteration be executed in the manner required for a will; but the will, with such alteration, shall be deemed duly executed if the signature of the testator and subscription of the witnesses be made in the margin or on some other part, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to it, and written at the end or other part of the will. As to interlineations see *ante*, p. 654.

By section 22, a will revoked can only be revived by re-execution, or by a codicil duly executed and attested and showing an intention to revive it; and where a will partly revoked, and afterwards wholly revoked, shall be revived, the revival shall not extend to so much as was revoked before the revocation of the whole, unless a contrary intention appears.

Where a will was last seen in the testator's own possession, and on his death after due search it cannot be found, the presumption is that he had himself destroyed it *animo revocandi*, and it lies on the party relying on the will to rebut this presumption; *Brown v. Brown*, 8 E. & B. 876; 27 L. J. (Q. B.) 173; and in such a case the contents may be proved by parol, in order to show that it revoked a former will; *S. C.* It is sufficient cancellation under the 20th section, if the will be so torn as no longer to exist in its entirety; and where a testator noticed in the witnessing clause that he had set his hand and seal to the will, tearing off the seal is a sufficient "tearing" if done with the intention of revoking; *Price v. Price*, 27 L. J. (Ex.) 409; *S. C. nom. Price v. Powell*, 3 H. & N. 341. So by a statement in the witnessing clause that he has set his hand to the preceding pages, a testator makes the signature on those pages part of his will; and if he afterwards, *animo revocandi*, tear off those signatures, though the formal signature be left, it is a tearing within the section, and a good revocation of the whole will; *Williams v. Tyley, Johns*. 530. The signatures of the attesting witnesses are a material part of the will, and if the will be found in the testator's custody with these signatures torn off, it will be presumed, in the absence of evidence to the contrary, that it was done by the testator *animo revocandi*, and the will is thereby revoked; *Evans v. Dallow*, 31 L. J. (Prob.) 128.

Where a codicil is made, not revoking a will, in order to operate as a revocation of a particular devise in the will, the intention to revoke must be as clear as the original intention to devise; *Robertson v. Powell*, 33 L. J. (Ex.) 34; 2 H. & C. 762.

Ejectment by Devisee of a Leasehold Interest.

A devisee of a leasehold interest must prove: 1. The title of the devisor to the property, unless the defendant be estopped from disputing it; 2. The probate of the will, *ante*, p. 81; and 3. The assent of the executor to the bequest.

By the assent, the term is vested in the devisee from the death of

the testator; *Saunders' case*, 5 *Rep.* 12 *b*; *Doe v. Guy*, 3 *East*, 120. A very small matter will amount to an assent, it being a rightful act; *Noel v. Robinson*, 1 *Vern.* 94; and it is a matter of fact for the jury; *Mason v. Farnell*, 12 *M. & W.* 674. The assent of one executor is sufficient; and one of several executors can make a valid assent to a devise to himself; *Townson v. Tickell*, 3 *B. & A.* 40. Assent before probate is good, and even although the executor assenting die without proving the will, provided probate is ultimately taken out; see *Wankford v. Wankford*, 1 *Salk.* 299, 308; *Brazier v. Hudson*, 8 *Sim.* 67; and see further, as to assent, 1 *Wms. Exors.* 256; 2 *id.* 1235—1250, 5th ed.

Ejectment by Devisee or Heir of Copyhold.

A devisee of copyhold premises must, independently of statutes, adduce the following proofs:

1. The seisin of the testator. The surrender by the testator to the use of his will is no proof of his seisin; *per* Taunton, J., in *Barfoot v. Sadler*, *Winton, Sum. As.* 1831. The admittance and actual possession of the testator himself would be the best evidence of seisin. And where the testator was a surrenderee, his admittance must be shown; *Matthew v. Osborne*, 13 *C. B.* 919; 22 *L. J. (C. P.)* 241.

2. The surrender by him to the use of his will. But this is not necessary in the case of a person dying after 12th July, 1815; 55 *Geo.* 3, c. 192; see *Doe v. Ludlam*, 7 *Bing.* 275. As between surrenderor and surrenderee a presentment on the court rolls of an admittance upon a surrender out of court is primary evidence of the surrender without producing the original surrender, and without regard to the stamp upon it; *Doe v. Olley*, 12 *Ad. & E.* 481.

3. The will itself. This, before the late statute, need not, it is said, have been in writing; 1 *Watk. Cop.* 130. A recital of it in the admittance is not evidence as between heir and devisee; *Anon. B. N. P.* 108; 1 *Ld. Ray.* 735. Nor is the probate admissible evidence of it; *Archer v. Slater*, 11 *Sim.* 507. But now see 20 & 21 *Vict.* c. 77, *ante*, p. 652. Wills of customary and copyhold land must now be executed with the same formalities as freehold; 1 *Vict.* c. 26, s. 9, *ante*, p. 82; and a will so executed is good, though the testator may not have surrendered to the use of his will; and though being entitled as heir, devisee, or otherwise, he may not have been admitted; and though there may be no custom, or only a limited custom, to devise or surrender to the use of a will; sect. 3.

4. The devisee must prove his own admittance, though an heir may bring ejectment without it; *post*, *Proof of Admittance*.

Where the title depends on a special custom, it is necessary to prove the custom; as to which see *ante*, pp. 19 *et seqq.*

By 4 & 5 *Vict.* c. 35 (the act for the commutation of manorial rights, &c.), sect. 86, a customary court may (after 31st December, 1841) be held without the presence, or even the existence, of any copyholder; and by sect. 88, the lord, his steward, or deputy-steward, may admit at any time or place within or out of the manor, and without holding any court; and by sect. 90, no presentment of such admittance is necessary. By sect. 89, the lord, &c., is compellable to enrol a copy of any will or codicil delivered to him, and the entry on the rolls shall be taken to be made in pursuance of a presentment

by the homage. But the act does not make the enrolment evidence of the will.

The late statute, 3 & 4 Wm. 4, c. 106, amending the law of inheritance, extends to copyhold and customary land.

By 15 & 16 Vict. c. 51 (for enfranchisement of copyholds, &c.), s. 54, after confirmation of an apportionment under the acts therein mentioned, and final enfranchisement under that act, the customary modes of descent are to cease, and the laws of descent of lands in common socage are to apply.

Proof of admittance.] Although in ejectment against a stranger the heir of the copyholder (*Doe v. Hellier*, 3 T. R. 169), or the grantee of the reversion of a copyhold from the lord (*Roe v. Loveless*, 2 B. & A. 453; and see *Doe v. Whitaker*, 5 B. & Ad. 409), need not prove an admittance; yet a devisee, being a purchaser, must prove it. The admittance of tenant for life being the admittance of him in remainder, even though it be a contingent one (*Brown's case*, 4 Rep. 22 b), a devisee in remainder has only to prove the admittance of the tenant for life, and not his own. The title of a surrenderee is not complete before admittance; *Berry v. Greene*, Cro. Eliz. 349; *Doe v. Wroot*, 5 East, 132; *Rayson v. Adcock*, 9 Jar. N. S. 800. But after admittance his title has relation to the surrender (or, in the case of devisee, to the testator's death), against all persons but the lord; and he may therefore recover in ejectment upon a title laid between the time of the surrender and admittance, provided the admittance be before the trial; *Holdfast v. Clapham*, 1 T. R. 600; *Doe v. Hall*, 16 East, 208. An heir may, before admittance, devise copyholds descending to him; *King v. Turner*, 7 Mylne & K. 456. But not an unadmitted devisee or surrenderee; *per curiam* in *Doe v. Lawes*, 7 Ad. & E. 211, 213; *Matthew v. Osborne*, 13 C. B. 919, *supra*, p. 658. Where an admittance was entered at a void court, and the proceedings of that court regularly entered by the steward on the court rolls, it was held sufficient; as at the following court the tenants would have information of it; *Doe v. Whitaker*, 5 B. & Ad. 409. An admittance at a court baron is good if it be a court at which customary tenants, as well as freeholders, have been used to do suit; *Doe v. Walker*, 15 Q. B. 28. The heir of a copyholder, admitted for life or lives only, cannot support an action without admittance, although by the custom he has a descendible right of renewal as heir; *Doe v. Thompson*, 13 Q. B. 670.

Ejectment by Mortgagee.

If the action be brought against the mortgagor in possession after default, or against a tenant let in by him after the mortgage, the mortgagee has only to prove the execution of the mortgage deed; and a demand of possession is unnecessary; *Keech v. Hall*, 1 Doug. 21; 1 Sm. L. C. 505 (where see notes); *Doe v. Maisey*, 8 B. & C. 767; *Doe v. Giles*, 5 Bing. 421. And the mere fact of the receipt of interest as such since the date from which the mortgagee claims by the writ to be entitled, is no recognition of a lawful possession by the mortgagor or his tenant, so as to make a demand necessary; *Doe v. Cudwallader*, 2 B. & Ad. 473; even though received under a distress, if the distress was made under a special power in the mort-

gage deed; *Doe v. Goodier*, 10 Q. B. 957. But if the mortgagee treats, as his tenant, one, who occupies under a demise by the mortgagor since the mortgage, a notice to quit may become necessary; *Rogers v. Humphreys*, 4 Ad. & E. 313, 314; *Doe v. Hales*, 7 Bing. 322. A. let B. into possession as tenant from year to year, and then mortgaged to plaintiff. After the mortgage B. let the defendant into possession, and informed A., the mortgagor, of the fact, and he afterwards received the rent from defendant. Held, that the tenancy of B. still existed, and that the plaintiff could not maintain ejectment without a proper notice to quit; *Cadle v. Moody*, 30 L. J. (Ex.) 385.

Notice to pay the rent to him by a mortgagee to the mortgagor's tenant in possession, will not *alone* create a tenancy between them without attornment; *Evans v. Elliot*, 9 Ad. & E. 342. But if such notice is not repudiated, it may be evidence of a yearly tenancy, at the former rent, from the date of the notice; *Brown v. Storey*, 1 M. & G. 117. Payment of rent to the mortgagee by the mortgagor's lessee, under an authority given by the mortgagor for that purpose to the mortgagee, makes no change of tenancy, but leaves the lessee still tenant to the mortgagor; *Wheeler v. Branscombe*, 5 Q. B. 373.

A covenant or agreement that the mortgagor shall continue to hold till a day certain fixed for payment operates as a re-demise till that day; *Wilkinson v. Hall*, 3 N. C. 508. So where the agreement is to hold till default in payment of an annuity; *Doe v. Goldwin*, 2 Q. B. 143. But see *contra*, *Doe v. Day*, *id.* 147, &c.; and the notes to *Keech v. Hall*, 1 Sm. L. C. 509—512, 5th ed., where, after a review of the cases, the editors of the 3rd and 4th editions come to the conclusion that, "in order to make a re-demise, there must be an *affirmative* covenant that the mortgagor shall hold for a *determinate* time; and that where either of these elements is wanting, there is no re-demise." Where it was agreed that the mortgagor should, during his occupation, pay rent to the mortgagee, provided such reservation should not prejudice the mortgagee's right to enter and evict upon default, it was held that the mortgagee might eject without notice to quit, though he had distrained for a year's rent; *Doe v. Olley*, 12 Ad. & E. 481. As to the construction of mortgage deeds in which are clauses creating a tenancy between the mortgagor in possession and the mortgagee; see *Walker v. Giles*, 6 C. B. 662; and note *id.* 698; *Pinhorn v. Souster*, 8 Ex. 763; *Brown v. Metropolitan Counties Insurance Soc.*, 28 L. J. (Q. B.), 236; 1 E. & E. 832; also a case between the same parties in the Exchequer, 4 H. & N. 428; 28 L. J. (Ex.) 340; see also *Turner v. Barnes*, 2 B. & S. 435; 31 L. J. (Q. B.) 170.

Where the mortgagor has leased by deed after the mortgage, and then joined in a conveyance by the mortgagee to A., who receives rent from the tenant, there is no estoppel so as to prevent A. from treating the tenant as only a tenant from year to year, and ejecting him after notice; *Doe v. Thompson*, 9 Q. B. 1037.

If a third person is in possession by a title prior to the mortgage, the mortgagee is the assignee of the reversion only, and must show a title to oust him. Thus, if he be a tenant from year to year who came in prior to the mortgage, the plaintiff must prove a regular notice to quit; see *Birch v. Wright*, 1 T. R. 380-1. But the defendant, being either the mortgagor or one claiming under him,

cannot himself set up a title in a third person prior to the mortgage; *Doe v. Vickers*, 4 *Ad. & E.* 782; and trustees for public purposes are not exempt from the doctrine of estoppel, so as to set up an earlier mortgage by themselves; *Doe v. Horne*, 3 *Q. B.* 757.

A mortgagee of turnpike tolls cannot recover in ejectment, unless the power to mortgage includes land, such as toll-houses and gates; *Fairtitle v. Gilbert*, 2 *T. R.* 169. As to ejectment by mortgagees of tolls under the General Turnpike Act, 3 *Geo. 4*, c. 126, see *Doe v. Lediard*, 4 *B. & Ad.* 137; *Doe v. Penfold*, 3 *Q. B.* 757. By 13 & 14 *Vict. c. 79*, s. 5, a mortgagee is not to enter into possession so long as the interest on his debt is paid within one month after it becomes due; and by 17 & 18 *Vict. c. 58*, s. 5, trustees are not to mortgage tolls without the consent of a Secretary of State.

In order to prove the execution of a mortgage by the trustees of a turnpike road, it is enough, under the General Turnpike Act, 3 *Geo. 4*, c. 126, s. 134, to show that the trustees acted as such, and that there was an order for their appointment, without showing the formal appointment under the local act; *Doe v. Hares*, 4 *B. & Ad.* 435.

A power given to a railway company to mortgage "the undertaking, with all tolls," &c., will not enable the mortgagee to recover the railway by ejectment; *Doe v. St. Helen's Railway Co.*, 2 *Q. B.* 364.

In ejectment by mortgagee against the assignee (under the Lords' Act, 32 *Geo. 2*, c. 28) of mortgagor, a letter written by the mortgagor to the plaintiff before the assignment is evidence against the defendant; and it shall be presumed to have been written at the time of its date; *Goodtitle v. Milburn*, 2 *M. & W.* 853.

As to the effect of the Statute of Limitations in the case of mortgages, see *post*, *Defence*, pp. 673-4; and stat. 7 *Wm. 4*, and 1 *Vict. c. 28*, there cited.

By the C. L. Pro. Act, 1852, ss. 219, 220, the 7 *Geo. 2*, c. 20, ss. 1 & 2, are re-enacted, enabling mortgagors to stop ejectment by payment of principal and interest.

Ejectment by Execution Creditor.

Tenant by elegit must prove: 1. The judgment; 2. The elegit issued upon it; and 3. The inquisition and return thereupon; *B. N. P.* 104.

An examined copy of the judgment roll, containing the award of elegit and the return of the inquisition, is sufficient, without proving a copy of the elegit and of the inquisition; *Ramsbottom v. Buckhurst*, 2 *M. & S.* 565. But the original writ of elegit, duly returned, would seem to be admissible, though there be no award of it on the judgment roll; *Pack v. Tarpley*, 9 *Ad. & E.* 468; where a writ of *sequestrari facias* was held evidence against the execution debtor, though no award of it appeared on the judgment roll. Execution creditors, by the 1 & 2 *Vict. c. 110*, s. 11, are entitled to all the debtor's lands, and the sheriff's return need no longer describe the lands taken by metes and bounds, but only so as to identify them; *Sherwood v. Clark*, 15 *M. & W.* 764. If a third person be in possession of the land extended, it is sufficient to prove a *prima facie* title in the debtor, and it lies upon the tenant in possession to show a title anterior to the judgment; *Doe v. Owen*, 2 *C. & J.* 71. And *semble*, the inqui-

sition is conclusive as against the judgment debtor, and he cannot set up the title of a third person; *Martin v. Smith*, 27 *L. J. (Ex.)* 317.

Where the plaintiff is vendee of a term under a *fi. fa.*, it is sufficient for him, in ejectment against the execution debtor, to produce the *fi. fa.*, without proving the judgment; *Doe v. Murless*, 6 *M. & S.* 110. *Aliter* as against a stranger; *Lake v. Billers*, 1 *Ld. Raym.* 733; *Martyn v. Podger*, 5 *Burr.* 2631. And where the sheriff's vendee is also the plaintiff at whose suit the writ was issued, and not a mere stranger, in ejectment against the execution debtor he must prove the judgment, for he is privy to it, and, if there be none, the writ, as far as he is concerned, would be a nullity; *Doe v. Smith, Holt, N. P.* 589; 2 *Stark.* 199 (by the court in banco). A sale by the sheriff without a written assignment passes no property, and the estate remains in the debtor, who may therefore eject the creditor in possession; *Doe v. Jones*, 9 *M. & W.* 372.

Ejectment by Executor or Administrator.

In ejectment by an executor or administrator, the plaintiff must prove—1. The leasehold title of his testator; 2. The testator's death; 3. The probate or grant of administration.

The leasehold title may be shown by producing and proving the lease in the usual way. As to what is sufficient secondary evidence of a lease, see *Metters v. Brown*, 32 *L. J. (Ex.)* 138; 1 *H. & C.* 686.

The death of the termor is proved by parol evidence, or by proof of the register of burial and identity of the party deceased. The probate or letters of administration are not of themselves evidence of the decease; *ante*, pp. 54, 89-91.

As to proof of the probate or grant of administration, see *ante*, p. 81. And see the enactments in 20 & 21 *Vict. c. 77*, the act for establishing a new court of probate, noticed *post*, *Actions by Executors and Administrators*.

Administration when granted relates back for some purposes to the intestate's death; *Com. Dig. Administration (B. 10)*. In Ireland this doctrine of relation was established for the purpose of ejectment by *Patten v. Patten, Alc. & Nap.* 493; cited in *Welchman v. Sturgis*, 13 *Q. B.* 554; see *Tharpe v. Stallwood*, 5 *M. & G.* 760. In 3 & 4 *Wm. 4, c. 27, s. 6 (post, p. 666)*, administration is expressly made to relate back to the death for the purposes of that act.

The term is vested in the executor from the death of the testator, and the executor may therefore recover on a claim dated between the time of the testator's death and of the probate; *Com. Dig. Administration (B. 10)*.

The plaintiff in ejectment, claiming as administrator of his mother, had during her life mortgaged the premises in fee, but it was held that he was not estopped from showing his mother's title as termor; *Metters v. Brown, supra*.

Ejectment by Assignees of Bankrupts.

The strict proof of the title of the assignees will be found, *post*, Part III., tit. *Actions by Assignees of Bankrupts*, p. 684.

By 12 & 13 Vict. c. 106, ss. 141, 142, *post*, p. 710, after adjudication all the personal and real estate of the bankrupt becomes absolutely vested in the assignees on their appointment, and their title has relation to the act of bankruptcy; but by sect. 145 the assignees have the power "to elect to take" or "decline" any leases or agreements for leases to which the bankrupt is entitled; and the question has been raised, in whom, by the above sections, is the term vested until the option has been exercised by the assignees? In *Mackley v. Pattenden*, 30 L. J. (Q. B.) 225; 1 B. & S. 178; the court intimated (under the previous similar enactments) that the term remained in the bankrupt; but in *Cartwright v. Glover*, 30 L. J. (Ch.) 324, 2 Giff. 620, Stuart, V. C., held the contrary under the present statutes. The adoption of the lease need not be express: any dealing with it as owner is sufficient. Thus putting it up for sale, and accepting a deposit from a purchaser, is sufficient; *Hastings v. Wilson*, *Holt*, N. P. 290; or an entry or occupation; *Hanson v. Stevenson*, 1 B. & A. 303; but a mere putting up for sale by auction is not sufficient; *Turner v. Richardson*, 7 East, 335; nor even if the assignees enter and submit to a distress, if there are other circumstances to show that this was not done with an intention of absolutely taking to the lease; *Goodwin v. Noble*, 8 E. & B. 587. The election of the assignees must be made within a reasonable time, and it is for the jury to say whether this has been done or not; *Mackley v. Pattenden*, *supra*. And now by the 24 & 25 Vict. c. 134, s. 131, the assignees may take and keep possession of the premises until some quarter-day, not longer than six months from the adjudication, and then decline to accept the lease. See the notes to *Auriol v. Mills*, 1 Sm. L. C. 769.

Ejectment by Parson.

In ejectment by a parson for the recovery of the parsonage-house, or glebe, where he does not claim in the character of landlord, or where the defendant is not otherwise estopped from disputing his title, he must show his title by proving presentation, institution, and induction, but he need not prove title in the patron; *Snow v. Phillips*, B. N. P. 105; *Heath v. Pryn*, 1 Vent. 14; B. N. P. 105. If the presentation to the bishop was by parol, it may be proved by a person who was present and heard it; per Ld. Kenyon, C.J., in *R. v. Eriswell*, 3 T. R. 723. But a presentation by a corporation aggregate must be in writing under the common seal; *Gibson's Codex*, 794; and must therefore be proved by proof of the seal. The institution may be proved by the letters testimonial of institution, or by the official entry in the public registry of the diocese, which ought regularly to record the time of the institution, and on whose presentation; *Gibs*. 813; in which case it would seem to be evidence of the presentation as well as of the institution; 2 *Phill. Ev.* 257; accord. *Irish Society v. Bishop of Derry*, 12 Cl. & F. 641. So the letters of institution of a party reciting the cession of his predecessor, followed by induction, are sufficient evidence of the cession; *Doe v. Carter*, Ry. & Moo. 237. The induction may be proved either by some person who was present at the ceremony, or by the indorsement on the mandate directed by the ordinary to the archdeacon, or by the return to the mandate, if a return has been made; 2 *Phill. Ev.* 257; see *Chapman v. Beard*, 3 Anst. 942. The plaintiff will not be

required to prove that he has taken the requisite oaths, or declared his assent to the Book of Common Prayer, according to the Act of Uniformity; *Powel v. Milbank*, 2 *W. Bl.* 851. Some evidence must be given that the property to be recovered is church property; as that the premises were occupied by a former incumbent, &c.; 2 *Phill. Ev.* 258. The parson may bring ejectment against a tenant from year to year of the glebe land, though the current year of the tenancy created by his predecessor is unexpired, and no notice to quit has been given; *Doe v. Carter, Ry. & Mood.* 237; unless he has impliedly confirmed the tenancy.

Defence in Ejectment, generally.

The only defence in ejectment is that the plaintiff had no such title as gave him a legal right of entry at the time mentioned in the writ. There are now no pleadings in this form of action; C. L. Pro. Act, 1852, s. 178; and consequently no equitable defence can be pleaded: *Neave v. Avery*, 16 *C. B.* 328; nor, it would seem, given in evidence at the trial; *per* Maule, J., *S. C.*

By the C. L. Pro. Act, 1852, ss. 172, 173 (a re-enactment of 11 Geo. 2, c. 19, s. 13, under which "landlord" was held to extend to the heir, devisee, or remainder-man under the same title, or a mortgagee; see Coleridge's, J., judgment in *Doe v. Birchmore*, *infra*), any person, not named in the writ, may be allowed to appear and defend, on an affidavit that he is in possession by himself or his tenant; and in the latter case must state in his appearance that he defends as landlord; and he shall be allowed to set up any defence hitherto allowed to a landlord, and no other.

One who defends as landlord cannot rely upon any title which the tenant in possession would be estopped from setting up; *Doe v. Smythe*, 4 *M. & S.* 347; *Doe v. Litherland*, 4 *Ad. & E.* 784; *Doe v. Birchmore*, 9 *Ad. & E.* 662; *Doe v. Mizem*, 2 *Mood. & Rob.* 56. Where the tenant in possession lets judgment go by default, the person defending as landlord cannot set up as a defence the want of a notice to quit from the plaintiff to such tenant; *Doe v. Creed*, 5 *Bing.* 327. But where both landlord and tenant defend, the tenant is not precluded from showing an outstanding tenancy in a third party under the joint demise of his landlord and the plaintiff as tenants in common; *Doe v. Horn*, 3 *M. & W.* 333. Thus, as in copyholds, the forfeiture of the copyhold tenant does not destroy a lease made with the licence of the lord before forfeiture, the party in possession by receipt of rent from the occupying tenant, and who has been admitted to defend as landlord, may, even where a forfeiture has been committed by the copyhold tenant, set up the subsisting lease against the lord; *Clarke v. Arden*, 16 *C. B.* 227.

By sect. 176 of the C. L. Pro. Act, 1852, the court or judge has power to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants.

By the C. L. Pro. Act, 1852, s. 180, cited, *ante*, p. 614, we have seen that one of the questions at the trial is, to what part of the property in question the plaintiff is entitled. Under the old form of action, if the defendant succeeded as to any part of the property, he was entitled to have the verdict entered for him as to that part; *Doe v. Lewis*, 13 *M. & W.* 241.

Statute of Limitations.] The period of limitation in the action of ejectment was formerly governed by the 21 Jac. 1, c. 16, but now by the 3 & 4 Wm. 4, c. 27, which specifies in detail the various periods at which, in different cases, the statute shall begin to operate, and the manner in which, by acknowledgment, its operation may be prevented. In the following extracts from it, the sections are not to be taken as transcribed *verbatim*, except where inverted commas are used.

Sect. 1. The interpretation clause, provides that, except where the context excludes such construction, the words used in the act are to be interpreted as follows:—

Land,—means manors and all corporeal hereditaments, and tithes (other than tithes belonging to spiritual or eleemosynary corporations sole), whether freehold, chattel, copyhold, or of any other tenure.

Rent,—means heriots, and all suits and services for which distress lies, annuities and periodical sums charged on land (except moduses and compositions belonging to such sole corporations as above).

Person through whom another claims,—means the person, by, through, under, or by the act of whom, the claimant is entitled, as heir, issue in tail, tenant by courtesy and in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and any person entitled to an estate or interest to which the claimant became entitled as lord by escheat.

Person,—means any body politic, corporate, or collegiate, or a class of creditors, or other persons, as well as an individual; and every word importing the singular number shall extend to several persons or things as well as one; and every word importing the masculine gender only, shall extend to a female as well as a male.

Sect. 2. *No land or rent to be recovered but within twenty years after the right of action accrued to the claimant or some person whose estate he claims.*] “After the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or

“If such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.”

Sect. 3. *When the right shall be deemed to have accrued.*] “The right to make an entry or distress or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say:

“When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of

such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

“When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, *then* such right shall be deemed to have first accrued at the time of such death.

“When the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, *then* such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

“When the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, *then* such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

“When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, *then* such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.”

Sect. 4. Where advantage of forfeiture is not taken by reversioner or remainder-man, he shall have a new right when his estate comes into possession.] When any right to make an entry, &c., by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry, &c., shall be deemed to have first accrued when the estate or interest shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

Sect. 5. Reversioner to have a new right.] A right to make an entry, &c., shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate in respect of which the land shall have been held, or the rent received, notwithstanding the person claiming such land, shall, at any time previously to the creation of the estate which shall have determined, have been in possession, or in receipt of such rent.

Sect. 6. Relation of letters of administration.] For the purposes of the act, an administrator, claiming the estate or interest of the deceased, shall be deemed to claim as if there had been no interval of time between the death and the grant of the letters of administration.

Sect. 7. In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year from its commencement.] When any person shall be in possession, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto to make an entry, &c., shall be deemed to have first accrued either at the termination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Sect. 8. No person after a tenancy from year to year, to have any right but from the end of the first year or last payment of rent.] When any person shall be in possession, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto to make an entry, &c., shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

Sect. 9. Where rent amounting to 20s., reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.] When any person shall be in possession, or in receipt of any rent, by virtue of a lease in writing, by which a rent of twenty shillings or upwards shall be reserved, and the rent reserved shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, to make an entry, &c., after the determination of the lease, shall be deemed to have first accrued at the time at which the rent reserved was first so received by the person so wrongfully claiming; and no such right shall be deemed to have first accrued upon the determination of the lease to the person rightfully entitled.

Sect. 10. Mere entry not to be equivalent to possession.] “No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.”

Sect. 11. Continual claim.] “No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action.”

Sect. 12. Possession by co-tenants.] Possession or receipt of more than his share by one co-parcener, joint tenant, or tenant in common, for his own benefit or that of a third person, shall not be deemed to be the possession, &c., of his co-parceners, &c.

Sect. 13. Possession of younger brother.] Possession or receipt by a younger brother or relation of an heir shall not be deemed to be the possession or receipt by the heir.

Sect. 14. Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.] When any acknowledgment of the title of the person entitled shall have been

given to him or his agent in writing, signed by the person in possession or in receipt of the profits or rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed to have been the possession or receipt of or by the persons to whom such acknowledgment shall have been given, and the right of such last-mentioned person to make an entry or distress, or bring an action, shall be deemed to have first accrued at the time at which such acknowledgment, or the last of such acknowledgments, was given.

Sect. 15. Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.] When no such acknowledgment shall have been given before the passing of this act, and the possession or receipt of the profits or the rent, shall not at the time of passing of this act (*i. e.*, on 24th July, 1833) have been adverse to the right or title of the person claiming to be entitled thereto, then such person may, notwithstanding the period of twenty years shall have expired, make an entry or distress or bring an action at any time within five years next after the passing of this act.

Sect. 16. Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the termination of their disability or death.] If at the time at which the right of any person to make an entry, &c., shall have first accrued, such person shall have been under any of the following disabilities, that is to say, infancy, coverture, idiotey, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years shall have expired, make an entry, &c., at any time within ten years next after the time at which the person to whom such right first accrued shall have ceased to be under any such disability, or shall have died (which shall have first happened).

Sect. 17. Entry, &c., to be within forty years at all events.] The entry, distress, or action shall be made or brought at all events within forty years after the right accrued, although the disability may have continued during the whole of that time, or the ten years from the termination of the disability or death shall not have expired.

Sect. 18. Allowance for a second disability limited.] When any persons shall be under any of the above disabilities at the time at which his right first accrued, and shall die under such disability, no time beyond the period of twenty years next after the right first accrued, or the period of ten years next after his death, shall be allowed by reason of any disability of any other person.

Sect. 19. Meaning of "beyond seas."] No part of the United Kingdom, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent, shall be deemed to be beyond the seas within the meaning of the act.

Sect. 20. When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.] When the right of any person to an estate or interest in possession shall have been barred by the determination of the period limited in such case, and he shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in the same land, &c., no entry, &c., shall be made by him, or any person claiming through him, in respect

of such other estate, &c., unless in the meantime such land, &c., shall have been recovered by some person entitled to an estate, limited or taking effect after, or in defeasance of, the estate or interest in possession.

Sect. 21. Effect of barring estate tail.] When a tenant in tail is barred by this statute, all persons, whose estate he might have barred, are also precluded from their entry, distress, or action.

Sect. 22. Possession adverse to a tenant in tail shall run on against the remainder-man whom he might have barred.] When a tenant in tail, entitled to recover the land, shall have died before the expiration of the period applicable to such case, no person claiming any estate which such tenant in tail might lawfully have barred, shall make an entry, &c., but within the period during which, if such tenant in tail had continued to live, he might have made such entry, &c.

Sect. 23. Where there shall have been possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.] When a tenant in tail shall have made an assurance, which shall not operate to bar an estate to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, be in possession of such land, &c., and the same person, or any other person whatsoever (other than some person entitled to such possession in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue in such possession for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, would, without the consent of any other person, have operated to bar such estate, then at the expiration of such period of twenty years the assurance shall be effectual against any person claiming any estate, &c., to take effect after or in defeasance of the estate tail.

Sect. 29. Ecclesiastical, &c., corporations.] No lands or rents are to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumbencies and six years after a third appointment or sixty years.

Sect 34. The right of the party out of possession extinguished.] At the determination of the period limited by the act for making an entry or distress, or bringing an action, the right and title to the land, rent, or advowson, for the recovery whereof an entry, distress, or action might have been made or brought within such period, shall be extinguished.

Sect. 35. Receipt of rent to be deemed receipt of profits.] "The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."

Sect. 39. Entry not to be tolled by descent, &c.] No descent cast, discontinuance, or warranty, after the 31st December, 1833, shall toll or defeat any right of entry or action.

The cases under the different sections of the above act are arranged, as far as possible, in the order of the sections; *post*, pp. 671-4.

Cases on the old stat. 21 Jac. 1, c. 16.] This statute, though not

repealed by the later act, 3 & 4 Wm. 4, c. 27, is superseded by it in all cases coming within its operation. In order to render the Statute of Limitations, 21 Jac. 1, a bar in ejectment, the defendant must have proved an adverse possession for twenty years. The words "*adverse possession*" are not in the statute; but the doctrine is a consequence of it. The statute forbids an entry, except within twenty years after the right first accrued: If, therefore, the person out of possession has by contract or otherwise precluded himself from entry, the statute does not apply. So also it cannot apply where the party already has actual or constructive possession; Hence it only operates as a bar where a party is in possession without the consent or contract of the person entitled to a present right of entry. The possession was not adverse in the following cases:—

Where the possession of the occupier is the possession of the plaintiff: as, formerly, where a younger son entered by abatement on the death of his father and died seised, this possession was not adverse to the title of his elder brother; *Litt. s. 396*. So the possession of one co-parcener, joint-tenant, or tenant in common, was not adverse to the title of his co-tenant; *Ford v. Grey*, 6 Mod. 44; *Doe v. Hulse*, 3 B. & C. 757; unless there had been an actual ouster of the co-tenant; and thirty-six years sole and uninterrupted possession by one tenant in common, without an accounting to or demand by the other, was held sufficient ground for presuming actual ouster; *Doe v. Prosser*, Cowp. 217. But the law seems to be now altered in all these instances by the late statute; sections 12 and 13, *ante*, p. 667.

There is no adverse possession where the estate of the party in possession and that of the plaintiff form parts of one and the same estate. Thus the possession of the particular tenant is never adverse to the title of him in remainder or reversion; *Taylor v. Horde*, 1 Burr. 60. See also *Doe v. Brightwen*, 10 East, 583. Where the relation of landlord and tenant can be implied, the statute will not run; *Doe v. Ferrars*, 2 B. & P. 542; nor where the party in possession is tenant at sufferance; *Doe v. Hull*, 2 D. & R. 38.

There is no adverse possession where the relation of trustee and cestui que trust subsists between the parties; *Keene v. Deardon*, 8 East, 248. Nor between mortgagor and mortgagee, unless there be a renunciation or other adverse holding commenced by the mortgagor; *Hall v. Doe*, 5 B. & A. 687; *Doe v. Williams*, 5 Ad. & E. 291, 296.

The vendee of land who is let into possession, but has never completed the purchase, has no adverse possession as against his vendor; *Doe v. Edgar*, 2 N. C. 498; unless he refuses to give up possession or to pay interest on the purchase-money; *per Tindal, C. J., S. C., Id.* 502, 503; and see *Doe v. Millett*, 11 Q. B. 1036. Upon the expiration of a lease for lives the lessor granted another lease; at this time W. was in possession, and continued so for twenty years without paying rent, claiming to hold under the first lease on the ground that it was still subsisting: held that his possession under such claim was not adverse; *R. v. Azbridge*, 2 Ad. & E. 520. Where a jointress for life married again and joined her second husband in levying a fine, and he survived her and held the land twenty years, this was held a bar to ejectment by the reversioner, though the fine was void; *Doe v. Gregory*, 2 Ad. & E. 14.

While this act was in operation, it was held that if a cottage be built on the lord's waste in defiance of him, twenty years' undisturbed possession of such cottage will be a bar to him. But if built at first

with the lord's permission, or if any acknowledgment has been since made, the statute will not run; *Doe v. Wilkinson*, 3 B. & C. 413; *Doe v. Clark*, 8 B. & C. 717. Where acts are set up as evidence of adverse possession, it may be a question for the jury whether they were not mere trespasses, and not done in assertion of any supposed right; *Doe v. Roberts*, 13 M. & W. 520, 533. See further, as to adverse possession, the notes to *Nepean v. Doe*, and *Taylor v. Horde*, 2 Sm. L. C. pp. 577-585, 5th edit.

When the statute has once begun to run, no subsequent disability will stop its operation. It was held that the saving clause, sect. 2, only extended to the persons to whom the right first descended; *Doe v. Jones*, 4 T. R. 300. And it was held in *Doe v. Jesson*, 6 East, 80, that the word *death*, in the saving clause of the statute, referred to the death of the person to whom the right first accrued, and who died under disability, and that the heir, though under disability, must enter within ten years from that time; but in a later case the Court of C. P. seemed to be of opinion that the heir had ten years after his own disability ceased; *Cotterell v. Dutton*, 4 Taunt. 830; and this is said to be the construction invariably adopted in practice; *Sugd. V. & P.* 334. The 16th and 18th sections of the 3 & 4 Wm. 4, c. 27, *ante*, p. 668, have put an end to these doubts, on the present statute.

Cases on stat. 3 & 4 Wm. c. 27.] It has been decided that the 2nd and 3rd sections of this act (which came into operation 1st January, 1834) have done away with the doctrine of non-adverse possession, and, except in cases falling within the 15th section, the question now is, whether twenty years have elapsed since the right accrued, whatever be the nature of the possession; *Nepean v. Doe*, 2 M. & W. 894; *Cullen v. Doe*, 11 Ad. & E. 1008. And the effect of the act is not merely to bar the remedy, but to bind and transfer the estate; *Scott v. Nixon*, 3 Dru. & War. 388, and re-entry will no longer operate as a remitter; *Brassington v. Llewellyn*, 27 L. J. (Ex.) 297. This however seems to be its effect only in favour either of one person who has held for the requisite period, or of a succession of persons claiming under the first wrongful possessor. Thus where an occupier held without payment of rent for nineteen years, and died leaving an heir, and his widow continued in occupation for thirteen more, it was held she could not bring ejectment upon such a title, because she had neither held for twenty years, nor derived under one who had so held; the possession of the husband *per se* being evidence of a seisin in fee which descended to his heir; *Doe v. Barnard*, 13 Q. B. 945. See also *Dixon v. Gayfere*, 17 Beav. 421; 23 L. J. (Ch.) 60. But this title was held sufficient as a defence to an ejectment, on the ground that the right of entry had accrued to the lessor of the plaintiff more than twenty years before; *Doe v. Carter*, 9 Q. B. 863.

The discontinuance of possession mentioned in sect. 3, is the abandonment of possession by one entitled to the possession, *Rimington v. Cannon*, 12 C. B. 18; 22 L. J. (C. P.) 153; followed by actual possession by another; *M'Donnell v. M'Kinty*, 10 Irish Law Rep. 514; *Smith v. Lloyd*, 9 Ex. 562; 23 L. J. (Ex.) 194. Possession of the surface is *prima facie* possession also of the minerals beneath it, where they are not dissevered in title; and therefore if a person in possession of the former as tenant, there being no exception of the mines, obtain a lease of the latter, he will be sufficiently in pos-

session to prevent the 3rd clause applying, and the statute will not begin to run until an ouster of the possession of the surface, although he may never have entered or worked the mines; *Keyse v. Powell*, 2 E. & B. 132; 22 L. J. (Q. B.) 305. But if they are discovered in title, the possession of the surface by the party entitled to it is not such a possession of the mines as to amount to a dispossession of, or discontinuance of possession of them by the real owner within the definition given above; *Smith v. Lloyd*, *supra*.

The word "rent" in sect. 2, means rent distinct from the land, as rent-charges, &c., and not rent reserved on a demise; *Grant v. Ellis*, 9 M. & W. 113. So the statute (though it includes tithes (sec. 1)) does not prevent the tithe owner from recovering tithes, as chattels, from the occupier, though there has been no perception for twenty years; but it is confined to adverse claims to the estate in the tithes; *Dean of Ely v. Cash*, 15 M. & W. 617. The application of sect. 2 is not restrained by sect. 3 to the cases there enumerated; the object of the latter section being to explain the construction of the 2nd in certain cases in which doubts might occur; *per curiam*, *James v. Salter*, 3 N. C. 553. A rent-charge created by will, if there has been no payment, must be enforced within twenty years from the death of the testator; *S. C.* So the right to rent within section 2 is extinguished under sections 3 and 34 by the lapse of twenty years from the last payment, although twenty years have not elapsed since the first rent unpaid became due; *De Beauvoir v. Owen*, 5 Ex. 166; 19 L. J. (Ex.) 177.

A lessor may recover in ejectment within twenty years after the determination of the lease, though he has received no rent for twenty years and upwards before such expiration, if it has not been received by any other person; his claim in such a case being of an estate in reversion within the meaning of sect. 3; *Doe v. Ozenham*, 7 M. & W. 131. But if the rent has been received by some other person not entitled to it, the lessor cannot recover, being barred by the 9th section; *Doe v. Angell*, 9 Q. B. 328; and this section applies where the rent has been received by a person not entitled to it before the act passed; *S. C.*

Section 3 was not intended to apply to the case of persons standing in the relation of trustee and *cestui que trust*; and where the latter is in possession, there is no right of entry in the trustee under s. 2, until the tenancy at will of *cestui que trust* has been determined; *Garrard v. Tuck*, 8 C. B. 231; where *Doe v. Phillips*, 10 Q. B. 130, is questioned.

The proviso in sect. 7 has been said to apply only to express trusts; see *Doe v. Rock*, Car. & M. 549; 4 M. & G. 30. If the *cestui que trust* is merely allowed to receive the rents, or otherwise manage the property, he is but a bailiff of the trustee, and the occupation under these circumstances of any other person for more than twenty years without payment of rent will bar the trustee; *Melling v. Leak*, 16 C. B. 652; 24 L. J. (C. P.) 187. In *Doe v. Turner*, 7 M. & W. 226, it was laid down that if, after a determination of a tenancy at will, the tenant continued in possession as mere tenant at sufferance, and not as tenant at will under a new tenancy, the time would run from the end of the first year of the original tenancy at will; but the Court of Exchequer Chamber declined giving any opinion on the point; 9 M. & W. 643. In *Randall v. Stevens*, 2 E. & B. 641; 23 L. J. (Q. B.) 68, a tenancy at will was determined within twenty-one years of its commencement, by actually

turning the tenant out of possession, and the tenant immediately resumed and thenceforward continued in possession, without any fresh tenancy being created; and it was held that the landlord had a right of entry within twenty-one years of this resumption of occupation by the tenant, although after twenty-years from the commencement of the tenancy at will. So where the defendant, being tenant at will of a house and land, was served with a notice of ejectment by the landlord, but was afterwards permitted to retain the house and part of the land for his life, the landlord taking possession of the other part; it was held that as there was an actual entry, and a new tenancy at will was created, the twenty-one years was to be reckoned from that time; *Locke v. Matthews*, 32 *L. J. (C. P.)* 98; 13 *C. B.*, *N. S.* 753. In the last two cases the Courts considered the doctrine of *Doe v. Turner*, 7 *M. & W.* 226, *supra*, might be questionable in a court of error. See the cases discussed in the notes to *Nepean v. Doe*, 2 *Sm. L. C.* 602—6. But a mere symbolical possession, by telling the family of the occupier that the claimant takes possession, and by carrying away a stone from a cottage, is a mere entry under sect. 10, and will not revert possession in the party entitled; *Doe v. Coombes*, 9 *C. B.* 714; 19 *L. J. (C. P.)* 306. The absence of the head of the family at the time was adverted to in the judgment.

As to proof of tenancy at will under sect. 7, see *Ley v. Peter*, 27 *L. J. (Ex.)* 239; 3 *H. & N.* 101.

The 7th section does not apply to tenancies determined before the passing of the act; *Doe v. Page*, 5 *Q. B.* 767; *Doe v. Bold*, 11 *Q. B.* 127; but only to those created subsequently, or in existence at that time; *Doe v. Moore*, 9 *Q. B.* 555.

A reserved service of cleaning a church or ringing a bell is a "rent" within sect. 8 of the act, as a distress might be made for it; *Doe v. Benham*, 7 *Q. B.* 976. Proof of payment of rent to the lessor of the plaintiff by A. while in occupation within twenty years, and an admission by the defendant that he held under A., is a sufficient payment within sect. 8; *Doe v. Beckett*, 4 *Q. B.* 601. A statement by A., since deceased, while in occupation of property in W., "I have no property in W. but what I hold of Lord S., and for which I pay 100*l.*," is evidence of payment of rent at that time, so as to bring the case within sect. 8, and is not a mere acknowledgment of title, which must be in writing under sect. 14; *S. C.* The lease in writing mentioned in this section must be an instrument passing an interest, and not a mere written instrument showing the terms of the holding; *Doe v. Gower*, 17 *Q. B.* 589; 21 *L. J. (Q. B.)* 57.

By sect. 12, for the purposes of the act, the possession of one tenant in common ceased to be that of the others from the commencement of the tenancy, and not merely from the passing of the act; *Culley v. Doe*, 11 *Ad. & E.* 1008; *Doe v. Horrocks*, 1 *C. & K.* 566; (by the court in banc); and see *Tidball v. James*, 29 *L. J. (Ex.)* 91.

D. mortgaged in fee to J., subject to a proviso of cesser on payment at a day more than twenty years before the statute. Within twenty years before the statute, D. acknowledged that the money was unpaid. On ejectment by J.'s heir within five years after the passing of the act, the jury found the money unpaid. Held, that the action was not barred by sect. 2; D.'s possession not being adverse at the passing of the act (see sect. 15), though the lessor of plaintiff was not shown to have been in possession, or to have received rent or interest; *Doe v. Williams*, 5 *Ad. & E.* 291; see also *Doe v.*

Thompson, Id. 532. In consequence of some doubts intimated in *Doe v. Williams, supra*, it has been since declared by 7 Wm. 4 & 1 Vict. c. 28, that persons entitled to or claiming under any mortgage, may make an entry or bring actions to recover the land at any time within twenty years next after the last payment of any part of the principal or interest secured, though more than twenty years may have elapsed since the right of entry and action first accrued. This act enables a mortgagee to recover where the mortgagor would himself be barred by the statute, provided that he was not barred at the time of making the mortgage; *Doe v. Eyre*, 17 Q. B. 366; 20 L. J. (Q. B.) 431. Thus, when a tenant was let into possession within twenty years before a mortgage, and paid no rent for twenty-five years after the mortgage, but the mortgagor had paid interest within twenty years, the mortgagee was not barred; *S. C.*; *Ford v. Ager*, 32 L. J. (Ex.) 269; 2 H. & C. 279. And a mortgagee may by sale, either under a power or by direction of the mortgagor, convey all the rights which he possesses to a purchaser, who will then be a person claiming under a mortgage, and entitled to the same time for bringing actions as the mortgagee was entitled to at the time of the sale; *Doe v. Massey*, 17 Q. B. 373; 20 L. J. (Q. B.) 434; *Ford v. Ager, supra*.

As under the old act (*Doe v. Jones*, 4 T. R. 300, 310), when the statute has once begun to run, no subsequent disability will prevent its continuing to run; *Goodall v. Skerratt, infra*. A feme sole, seised in fee, married, and she and her husband quitted possession of the land. Both died at times not shown to be within forty years from the ceasing to occupy. The wife's heir brought ejectment within twenty years of the husband's death, and within five years of the passing of the statute, but more than forty years after she and her husband had left the land. Held, that the heir was barred by the 17th section, though it did not appear how the defendant came into possession, or that the wife had levied any fine; *Doe v. Bramston*, 3 Ad. & E. 63.

The 3 & 4 W. 4, c. 27, came into operation in a colony in 1837. In 1830 A. died seised of land in the colony; B., his heir, was then beyond seas, and so died in 1835; C., the heir of A. and B., was also beyond seas in 1830, and did not come to the colony till 1856, when he brought ejectment: it was held that the operation of sects. 2, 16, and 18 was retrospective, and that C. was barred; *Devine v. Holloway*, 14 Moo. P. C. 290.

Wherever the tenant in tail is barred by the statute, the issue in tail is also barred under sect. 21; *Austin v. Llewellyn*, 9 Ex. 276; 23 L. J. (Ex.) 11. Sects. 21 and 22 include time elapsed before the statute passed, and since the right accrued; and where the statute has once begun to run, no disability in any remainder-man will prevent its continuing to run; *Goodall v. Skerratt*, 3 Drew. 216; 24 L. J. (Ch.) 323; but as it does not run against any but those entitled to the possession (*vide supra*), if a tenant in tail make a feoffment in fee or other conveyance which prevents his own entry, but does not bar the estate tail or remainders, the right of entry will first accrue, and therefore the statute will first begin to run, on his death; *Rimington v. Cannon*, 12 C. B. 18, cited *supra*, p. 671, and see *Goodall v. Skerratt, supra*.

The effect of a writing as an acknowledgment under section 14, is for the judge, and not for the jury; *Doe v. Edmonds*, 6 M. & W. 295. Letters containing an admission of rent due, written to the claimant's attorney, are a sufficient acknowledgment; *Fursdon v.*

Clogg, 10 M. & W. 572. By indenture, dated the 27th of October, 1827, between the defendant and the plaintiff, after reciting that certain copyhold premises were surrendered "this day" to the plaintiff for securing the repayment of 300*l.*, by him "this day" lent to the defendant, the plaintiff covenanted, on repayment of that sum, and interest, on the 27th of April, 1828, to surrender the premises to the defendant, and the defendant covenanted to pay the 300*l.* and interest at the time appointed for payment: there was also a stipulation that, in default of payment, the plaintiff might take possession of the premises. The deed was, in fact, executed on the 23rd of August, 1834. No principal, interest, or rent had ever been paid by the defendant. In February, 1854, the plaintiff brought ejectment. Held, that the deed was a sufficient acknowledgment within s. 14 of the plaintiff's title at the time of the execution of the deed, and consequently the right of entry was not barred; *Jayne v. Hughes*, 10 Ex. 430; 24 L. J. (Ex.) 115. An answer to a bill in chancery, filed by the plaintiff in ejectment, by a person, through whom the defendant claims, admitting that he holds under the plaintiff, is an acknowledgment within the 14th section; *Goode v. Job*, 1 E. & E. 6; 28 L. J. (Q. B.) 1. The signature must be that of the party in possession or receipt of rents, and not that of an agent; *Ley v. Peter*, 3 H. & N. 101; 27 L. J. (Ex.) 239.

ACTION OF REPLEVIN.

Replevin lies for goods unlawfully taken, as on an allegation that they belonged to and had been stolen from the person taking them; the remedy is not confined to goods taken by way of distress; *Mellor v. Leather*, 1 E. & B. 619; 22 L. J. (M. C.) 76.

In some cases of distress the defendant is allowed by statute to plead not guilty, or, in a general form, that the matter complained of was done under the authority of an act of Parliament, and to give the special matter in evidence under such general plea; as by 43 Eliz. c. 2, s. 19, in the case of poor rates, and by 23 Hen. 8, c. 5, s. 11, as to sewers rates; 1 Wms. Saund. 347 c. (n).

Evidence on non cepit, or cepit in alio loco.] The plea of *non cepit*, that the defendant did not take the cattle, &c., is termed the general issue in replevin. The proof lies upon the plaintiff on this issue, and it is sufficient for him to show that the defendant had the goods in his possession in the place alleged; for the wrongful taking is continued in every place in which he afterwards detained them; *Walton v. Kersop*, 2 Wils. 354. The place in which goods are alleged in the declaration to have been taken is material; *Weston v. Carter*, 1 Sid. 9; 1 Wms. Saund. 347 (n). If in fact the defendant neither took the cattle in the place named, nor had them there afterwards, the plaintiff must fail; but the defendant is not entitled to a return, or to damages under 7 Hen. 8, c. 4, and 21 Hen. 8, c. 19, unless he pleads *cepit in alio loco*, and adds an avowry by way of suggestion; *Potter v. North*, 1 Wms. Saund. 347 (n); and the avowry, so added, is not traversable; *Id.* *Non cepit* does not put in issue the plaintiff's property; *Dover v. Rawlings*, 2 M. & Rob. 544. Upon an issue joined on *non-cepit*,

defendant may show, under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 133, that he was a constable appointed for a borough, and took the goods, under sect. 76, within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen; *Mellor v. Leather*, 1 E. & B. 619; 27 L. J. (M. C.) 76.

Property in defendant or a stranger.] The defendant may set up the right of a third person, or of himself to the property in the goods; for he has a right of possession against all but the right owner at the time of replevying; *Bro. Replevin*, pl. 31; *Butcher v. Porter*, 1 Salk. 94. And the plaintiff on this issue may prove property in part of the goods; *Com. Dig. Pleader*, 3 K. 12; in which case the issue will be divisible. The defendant, who has a verdict on this plea, will have a return without other avowry or cognizance; *Butcher v. Porter*, *supra*; *Salkill v. Shelton*, 2 Rolle, 64.

Avowry for rent.] When the distress is for rent, it is enacted by 17 Car. 2, c. 7, s. 2, that, in case the plaintiff should be nonsuited after cognizance or avowry made and issue joined, or if a verdict shall be given against him, then the jurors, impanelled or returned to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the *sum of the arrears*, and the *value of the goods or cattle distrained*; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, &c. The avowant, therefore, must be prepared to prove both the amount of the rent in arrear and the value of the goods or cattle taken; and the omission of this inquiry cannot be supplied by a writ of inquiry; *Sheape v. Culpeper*, 1 Lev. 255; 1 Wms. Saund. 195 b (n); though the defendant may still have the common law judgment for a return; *Rees v. Morgan*, 3 T. R. 319. In all cases, except avowries for rent, the omission may be supplied by writ of inquiry; 1 Wms. Saund. 195 c (n).

Since the 11 Geo. 2, c. 19, s. 22, which enables an avowry or cognizance to be made in general terms, under an avowry for rent, the defendant may recover for so much as he proves due without regard to the amount that he avowed for; *Harrison v. Barnby*, 5 T. R. 248; *Forty v. Imber*, 6 East. 434; but the rent recovered must be parcel of that avowed for, and the defendant cannot under an avowry for double rent for holding over recover the single rent; *Johnstone v. Hudleston*, 4 B. & C. 938; and in *Roskrug v. Caddy*; 7 Ex. 840, 22 L. J. (Ex.) 16, it seems to have been held that under an avowry for rent due for a specific year, none of which was due, the defendant was not entitled to recover for part of the rent for the previous year.

Where a separate rent is due on closes A. and B. from the same tenant to one landlord, and he takes one joint distress over both closes, he may avow separately for the rent due on each; and the facts afford no answer to such avowries; *Phillips v. Whitsed*, 29 L. J. (Q. B.) 164; 2 E. & E. 804.

Avowry for distress after the end of lease, and on goods fraudulently removed.] A distress after the end of the lease, under 8 Anne, c. 14, or on goods fraudulently removed, under that statute, or 11 Geo. 2, c. 19, must be specially pleaded, and cannot be shown under the general

form of avowry; 2 *Wms. Saund.* 284 c (n); *Williams v. Stiven*, 9 Q. B. 14; 15 *L. J. (Q. B.)* 321; see *Williams v. Roberts*, 7 *Ex.* 618. In order to justify a seizure of goods off the demised premises, as fraudulently removed to avoid a distress, under the 8 Anne, c. 14, or 11 Geo. 2, c. 19, s. 1, the rent must have been due at the time of removal; *Rand v. Vaughan*, 1 *N. C.* 767. But if due, it need not be in arrear; and where a tenant, on the morning of a quarter-day, fraudulently removed his goods with intent to avoid a distress for the rent which became due on that day; and the landlord the next day followed and seized the goods as a distress; it was held that the seizure was justified under the statutes; *Dibble v. Bowater*, 2 *E. & B.* 564; 22 *L. J. (Q. B.)* 396. In that case the majority of the court distinguished *Rand v. Vaughan*; but Crompton, J., dissented on the ground that the cases were not distinguishable, but he declined to give an opinion as to what ought to be the construction put upon the statutes in a court of error. The words of the statutes are "fraudulently or clandestinely," the removal therefore need not be secret if it be fraudulent; and if the effect of the removal is to leave no sufficient distress on the premises, so that the landlord has only his barren remedy by action; it would seem that the removal is within the act; *Opperman v. Smith*, 4 *D. & R.* 33; *Parry v. Duncan*, 7 *Bing.* 243; *Mood. & M.* 533. But fraud is a question for the jury; and even where the tenant admits that he removed to avoid a distress, it is a question for the jury whether there was fraud; *John v. Jenkins*, 1 *C. & M.* 227; but the facts of that case were very peculiar; there being a *bonâ fide* question between the parties whether there was any tenancy existing between them, and if so, on what terms. By sect. 2 of the act of Geo. 2 the landlord cannot seize the goods if they have passed to a *bonâ fide* purchaser for value; and the first section applies only to the goods of the tenant himself, and not to those of a stranger or a lodger; *Thornton v. Adams*, 5 *M. & S.* 38; *Postman v. Harrell*, 6 *C. & P.* 226. Where a tenant became bankrupt, and the assignees for two days after their appointment allowed three cows, which had belonged to the bankrupt, to remain and be milked on the premises, and then removed them; it was held that the landlord might follow and distrain the cows for rent due before the bankruptcy; *Welch v. Myers*, 4 *Camp.* 368.

By the 8 Anne, c. 14, ss. 6 and 7, a landlord may distrain within six months after the determination of the tenancy, provided his reversion remain, and it be during the possession of the tenant from whom the rent became due. Where the tenant died during the term, and his executor entered and occupied until after the expiration of the term, it was held that the landlord might distrain for the rent of the whole term; *Braithwaite v. Cooksey*, 1 *H. Bl.* 465; but where the deceased was tenant at will, and his widow (who afterwards became administratrix) remained in possession, it was held that the landlord could not distrain for rent due before the death; *Turner v. Barnes*, 31 *L. J. (Q. B.)* 170; 2 *B. & S.* 435; and he could not have distrained if she had been administratrix at the time of the distress; *S. C.* The holding over need not be tortious; and where the landlord permits the tenant to hold over part of the premises, he may distrain on that part for the arrears of rent due over the whole; *Nuttall v. Staunton*, 4 *B. & C.* 51. There must be possession by the same tenant, and if a fresh tenant has come in, and the old tenant has left some pigs behind, they cannot be distrained under the statute; *Taylorson v. Peters*, 7 *Ad. & E.* 110.

Evidence on a plea of non demisit, or non tenuit.] If to an avowry for rent in arrear the plaintiff pleads *non demisit* or *non tenuit*, the defendant must prove the tenancy as stated in his avowry. He must prove a *demise* at a fixed rent; and therefore if he shows what only amounts to an *agreement* for a lease it is insufficient; *Dunk v. Hunter*, 5 B. & A. 322; *Hayward v. Haswell*, 6 Ad. & E. 265. But though the plaintiff enters upon the land under an agreement for a lease in which the amount of the rent is not stated, yet if he occupies and pays yearly rent, he becomes tenant from year to year at that rent, and is liable to a distress, and an avowry, stating the terms of the tenancy accordingly, will be sufficient; *Knight v. Benett*, 3 Bing. 361. So if, entering under an agreement, the rent being named, he acknowledges a specific sum as half a year's rent to be due, although he has paid none; *Cox v. Bent*, 5 Bing. 185. But unless a person, entering under an agreement for a lease, pays the rent, or promises to pay a rent certain, or to settle a rent certain in account, no demise at a rent certain can be implied so as to entitle the landlord to distrain; *Regnart v. Porter*, 7 Bing. 451. But if the amount of rent be named and there be a clause in the agreement, that until the lease be prepared he shall hold on the stipulated terms, on entry he becomes tenant at will on these terms, and is liable to be distrained on when rent becomes due; *Anderson v. Midland Ry. Co.*, 30 L. J. (Q. B.) 94. Where a person enters under a lease for a period exceeding three years, void under the 8 & 9 Vict. c. 106, s. 3, as not being made by deed, and the receipt given to him for rent, which he had paid for two years, but not in advance, stated the rent to be payable in advance, such being the terms of the intended lease: Held, that he became a yearly tenant on the terms of paying the rent in advance; *Lee v. Smith*, 9 Ex. 662; 23 L. J. (Ex.) 198. So where the purchaser entered under an agreement that until completion of the purchase, he should pay and allow to the vendor at the rate of 100*l.* per annum by half-yearly payments; that was held to constitute the relation of landlord and tenant at a fixed rent; *Saunders v. Musgrave*, 6 B. & C. 524; see *ante*, p. 624. A tenant holding over after notice to quit given by the landlord, but not paying rent, is not liable to a distress in respect of the subsequent occupation, for no new tenancy is created; *Jenner v. Clegg*, 1 Moo. & Rob. 213.

An attornment by a tenant of land to a receiver appointed by the Court of Chancery to collect the rents, and payment of rent to such receiver, create a tenancy by estoppel between the tenant and receiver, but do not operate to enable the person who is found ultimately to have the legal title to the land to treat the tenant as his tenant, and to distrain for rent; *Evans v. Matthias*, 7 E. & B. 590; 26 L. J. (Q. B.) 309. The plaintiff paid rent to A. as agent for W. and B., trustees of C., receiving receipts "For the trustees of C.," the legal estate was assigned without the plaintiff's knowledge to W. and N., and he continued to pay rent to A., and received receipts as before, A. paying over the rent to W. and N. W. and N. having distrained, proved all the above facts, except the assignment to them: Held, that there was some evidence of title in W. and N., as against the plaintiff, to support an avowry for rent; *Hitchings v. Thompson*, 5 Ex. 50; 19 L. J. (Ex.) 146. See further, as to the creation of a tenancy, *ante*, pp. 624 *et seqq.*

Although the 11 Geo. 2, c. 19, s. 22, enables the defendant to avow without setting out all the particulars of title, still the terms

of the tenancy must be proved as laid; therefore, if the rent reserved is higher than the rent stated, it is a variance; for the contract must be truly stated; *Brown v. Sayce*, 4 Taunt. 320. So where the defendant avowed for an entire rent of 170*l.*, and it appeared that he had only two-thirds of that rent as tenant in common of the reversion with another not named in the avowry, it was held a fatal variance on *non tenuit*; *Philpott v. Dobbinson*, 6 Bing. 104. But in replevin against the assignee of the reversion of part, it was held that the defendant might avow specially, and leave the jury to apportion, or might avow generally as for a certain rent, in which case the judge might amend either by directing the amount to be altered, or the avowry to be converted into a special one; *Roberts v. Snell*, 1 M. & G. 577. Where the defendant avowed for taking growing corn in four closes, and stated that the plaintiff held the closes in which, &c., at a yearly rent, and it appeared that he also held two other closes at that rent, this was decided to be no variance; for every part of the land was liable to the whole rent; *Hargrave v. Shewin*, 6 B. & C. 34; and see *Page v. Chuck*, 10 B. Moore, 264. If the defendant avows under a lease, reserving rent payable at Martinmas, this means *New Martinmas*; and if it appears that it is in fact payable at *Old Martinmas*, it is a variance, though amendable; *Smith v. Walton*, 8 Bing. 235. A letting "at 120*l.* a year," determinable by "six months' notice at any quarter," does not make a quarterly, but a yearly reservation; *Collett v. Curling*, 10 Q. B. 785. A lease at a rent of 40*l.*, with a covenant to make an allowance out of it of 5*l.*, payable to third persons, should be alleged as a lease at a rent of 40*l.*; *Davies v. Stacey*, 12 Ad. & E. 506. Where there were pleas of *non tenuit* and tender, proof of a tender by plaintiff of "a year's rent" in November, without stating, at the time, when it became due or the terms of the holding, is no proof, *per se*, of a holding from Michaelmas to Michaelmas as stated in the avowry; *Knight v. M'Douall*, 12 Ad. & E. 438.

As the plea of *nil habuit in tenementis* is a bad plea to an avowry for rent in arrear (*Sullivan v. Stradling*, 2 Wils. 208), the plaintiff is not allowed to give in evidence, under *non demisit* or *non tenuit*, any matter amounting to *nil habuit in tenementis*, even though the title of the avowant be founded in fraud; *Parry v. House*, *Holt*, N. P. 489; for a tenant cannot be allowed to dispute the title of his landlord; *ante*, pp. 162, 168, and 621. On this principle, where the plaintiff in replevin came into the occupation of premises under a person who had submitted to a distress by the defendant, it was held, that he could not dispute the title of the defendant, though the latter had put in evidence a deed which showed that the plaintiff's predecessor occupied under a lease to which the defendant was a stranger; *Cooper v. Blandy*, 1 N. C. 45. So where the plaintiff, being put into possession by A., was afterwards told *bond fide* by A. that the defendant was entitled, and thereupon paid defendant his rent, the plaintiff cannot afterwards, upon *non tenuit*, set up the title of a third person who has taken no steps to eject him; *Hall v. Butler*, 10 Ad. & E. 204. But where the plaintiff came in under another person and not under the defendant, and had paid rent to the defendant in ignorance of a defect in his title, it was held that the plaintiff might show his want of title; *Rogers v. Pitcher*, 6 Taunt, 202; *Gregory v. Doidge*, 3 Bing. 474; *Claridge v. Mackenzie*, 4 M. & G. 143. So a payment or acknowledgment made under the influence of a fraudulent or false

representation will not estop the tenant; *Doe v. Brown*, 7 *Ad. & E.* 447. So a payment on a mistaken supposition that the claimant was personal representative of the tenant's deceased landlord; *Knight v. Cox*, 18 *C. B.* 645. The plaintiff may show that the defendant's title expired before the rent became due; *Downs v. Cooper*, 2 *Q. B.* 256. Thus where a person, having an equitable title only, made a lease, and afterwards assigned all his interest at law and in equity, and then brought ejectment, the tenant was permitted to show the assignment as an answer to the action; *Doe v. Edwards*, 5 *B. & Ad.* 1065; and a tenant may show his landlord's title expired, though he has paid rent to him after such expiration, provided the rent was paid in ignorance of the defect in the landlord's title, although he knew that it was disputed; *Fenner v. Duplock*, 2 *Bing.* 10; see also cases, *ante*, pp. 162-3. The plaintiff may dispute the avowant's derivative title from the person who let the plaintiff into possession under *non tenuit*; *Rogers v. Pitcher*, 6 *Taunt.* 202.

It is no variance, under *non tenuit*, if it appears that the plaintiff held for a less time than the period stated in the avowry; *Forty v. Imber*, 6 *East*, 434; see *Roskrige v. Caddy*, *ante*, p. 676.

An eviction may be evidence under this plea; as where the plaintiff, by reason of an eviction by title paramount, ceased to be tenant to the avowant; *Hopcraft v. Keys*, 9 *Bing.* 613. An eviction, to be a good defence, must have happened before the rent became due; *Boodle v. Cambell*, 7 *M. & G.* 386. And it must be an actual, not a constructive eviction; *Delaney v. Fox*, 2 *C. B.*, *N. S.*, 768, cited *ante*, p. 622. And as to eviction, see *ante*, pp. 169, 428.

The plaintiff may show under *non tenuit* that the defendant's title to a rent service has been extinguished by the Statute of Limitations; 3 & 4 *Will.* 4, c. 27, ss. 2 & 34; *Owen v. De Beauvoir*, 16 *M. & W.* 547; *aff. on error*, 5 *Ex.* 166; 19 *L. J. (Ex.)* 177.

Evidence on plea of riens in arrere.] The plea in bar of *riens in arrere* admits the demise stated in the avowry. Therefore where, to an avowry for a quarter's rent due upon a *quarterly* reservation, the plaintiff pleads *riens in arrere*, he cannot show that the reservation is *half-yearly*, and that therefore no rent had accrued; *Hill v. Wright*, 2 *Esp.* 669. It will not be sufficient to support this plea to show that part of the rent has been satisfied, for the defendant will be entitled to a verdict if part is in arrear; *Cobb v. Bryan*, 3 *B. & P.* 348; and see *ante*, p. 676.

In answer to an avowry for rent, the plaintiff may show that he has paid an amount equivalent to the rent, under compulsion or threat of distress, to a superior landlord or a prior incumbancer; *Sapsford v. Fletcher*, 4 *T. R.* 511; *Taylor v. Zamira*, 6 *Taunt.* 524; *Stubbs v. Parsons*, 3 *B. & A.* 516. The payment is not the less compulsory because the ground landlord has allowed the occupier time to pay; *Carter v. Carter*, 5 *Bing.* 406. And rent growing due, as well as that already accrued due, is discharged by such a payment; *S. C.* And though a special plea has been usual, *riens in arrere* is the proper plea; *Jones v. Morris*, 3 *Ex.* 742; 18 *L. J. (Ex.)* 477. So where a demand in respect of interest on a mortgage affecting the premises is paid with the avowant's assent, the plaintiff may avail himself of the payment under this plea; *Dyer v. Bowley*, 2 *Bing.* 94; and see *Pope v. Biggs*, 9 *B. & C.* 245. But it is doubtful whether a collateral payment by the tenant, though stipulated for in the lease, can be shown on this plea; *Davies v. Stacey*, 12 *Ad. & E.*

506; see further, *ante*, p. 448, *Action for Rent on Indenture, &c.* And a binding agreement by the plaintiff to pay a third person, authorised by defendant to receive, without actual payment, cannot be shown under this plea; *Wheeler v. Branscombe*, 5 Q. B. 373.

Evidence on traverse of defendant being bailiff.] If the plaintiff traverses that the defendant is bailiff as stated in the cognizance, the defendant must prove his authority to make the distress, and a recognition of his act will be equivalent to a previous command; *Trevillian v. Pine*, 11 Mod. 112; 1 Wms. Saund. 347 d. (n). And the ratification may be after action; *per curiam* in *Whitehead v. Taylor*, 10 Ad. & E. 213. One joint tenant, or coparcener, or co-heir in gavelkind, has an authority in law, without proof of any express command, to distrain as bailiff of his co-tenant; *Leigh v. Shepherd*, 2 B. & B. 465; but it is not clear that he can distrain for the rest notwithstanding the express dissent of his co-tenants; *S. C.*; *Robinson v. Hofman*, 4 Bing. 562. A tenant in common cannot avow as bailiff of his co-tenant without his authority; see *Harrison v. Barnby*, 5 T. R. 246. A corporation may appoint a bailiff to distrain without deed; *Smith v. Birmingham Gas Co.*, 1 Ad. & E. 526. Where defendant makes cognizance as bailiff of an executor for rent due to the testator, it is enough to prove a distress by the testator's direction, made after his death and before probate, but subsequently adopted by the executor; *Whitehead v. Taylor*, 10 Ad. & E. 210. If a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in receipt of the rent incident to that reversion, he, during such permission, is *ex presumptione juris* authorised, if it should become necessary, to realise the rent by distress, and to distrain for it in the mortgagee's name as his bailiff; *Trent v. Hunt*, 9 Ex. 14; 22 L. J. (Ex.) 318. So where the assignee of the equity of redemption has paid off the mortgage, and obtained from the mortgagee authority to receive the rents, he may distrain in the mortgagee's name before transfer; *Snell v. Finch*, 13 C. B., N. S. 651; 32 L. J. (C. P.) 117.

If a person, having authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other; *Trent v. Hunt*, *supra*.

A warrant of distress, directed to two jointly, in a matter connected with the execution of a public authority, may be executed by one; *Lee v. Vessey*, 25 L. J. (Ex.) 271; 1 H. & N. 90.

Evidence on avowry for damage feasant.] Where the defendant avows taking cattle damage feasant, and pleads that the *locus in quo* is his soil and freehold, the plaintiff may deny it, and the evidence in such case will be the same as under the plea of *liberum tenementum* in trespass *quare clausum fregit*; see *ante*, p. 567.

Or the plaintiff may plead in bar the defect of fences which the defendant was bound to repair, whereby the cattle escaped; *Bailey v. Appleyard*, 8 Ad. & E. 161; a right of common, of way, &c.; *Com. Dig. Pleader* (3 K. 24, 25); in which cases the evidence will of course depend upon the issue joined.

Where cattle, being lawfully driven along a highway, stray into an adjoining field through the defect of fences, the owner is bound to remove them within a reasonable time, but the owner of the field cannot distrain them immediately; what is a reasonable time under the circumstances of the case is for the jury; *Goodwyn v.*

Cheveley, 4 H. & N. 631; 28 L. J. (Ex.) 298. If cattle get into the defendant's field through defect in a fence which he is bound to keep up, and then break through a good fence into another field of the defendant's, he cannot distrain them damage feasant, for the damage was the natural result of his own default; *Singleton v. Williamson*, 31 L. J. (Ex.) 17; 7 H. & N. 410.

As to the obligation to repair fences, the general rule of law is that a man is only bound to keep his cattle from trespassing on the land of others; *per* Bayley, J., in *Boyle v. Tamlyn*, 6 B. & C. 337; 3 Dyer, 372 (10); *Fitz. N. B.* 128, note by Ld. Hale. But the owner and occupier of one close may be bound by prescription to fence, not only to keep his own cattle in, but as against those of the occupier of the adjoining close; *S. C.* Where the owner granted close A. to the plaintiff and soon afterwards an adjoining close B. to the defendant, it seems that the fact that the defendant had for twenty-eight years, ever since the grant, repaired the fence between A. and B., which was on his own ground, was not evidence *per se* from which a jury might presume that he had bound himself by agreement to keep up the fence as against cattle in A.; *Boyle v. Tamlyn*, 6 B. & C. 329. But in a very recent case, the defendant and previous occupiers of an ancient copyhold tenement had always repaired the fence erected on it between it and the waste of the manor; and on the waste being inclosed under a modern inclosure act, the Court of Queen's Bench held, that the defendant was bound to keep up the fence against cattle on the new inclosure, as a jury might presume that the grantee of the ancient inclosure had taken it subject to the obligation to fence against the waste; for the lord was not likely to have granted it without this obligation, and so to have subjected the tenants of the manor turning out on the waste to the burthen of keeping their cattle from trespassing on the inclosed land; *Barber v. Whiteley*, 34 L. J. (Q. B.) 212.

Evidence on a plea of tender.] To an avowry for rent the plaintiff may plead a tender of the rent; to an avowry for damage feasant a tender of amends.

A plea to an avowry for rent of a tender of 16*l.*, is not supported by proof of a tender of 15*l.* 16*s.*, though no more rent be due than the sum proved to have been tendered; *John v. Jenkins*, 1 C. & M. 227. A tender before distress makes the taking unlawful; after distress, and before impounding, it makes the detention unlawful; *Six Carpenters' case*, 8 Rep. 147 a; *Gulliver v. Cosens*, 1 C. B. 788; *Loring v. Warburton*, E. B. & E. 507; 28 L. J. (Q. B.) 31. Tender after impounding is too late, whether the taking be damage feasant or for rent arrear; *Pilkington's case*, 5 Rep. 76 a; *Cro. Eliz.* 813; *Ladd v. Thomas*, 12 Ad. & E. 117. Where the cattle were taken damage feasant, and had been put into an out-house near the spot, with an intention to send them to a public pound, a tender was held not too late; *Browne v. Powell*, 4 Bing. 230. Since the 11 Geo. 2, c. 19, s. 10, an impounding of cattle on the premises, with a notice that such cattle are distrained for rent, has been held a complete impounding (*Maule, J., diss.*); *Thomas v. Harries*, 1 M. & G. 695. So an impounding on the premises, leaving a person in possession, without moving any of the goods, may, it seems, be an impounding so as to preclude a tender of rent (*Erle, J., diss.*). At all events, if the distress be so conducted with the tenant's assent; *Tennant v. Field*, 27 L. J. (Q. B.) 33; 8 E. & B. 336; see also *Johnson v. Upham*,

infra. But it has been since held, that a sale after a tender of rent and costs, made before the expiration of the five days, though after impounding, is wrongful within the equity of the stat. 2 W. & M. stat. 1, c. 5; *Johnson v. Upham*, 28 L. J. (Q. B.) 252; 2 E. & E. 250; overruling *Ellis v. Taylor*, 8 M. & W. 415; and see Maule, J.'s, judgment in *Thomas v. Hurries*, *supra*, and Erle, J.'s, judgment in *Tennant v. Field*, *supra*.

Although it has been held that a tender of *amends* to a mere bailiff is not good (*Pilkington's case*, *supra*), yet if the bailiff is the avowant's usual receiver, or if it appears from other circumstances that he is his agent for that purpose, such tender may be good; *Gilb. Repl.* 83 (4th edit.); *Browne v. Powell*, 4 Bing. 230. A tender of rent and charges is good if made to the landlord, though after a broker has received a warrant and has distrained; *Smith v. Goodwin*, 4 B. & Ad. 413; but the bailiff to whom the warrant is given by the landlord is authorised *virtute officii* to receive the rent, and a tender to him is good; *Hatch v. Hale*, 15 Q. B. 10; and see *Boulton v. Reynolds*, *infra*. But a man left in possession by the bailiff or broker to whom the warrant was given has no such authority; and a tender to him is bad, at least where the tenant is informed that some one authorised to receive the rent is within a convenient distance; *Boulton v. Reynolds*, 2 E. & E. 369; 29 L. J. (Q. B.) 11. A tender of rent *without expenses*, after a warrant of distress has been delivered to a broker, but before it has been executed, is good; *Bennett v. Bayes*, 5 H. & N. 391; 29 L. J. (Ex.) 224.

Payment into Court.] By the 23 & 24 Vict. c. 126, ss. 23, 24, the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction, in like manner and subject to the same proceedings as to costs and otherwise as a payment into court by a defendant in other actions; and such payment, or the acceptance, is not to work the forfeiture of the replevin bond.

Damages.] In case the chattels have been delivered to the plaintiff on the replevin, which is the general practice, the damages recovered by the plaintiff are usually confined to the expense of the replevin bond; *Tidd's Pract.* 887, 9th ed.; *Wilk. Repl.* 85. It is doubtful whether special damages arising from an injury to the goods by defendant or otherwise, can be recovered; *Connor v. Bentley*, 1 Jebb & S. 246.

A replevin bond obliges the plaintiff in a replevin suit in a superior court to show, not only a successful result, but also that he had good ground for believing either that title was in question, or that the rent or damage exceeded 20*l*. See 19 & 20 Vict. c. 108, cited *ante*, pp. 445-6. It may therefore be desirable in some cases for the successful plaintiff to procure either at, or after, the trial some declaration or certificate by the judge that the plaintiff had such ground. It does not however appear to be expressly made obligatory on the judge by any statute to give such certificate. In *Tunnicliffe v. Wilmot*, 2 C. & K. 626, it seems to have been refused only because the plaintiff had failed at the trial. The usual certificate for costs, when given, is not of equivalent value.

PART .III.

EVIDENCE IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

ACTIONS BY AND AGAINST ATTORNEYS.

See *ante*, pp. 265-275.

ACTIONS BY ASSIGNEES OF BANKRUPTS.

THE present Bankruptcy Act is the 24 & 25 Vict. c. 134, which (s. 232) is to be construed, together with so much of the 12 & 13 Vict. c. 106 (the Bankruptcy Consolidation Act, 1849), and of the 17 & 18 Vict. c. 119 (Bankruptcy Act, 1854), as remains unrepealed, as one act; and is to be cited as "The Bankruptcy Act, 1861."

By this statute (s. 230 and sch. (G.)) the insolvency acts are repealed; and by s. 69 all debtors, whether *traders or not*, are to be subject to the provisions of the act; but no debtor who is not a trader is to be adjudged a bankrupt, except in respect of an act of bankruptcy described by the act as applicable to a non-trader; see sections 70, 71, 72, 75, 76, 83, 86, *post*.

Many of the cases referred to were decided under former statutes now repealed, but have still bearing on the present enactments.

Strict proof of title of assignees, what constitutes.] Whenever assignees appointed under the present Bankruptcy Act are required to give strict proof of their title, they must in general be prepared with proof—1. Of the petition for adjudication; 2. Of the petitioning creditor's debt; 3. Where the petition is against a trader, as such, of the trading; 4. Of the act of bankruptcy; 5. Of the adjudication; and 6. Of the appointment of assignees.

Evidence of petition for adjudication.] Under s. 89 of the 12 & 13 Vict. c. 106, the petition for adjudication of bankruptcy is the first step in the court of bankruptcy, and gives jurisdiction without any commission or fiat. If filed by a creditor it must be signed by him in the presence of his solicitor; see form, sch. M. As to proof, see *post*, p. 705.

By 24 & 25 Vict. c. 134, s. 92, a petition by a partnership, authorised to sue and be sued in the name of a public officer, may be filed by such officer.

Petitioning creditor's debt.] The petitioning creditor's debt must be one which the creditor, according to the rules both of law and equity, is entitled to recover; *per cur. Hope v. Meek*, 10 *Er.* 829; 25 *L. J. (Ex.)* 15. It is to be proved in the same manner as in an action against the bankrupt himself; *Abbott v. Plumbe*, 1 *Doug.* 216. It must be proved that the debt was in existence at the time of the act of bankruptcy; *Clarke v. Askew*, 1 *Stark.* 458 (*n*). Thus, where the petitioning creditor's debt arises on a promissory note dated before the bankruptcy, the note, it has been said, must be proved to have existed prior to the act of bankruptcy; for the date is not even *prima facie* evidence of that fact; 2 *Stark. Ev.* 149, 3rd edit.; *Fletcher v. Manning*, 12 *M. & W.* 571. In *Wright v. Lainson*, 2 *M. & W.* 739, it was held that an I. O. U., bearing date before the bankruptcy, was no evidence of a petitioning creditor's debt without some proof that it was in existence before the bankruptcy. But see the judgment in *Anderson v. Weston*, 6 *N. C.* 301, and the observations of Lord Abinger and Alderson, B., in *Goodtitle v. Milburn*, 2 *M. & W.* 859, 860; *Morgan v. Whitmore*, 6 *Ex.* 716, *ante*, p. 34. But where a note was proved to be in existence before the docket was struck, and bore date on the face of it before the act of bankruptcy, this was considered *prima facie* proof that the note was in existence before the act of bankruptcy; *Obbard v. Betham*, *Mood. & M.* 486. So, if it can be shown that, about the date of the bill, goods were sold of corresponding amount; *Cowie v. Harris*, *Mood. & M.* 143. Where the petitioning creditor is the indorsee of a bill, the indorsement must be proved to have been made before the filing of the petition, and the date of the bill affords no presumption as to the time of the indorsement; *Rose v. Rowcroft*, 4 *Camp.* 245. But the indorsement may be after the act of bankruptcy; *Glaister v. Hewer*, 7 *T. R.* 498. If the debt be proved to have existed before the act of bankruptcy, its continued existence until the act will be presumed; *Jackson v. Irvin*, 2 *Camp.* 50; unless there have been intermediate transactions tending to defeat the presumption; *Gresley v. Price*, 2 *C. & P.* 48.

No adjudication can now be impeached by reason of an act of bankruptcy prior to the debt; 12 & 13 *Vict. c.* 106, s. 88.

When the petition is against the bankrupt as a trader, it must appear that the debt was contracted while he was a trader, or, if contracted before, was subsisting while he was a trader; *Meggot v. Mills*, 1 *Ld. Raym.* 286; *Butcher v. Easto*, 1 *Doug.* 295. Where a person contracted a debt, and afterwards became a trader, and, the debt still remaining unpaid, he went out of trade, and afterwards committed an act of bankruptcy, a commission founded on this debt and act of bankruptcy was held to be valid; *Baillie v. Grant*, 1 *Cl. & F.* 238; 9 *Bing.* 121. If there was a petitioning creditor's debt at the time of the act of bankruptcy on which a commission might have issued, and there was a petitioning creditor's debt still existing at the time of the commission, it does not signify what happened in the interim as to the payment of the first debt; the balance throughout continuing sufficient for a petitioning creditor's debt; *Shaw v. Hurvey*, *Mood. & M.* 526.

By sect. 90 of 24 & 25 *Vict. c.* 134, the debt of the petitioning creditor of any debtor, not being a trader, and not being at the time a prisoner, against whom such creditor would have been entitled to obtain a vesting order in insolvency, must be a debt contracted after the passing of the act. See *Ex parte Harding*, 33 *L. J. (Bank.)* 26.

Taking a security of a higher nature, after the act of bankruptcy, for a debt of an inferior nature contracted before, will not prevent the original debt being a good petitioning creditor's debt; *Ambrose v. Clendon*, 2 *Stra.* 1042; *Ex parte Griffiths*, 22 *L. J. (Bank.)* 50; 3 *De G. M. & G.* 174. Nor did the fact that the debtor had received his discharge as an insolvent, and included the debt in his schedule; *Jellis v. Mountford*, 4 *B. & A.* 256. Where the debtor is taken in execution, there is no debt to support a commission; *Cohen v. Cunningham*, 8 *T. R.* 123. But if he had been discharged from custody under the Insolvent Debtors Act (1 & 2 *Vict. c.* 110), it was otherwise; *Watson v. Humphrey*, 10 *Ex.* 781; 24 *L. J. (Ex.)* 190. A debt upon an attorney's bill, not signed and delivered according to the statute, is sufficient; *Ex parte Sutton*, 11 *Ves.* 163; *Ex parte Howell*, 1 *Rose*, 312. But a verdict for damages in an action for breach of contract, does not, before judgment, constitute a debt; *Ex parte Charles*, 14 *East*, 197. The debt must be a lawful one; therefore a promissory note made in violation of the statutes for the protection of the Bank of England, cannot be proved; *Ex parte Randleson*, *Mont. & Mac.* 86; and consequently cannot form a petitioning creditor's debt.

(No partner cannot petition against another unless there has been an account rendered and balance struck; see 1 *Mont. & Ayr.* 47 (n). Where A. advanced 200*l.* to B. to set up in trade, and it was agreed that A. should have one-eighth of the profits, it was held that this advance formed a good petitioning creditor's debt; *Ex parte Notley*, 1 *Mont. & Ayr.* 46. Where there is only one petitioning creditor, there must be a debt to him separately, for which he alone might maintain an action at law; and therefore a commission cannot be supported on the petition of one of two partners to whom a debt is due jointly; *Buckland v. Newsame*, 1 *Taunt.* 477; 1 *Camp.* 474.

A member of a banking company, established under the 7 *Geo. 4. c.* 46, cannot be proceeded against in bankruptcy for a debt due from the company, no judgment for such debt having been recovered against the public officer of the company; *Davison v. Farmer*, 6 *Ex.* 242; 20 *L. J. (Ex.)* 177.

Where the petitioning creditor is assignee of another bankrupt, and the debt is due to him in that character, and his title comes incidentally in question, strict evidence of his title as assignee must be given; *Doe v. Liston*, 4 *Taunt.* 741; *Muskett v. Drummond*, 10 *B. & C.* 153. A person may in general be a petitioning creditor in respect of a debt due to him as trustee; *Hope v. Meek*, 10 *Ex.* 829; 25 *L. J. (Ex.)* 11.

By the 24 & 25 *Vict. c.* 134, s. 96, and 12 & 13 *Vict. c.* 106, s. 101, if the petitioning creditor shall not obtain adjudication within three days after petition, or within any further time allowed by the court, the court may, at any time after the three days, or extended time, upon the petition of any other creditor to the amount required to constitute a petitioning creditor, proceed to adjudication on such last petition; see *Kynaston v. Davis*, 15 *M. & W.* 705. And by s. 103 of 12 & 13 *Vict. c.* 106, after adjudication, in case the petitioning creditor's debt is insufficient, the Court of Bankruptcy may order the adjudication to proceed upon the application of any other creditor having proved any sufficient debt. But the order would seem to be no evidence of the substituted debt, and when put in issue it must be proved as in ordinary cases; *Fletcher v. Manning*, 12 *M. & W.* 571.

Petitioning creditor's debt, amount of.] The debt due to the petitioning creditor, whether against a trader or not, must amount, if to one creditor or one firm, to 50*l.*; if to two, to 70*l.*; if to three or more, to 100*l.*; 24 & 25 Vict. c. 134, s. 89. See s. 97, as to what debts are to be reckoned if securities are held for them. 100*l.* in notes of the bankrupt, bought at 10*s.* in the pound by the petitioner, to whom they were indorsed, is a sufficient petitioning creditor's debt to the larger amount; *Ex parte Lee*, 1 P. Wms. 782. Two firms, of several partners each, may jointly petition, though the debt of neither amounts to 70*l.*, if the two debts equal 70*l.*; *Doe v. Ingleby*, 14 M. & W. 91. Where a creditor to a sufficient amount after notice of an act of bankruptcy received a part-payment, which reduced the debt below the required amount, and then himself petitioned, it was held that, as the payment was void, there was still a good petitioning creditor's debt; *Mann v. Shepherd*, 6 T. R. 79.

Petitioning creditor's debt—Bills of exchange, and debts due on credit.] The debt must have been a debt due from the bankrupt at the time of the act of bankruptcy; but it need not be then a debt to the petitioning creditor. Thus A. drew a promissory note payable to B. or order, and then committed an act of bankruptcy, after which B. indorsed it to the petitioning creditor, and it was held a good debt to support the petition; *Anon. C. B.*, 2 Wilson, 135; *Glaisier v. Hewer*, 7 T. R. 498. But it must be proved that the indorsement was made to the petitioning creditor before the filing of the petition; *Rose v. Rowcroft*, 4 Camp. 245. As a bill of exchange is a debt from the date of it as against the drawer, it was held a sufficient petitioning creditor's debt, though not dishonoured till after an act of bankruptcy; *Macarty v. Barrow*, 2 Stra. 949; cited more fully from Wilmut, C. J.'s, note, 3 Wils. 16. And by the 24 & 25 Vict. c. 134, s. 89, every person who has given credit to any debtor, upon valuable consideration, for any sum payable at a certain time, which time shall not have arrived when such debtor committed an act of bankruptcy, may petition, or join in petitioning, whether he shall have any security for such sum or not.

The following cases were decided under the old statutes:—

Where A., having drawn a bill in favour of B. to whom he was previously indebted in the amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance, it was held that the bill of exchange was a good petitioning creditor's debt, though subsequently to the commission it had been duly presented to and paid by the acceptors; *Ex parte Douthat*, 4 B. & A. 67. Two persons exchange acceptances, and, before the bills are mature, one of them commits an act of bankruptcy; this is not such a debt due from him to the other as will sustain a commission before the other has paid his own acceptance; *Surratt v. Austin*, 4 Taunt. 200. Interest, where not expressed in the body of the bill, cannot be added so as to make a good petitioning creditor's debt; *In re Burgess*, 8 Taunt. 660; *Cameron v. Smith*, 2 B. & A. 305.

Evidence of petitioning creditor's debt—Admission of bankrupt.] The admissions of the bankrupt himself are frequently given in evidence to establish the petitioning creditor's debt. Thus an entry in the bankrupt's books; *Watts v. Thorpe*, 1 Camp. 376; or an account signed by him, charging himself; *Hoare v. Coryton*, 4 Taunt. 560;

Ex parte Harrison re Lawford, 26 L. J. (Bank.) 30; is sufficient evidence of the debt; or a mere oral admission; provided it be shown that his admission, however made, was made before the act of bankruptcy as well as before the petition; *Smallcombe v. Bruges*, M'Cl. 45; 13 Price, 136. Where the debt was founded on a bill of exchange of which the bankrupt was drawer, it was held that the bankrupt's declaration, made after the act of bankruptcy and before the commission, that the bill would not be paid, was admissible evidence to supply the proof of notice of dishonour; *Brett v. Levett*, 13 East, 213; see this case discussed in *Smallcombe v. Bruges*, *supra*, the distinction pointed out being that the admission does not go directly to prove the debt; and see also *Abbott v. Plumbe*, 1 Doug. 216.

Trading.] Although non-traders as well as traders may now be made bankrupt, yet there are distinctions made between the two classes as to acts of bankruptcy, &c. (*ante*, p. 684); and by s. 229 of 24 & 25 Vict. c. 134, for the purposes of the act, traders are all persons who before the act would have been liable to be made bankrupts; it is therefore still necessary to consider the question of trading.

By the 12 & 13 Vict. c. 106, s. 65, all alum-makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cowkeepers, dyers, fullers, keepers of inns, taverns, hotels, or coffee-houses, limeburners, livery stable keepers, market gardeners, millers, packers, printers, shipowners, shipwrights, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener receiving other men's monies or estates into their trust or custody, persons insuring ships or their freight or other matters against perils of the sea, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; *provided* that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading company established by charter or statute, shall be deemed, as such, a trader liable to become bankrupt.

The Bankrupt Acts apply to aliens, denizens, and women; and a feme covert may be a bankrupt whenever she can by law be a sole trader apart from her husband, as in the city of London, or where her husband is a convicted felon undergoing his sentence; *Lavie v. Phillips*, 3 Burr. 1776; *Ex parte Franks*, 7 Bing. 762. A commission against an infant was held to be void; *Belton v. Hodges*, 9 Bing. 365. So against a lunatic; *Ex parte Stamp*, De Gez, 345. A trader member of Parliament may be made bankrupt under the 66th sect. of 12 & 13 Vict. c. 106, like any other trader.

Evidence of trading.] Declarations of the bankrupt, made before the bankruptcy, have been admitted to prove the trading, as against him, in an action brought by him against the assignees to dispute the commission; *Parker v. Barker*, 1 B. & B. 9. But in an action by the assignees against a third person, such evidence was held by Best, C. J., clearly inadmissible for them; *Bromley v. King*, Ry. & Mood. 228.

The bankrupt's declarations at the time of the purchase of goods as to the mode in which he intended to dispose of them are admissible to prove the trading; *Gale v. Halfknight*, 3 Stark. 56.

Evidence of trading—What persons are traders within the general words of 12 & 13 Vict. c. 106, s. 65.] To prove a person a trader within the general words of the act (*ante*, p. 688), evidence of both buying and selling is necessary; *Eden, Bank*. 3. But an admission by the bankrupt that he is in partnership with a trader is sufficient, without showing any acts of trading during the time the bankrupt was a partner; *Parker v. Barker*, *supra*. Where the buying is proved, the intention to sell again may be proved by the declarations as well as acts of the bankrupt; *Gale v. Halfknight*, *supra*; *Millikin v. Brandon*, 1 C. & P. 380. The quantum of dealing is immaterial, when coupled with the intention to continue it; *Patman v. Vaughan*, 1 T. R. 572; *Newland v. Bell*, Holt, N. P. 221. Thus the purchase of one lot of timber, and the sale of a portion of it, will make a man a trader; *Holroyd v. Gwynne*, 2 Taunt. 176. But occasional acts, as of a schoolmaster selling books to his own scholars only; *Valentine v. Vaughan*, Peake, N. P. 76; a colonel of a regiment selling horses occasionally at Tattersall's; *Ex parte Blackmore*, 6 Ves. 3; or of a person who keeps hounds buying dead horses and selling the skins and bones; *Summersett v. Jarvis*, 3 B. & B. 2; are not alone evidence of trading. And where a person buys more of an article than he wants, and sells the surplus, he does not thereby become a trader; *semble*, *Newland v. Bell*, Holt, N. P. 222. So where a farmer buys and sells articles incidental to the occupation of his farm, as if he buys pigs, &c., feeds them on his stubbles, and re-sells them; *Patten v. Browne*, 7 Taunt. 409; or where a farmer buys seed to mix with his own in order to sell with greater advantage, and then sells the mixture; *S. C.*; he does not thereby become a trader. But where a mine-owner buys other ore to mix with his own and then smelts the whole into pig-iron which he sells, he is a trader; *Turner v. Hardcastle*, 31 L. J. (C. P.) 193; 11 C. B., N. S., 683. And where a farmer bought horses unfit for farming, and resold them, and avowed his intention to take out a licence and become a horse-dealer, these facts were held to be evidence of trading; *Wright v. Bird*, 1 Price, 20. A drawing and redrawing of bills of exchange and promissory notes, if there be a continuation of it with a view to gain a profit on the exchange, is a trafficking in exchange and a trading; *Richardson v. Bradshaw*, 1 Atk. 128. See *Hankey v. Jones*, Cowp. 745.

Whether a trader, who has ceased to buy, but is selling off his stock, continues liable to be made bankrupt as a trader, depends upon the circumstance whether there be an intention to resume the trading; which is a question for a jury; *Ex parte Paterson*, 1 Rose; 402; *Eden, Bank*. 5; *Wharam v. Routledge*, 5 Esp. 235. So where a person having manufactured goods for sale, continues the manufacture for his own use, and occasionally allows persons applying to have small quantities, it is a question for the jury whether these sales are with the intention of continuing the trade, or for the accommodation merely of the applicants; *Paul v. Dowling*, Mood. & M. 268. Where a fisherman was proved to have bought fish at sea and sold it again during one season, which was the usual course on the particular coast, Lord Ellenborough said that that was trading, and it must be presumed the bankrupt still carried on his business in the usual way,

and continued a trader down to the time of his bankruptcy; *Heanny v. Birch*, 3 Camp. 233. Where business had been carried on by one in partnership with another, which partnership had been dissolved some years before, and no act of trading had been done for two or three years before the time when the petitioning creditor's debt accrued, but the concerns had not been ultimately wound up, and part of the stock still remained in the warehouse of the parties undisposed of, the jury found, under the direction of the court, that the trading continued; *Buckhouse's Executors v. Tarleton*, coram Lord Ellenborough, C. J., 2 Stark. Ev. 129, 3rd ed. An executor disposing of his testator's stock is not a trader, though he purchases other articles to make it marketable; but if he increases the stock, and continues to sell, he becomes a trader; *Ex parte Nutt*, 1 Atk. 102. Where a testator directs his trade to be carried on after his death, that part of his assets only will be liable in case of bankruptcy, which he has directed to be embarked in the trade; *Ex parte Garland*, 10 Ves. 110; *Thompson v. Andrews*, 1 Myl & K. 116.

An illegal trading will support a commission, as the buying and selling of smuggled goods; *Cobb v. Symonds*, 5 B. & A. 516; or the trading of a clergyman; *Ex parte Meymot*, 1 Atk. 196.

Trading—What persons are within the particular words of 12 & 13 Vict. c. 106, s. 65 (*ante*, p. 688)]. A surgeon, who was also licensed to practise as an apothecary, supplied medicines to his patients but not to other persons; held, that he was a trader as an apothecary; *Ex parte Crabb*, 8 De G. M. & G. 277; 25 L. J. (Bank.) 45. A pawnbroker is a broker within the statute; *Rawlinson v. Pearson*, 5 B. & A. 124. So a ship-broker; *Pott v. Turner*, 6 Bing. 702. Whether an insurance broker be within the same term, has been questioned, but not determined; *Ex parte Stevens*, 4 Madd. 256; *Pott v. Turner*, *supra*; but it seems that he is; see *Eden*, Bank. 6, 7; and *Milford v. Hughes*, 16 M. & W. 174.

Where a person takes land in three instances for the purpose of building, and builds upon it and sells the buildings, he is not a "builder" within the act, if the jury find that it is not the general business of the bankrupt; *Stuart v. Sloper*, 3 Ex. 700; *Ex parte Stewart*, 18 L. J. (Bank.) 14. A farmer who keeps cows on the part of his land in pasture, and sells the milk to a retail dealer, is not a cowkeeper within the act; *Ex parte Dering*, 16 L. J. (Bank.) 3; *De Gez*, 398; nor if he sell the milk retail himself; *Bell v. Young*, 15 C. B. 524; 24 L. J. (C. P.) 66. So a farmer who grows peas and potatoes in rotation on parts of his farm, and consigns them to London salesmen to sell on commission, is not a market-gardener; *Ex parte Hammond*, *De Gez*, 93.

In order to make a man a money-scrivener, it must be an occupation to which he resorts in order to gain his living, and in the course of this occupation he must receive other men's monies into his trust or custody; he must carry on the business of being trusted with other people's monies to lay it out for them as occasion offers; *Adams v. Malkin*, 3 Camp. 534; *Lott v. Melville*, 3 M. & G. 40; *Ex parte Dufaur*, 21 L. J. (Bank.) 38.

The keeper of a private lodging-house, who buys provisions for his lodgers and charges a profit, is an *hotel-keeper*, &c. within the above section; *Smith v. Scott*, 9 Bing. 14; *Gibson v. King*, 10 M. & W. 667.

As to agents, see *Hernamann v. Barber*, 14 C. B. 583.

Bankruptcy of companies.] The 7 & 8 Vict. c. 111, which provided that certain companies might become bankrupt in their corporate or aggregate character, by committing certain acts of bankruptcy specified in the act, is repealed by 25 & 26 Vict. c. 89, s. 205, sch. 3; and by part 4, ss. 74-173, provision is made for winding up companies registered under the act; and by part 8, ss. 199-204, unregistered companies may also be wound up.

Acts of bankruptcy—Statutes.] By the 12 & 13 Vict. c. 106, s. 67, if any trader liable to become bankrupt shall depart this realm—or being out of this realm shall remain abroad—or shall depart from his dwelling-house—or otherwise absent himself—or begin to keep his house—or suffer himself to be arrested or taken in execution for any debt not due—or yield himself to prison—or suffer himself to be outlawed—or procure himself to be arrested or taken in execution, or his goods, money, or chattels to be attached, sequestered, or taken in execution—or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels;—every such trader doing, suffering, procuring, executing, permitting, making or causing to be made any of the acts, deeds, or matters aforesaid, with *intent to defeat or delay his creditors*, shall be deemed to have thereby committed an act of bankruptcy.

By 24 & 25 Vict. c. 134, s. 70, if any person, *not a trader*, shall, with intent to defeat or delay his creditors, depart this realm, or being out of this realm shall with such intent remain abroad, or shall with such intent make any fraudulent conveyance, gift, delivery, or transfer of his real or personal estate, or any part thereof respectively, he shall be deemed to have committed an act of bankruptcy. Then follow certain rules to be observed before adjudication can be made under this section.

By 12 & 13 Vict. c. 106, s. 68, if any trader shall execute any conveyance or assignment by deed of all his estate and effects to a trustee or trustees for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within three months from the execution thereof; provided such deed shall be executed by every such trustee within *fifteen days* after execution thereof by the trader, and the execution by the trader and by every such trustee be attested by an attorney or solicitor, and notice thereof be given within one month after the execution thereof by such trader, in case such trader reside in London or within forty miles thereof, in the *London Gazette*, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the *London Gazette* and in one London daily newspaper and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee and attorney or solicitor. See also 24 & 25 Vict. c. 134, s. 199 (*post*, p. 732), giving protection to a debtor executing a deed under ss. 192-200.

By 24 & 25 Vict. c. 134, s. 71, if any debtor, whether a trader or not, having been arrested or committed to prison for debt, or on any

attachment for non-payment of money, shall, upon such or any other arrest or commitment for debt or non-payment of money, or upon any detention for debt lie in prison, being a trader, for *fourteen days*, or, not being a trader, for two calendar months, or having been arrested for any cause, shall lie in prison as aforesaid, after any detainer for debt lodged against him and not discharged, every such debtor shall thereby be deemed to have committed an act of bankruptcy; or if any such debtor, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such debtor shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention. But no debtor shall be adjudged bankrupt on the ground of having lain in prison as aforesaid, unless having been summoned he shall not offer such security for the debt or debts in respect of which he is imprisoned or detained as the commissioner or registrar, whose duty it would otherwise be to adjudicate, shall deem reasonably sufficient.—This last clause is new. Sect. 69 (repealed) of 12 & 13 Vict. c. 106, had twenty-one days instead of fourteen.

By sect. 72 of 24 & 25 Vict. c. 134, if any debtor, whether a trader or not, shall file in the office of the chief registrar, or with the registrar of a district court of bankruptcy, or of a county court having jurisdiction in bankruptcy, a declaration in writing in such form as general orders shall direct, signed by such debtor, and attested by a registrar of the court or by an attorney or solicitor, that he is unable to meet his engagements, every such debtor shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a petition for adjudication of bankruptcy shall be filed by or against him within two months from the filing of such declaration.—Sect. 70 of 12 & 13 Vict. c. 106 (now repealed), was similar. By the 17 & 18 Vict. c. 119, s. 16, the declaration is to be filed in the court within the district whereof the trader filing the same shall have resided or carried on business for six calendar months next immediately preceding the time of the filing thereof, and the same is to be filed in the case of the London district in the office of the chief registrar, and in the case of the country districts with the respective registrars thereof. By sect. 19, “a copy of a declaration of insolvency purporting to be certified by a registrar of a country district as a true copy of a declaration filed in the court for that district shall be received as evidence of such declaration as aforesaid having been filed.” By the 15 & 16 Vict. c. 77, s. 6, a copy of a declaration of insolvency filed in the office of the chief registrar, purporting to be certified by him or any of his clerks as a true copy, shall be received as evidence of such declaration having been filed.

By 24 & 25 Vict. c. 134, s. 86, any debtor may petition for adjudication of bankruptcy against himself, and the filing of such petition shall be an act of bankruptcy, without any previous declaration of insolvency by such debtor.

Sect. 98. If any debtor, whether a trader or not, now being, or who shall be imprisoned for any debt or demand, shall through poverty be unable to petition the proper court for an adjudication of bankruptcy against himself, he shall be at liberty to petition *in formā pauperis*, upon making an affidavit to be sworn before the gaoler, that he has not the means of paying the usual fees and expenses. Sect. 99. If not previously discharged by a registrar, the county court of the district, at its next sitting after presentation of such petition, shall examine the petitioner touching his estate and effects, debts, dealings,

and transactions; and, if satisfied with such examination, shall make an order of adjudication of bankruptcy against him. Sect. 103. Every such adjudication shall, unless the court otherwise direct, have relation back to the date of the commitment or detention, as the case may be, and shall be as valid and effectual for all purposes as if it had been made under any other of the provisions of this act. On the construction of these three sections, see *Bramwell v. Eglinton*, *post*, p. 715.

By the 12 & 13 Vict. c. 106, s. 71, if a trader after the filing of any petition against him, pay money, satisfy, or give security to a petitioning creditor, whereby he may receive more in the pound than the other creditors, such payment, &c., shall be an act of bankruptcy, and the court may either proceed on the adjudication already made, or order it to be annulled, and a new petition may then be filed on the above or any other act of bankruptcy. See *Ex parte Smith*, 3 *M. D. & De G.* 144.

Sect. 74 of 12 & 13 Vict. c. 106 (un-repealed), makes the filing of a petition in the *Insolvent Debtors Court in England* by any trader who shall be in actual custody for his discharge from custody, an act of bankruptcy.

By 24 & 25 Vict. c. 134, s. 75, a petition by or against a trader or non-trader, and an adjudication of insolvency or bankruptcy, in any of the Queen's dominions, colonies, or dependancies, are conclusive evidence of an act of bankruptcy at the time of filing of the petition; and any creditor or creditors, whose debts are of sufficient amount, may thereupon petition under this act, within two months after notice in the *London Gazette* of such adjudication. Sect. 75 (repealed) of 12 & 13 Vict. c. 106, was similar, but applying only to India.

By 12 & 13 Vict. c. 106, s. 76, "The filing of a petition by any trader for an arrangement between him and his creditors, under the provisions of this act, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed; provided also that no adjudication shall be made on any such act of bankruptcy unless and until after such petition for arrangement shall have been dismissed." As to relation under this section, see *Ex parte Harrison*, 26 *L. J. (Bank.)* 30; and see *Monk v. Sharp*, 2 *H. & N.* 540; 27 *L. J. (Ex.)* 29; and *Lee v. Rowley*, 8 *E. & B.* 857, as to the sufficiency of an order of adjudication of bankruptcy under the sections as to arrangement; but it is to be observed that those sections, 211-231, are repealed.

The 12 & 13 Vict. c. 106, s. 77, provides for acts of bankruptcy by traders having privilege of Parliament.

Sections 78-84 of 12 & 13 Vict. c. 106 enable a creditor to summon a trader to the Court of Bankruptcy in the mode mentioned therein, and make certain acts and defaults on the trader's part acts of bankruptcy.

And the 24 & 25 Vict. c. 134, ss. 76-84, enables a judgment creditor for a debt of £50 exclusive of costs, or a person entitled to payment of money under an order in a Court of Bankruptcy, &c., to summon the debtor whether a trader or not; and in default of payment after a certain limited time, or composition to the satisfaction of the creditor, the court may adjudge the debtor a bankrupt, the adjudication to have relation back to the service of the summons, or in default of service to the notice in the *London Gazette*. In the case

of a non-trader the summons must be in respect of a debt contracted or a liability incurred after the passing of the act; s. 90.

By 24 & 25 Vict. c. 134, s. 73, if any execution shall be levied by seizure and sale of any of the goods and chattels of any trader debtor, upon any judgment recovered in any action personal for any debt or money demand exceeding £50, the debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure: Provided, that unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented, the sheriff or other officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds, or so much as ought to be paid, to the execution creditor who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy, but the sheriff or other officer shall not incur any liability by reason of anything done by him: Provided also that, in case of bankruptcy, the costs and expenses of such action and execution shall be retained and paid out of the proceeds of the sale, and the balance only be paid to the assignees.

By 12 & 13 Vict. c. 104, s. 88, no person shall be liable to be made a bankrupt by reason of any act of bankruptcy committed more than twelve months before the fiat or petition for adjudication. See *Ex parte Bunny, infra*; *Wallace v. Blackwell, post*, p. 704.

Some of the most useful decisions with regard to the above acts of bankruptcy will now be noticed.

Evidence of acts of bankruptcy—Departing the realm, &c.] This applies to traders or non-traders, *ante*, p. 691. It must be shown that the bankrupt departed the realm *with intent* to delay his creditors; and, therefore, though the creditors be in fact delayed, yet if the intent is wanting, there is no act of bankruptcy; *Warner v. Barber, Holt, N. P.* 175; *Windham v. Paterson, 1 Stark.* 145; *Fowler v. Padget, 7 T. R.* 509. But where the departing the realm must necessarily cause a delay, it will be an act of bankruptcy; for a person must be supposed to foresee and intend the necessary consequence of his own acts; *Ramsbottom v. Lewis, 1 Camp.* 279. Therefore where a trader went abroad in consequence of having killed his wife, it was held an act of bankruptcy; *Woodier's case, B. N. P.* 39; and see *Raikes v. Poreau, Cook, B. L.* 73. Returning to Ireland, the trader's place of business, is a departing the realm within this section, if he leave England to avoid arrest; *Williams v. Nunn, 1 Taunt.* 270.

Where a trader departed the realm, leaving a letter behind him, and on the following day wrote another letter from Calais, it was held that both letters were admissible to show with what intention he departed; *Rawson v. Haigh, 2 Bing.* 99. See *Ridley v. Gyde*, and other cases cited, *post*, p. 695.

A fresh act of bankruptcy is committed every day a trader remains abroad with intent to delay his creditors; *Ex parte Bunny, 1 De G. & J.* 309; 26 *L. J. (Bank.)* 83.

Departing from his dwelling-house.] This applies to traders only, *ante*, p. 691. In this, and all such cases, actual delay need not be proved; an *intent* to delay is sufficient; *Robertson v. Liddell, 9 East*, 487; *Williams v. Nunn, supra*; *Chenoweth v. Hay, infra*. Even where

a trader departed under a mistaken idea that an officer, who called, had a writ for him, it was held an act of bankruptcy; *Ex parte Bamford*, 15 Ves. 449. Where the act of departing is equivocal, it is a question for the jury whether it was with intent to delay creditors; *Deffle v. Desanges*, 8 Taunt. 671; *Aldridge v. Ireland*, cited 1 Taunt. 273, and 7 T. R. 512. A trader who has no settled house or counting-house, but takes up a temporary abode at a public-house in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house with intent to delay his creditors; *Holroyd v. Gwynne*, 2 Taunt. 176.

In order to prove the intent with which the bankrupt departed from his dwelling-house, evidence of what he said is admissible as part of the *res gestæ*; *Ambrose v. Clendon*, Ca. t. Hardw. 267. There are many cases to show that the declaration ought to be one made at the time of the act, or, at all events, so near it as to form part of one and the same transaction. But it has been held that, though concurrence of time is material to show the connection between the act done and the expressed intention, it is not essential; *Rouch v. Great Western Ry. Co.*, 1 Q. B. 51. Thus the declarations of the bankrupt after his return home, as to the reason of his absence; *Bateman v. Bailey*, 5 T. R. 512; or before leaving his home; *Smith v. Cramer*, 1 N. C. 585; have been admitted. And see *Ridley v. Gyde*, 9 Bing. 349; and *per Tindal, C. J., S. C.*, the court must consider whether the declaration was within a reasonable time of the disputed act. The bankrupt's declaration that he departed to avoid a writ, is evidence of an act of bankruptcy without proof of the writ, the debt, or even the existence of creditors; *Newman v. Stretch*, Mood. & M. 338; *Wilson v. Norman*, *infra*; *Rouch v. Great Western Ry. Co.*, *supra*.

Otherwise absenting himself.] This applies to traders only, *ante*, p. 691. It has been held sufficient evidence of the trader absenting himself, to show that after being arrested he fled from the officer into the house of another person, where the door was fastened and the officer not permitted to enter, and that he said he remained there for fear of other creditors; *Bayly v. Schofield*, 1 M. & S. 338. So where the trader went into the back shop of a neighbour's house to avoid an officer who he said had a writ against him; *Chenoweth v. Hay*, *Id.* 676; and see *Wilson v. Norman*, 1 Esp. 334. Where a trader left his counting-house, to which he never returned, taking away his books with him, and went to his country-house, where he slept two or three nights afterwards, he was held to have committed an act of bankruptcy when he left the counting-house; *Judine v. Du Cossen*, 1 N. R. 234. So where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his house without intent to delay his creditors and having been a few days on a visit at Manchester, both of them left their counting-house there to avoid an arrest, carrying with them their books of accounts: this was held an act of bankruptcy by both; *Spencer v. Billing*, 3 Camp. 312.

A trader absented himself for three or four days from his place of business, and in his absence a bill of exchange was presented and dishonoured, and other applications for the payment of debts were made; the bankrupt's absence was for the purpose of getting up evidence against one of his workmen for forgery, and also of obtaining assistance to enable him to discharge certain liabilities; held

that the evidence was insufficient to show an intent to delay creditors ; *Ex parte Barney*, 32 L. J. (Bank.) 41.

If a trader absents himself from any place in order to delay his creditors, whether it be his ordinary place of business or a place appointed by himself for a meeting, or a place he would have gone to but for even an unfounded apprehension of arrest, he commits an act of bankruptcy ; *Lees v. Marton*, 1 Mood. & Rob. 210 ; *Russell v. Bell*, 10 M. & W. 340 ; *Gillingham v. Laing*, 6 Taunt. 532 ; *Robson v. Rolls*, 9 Bing. 648. And see *Ex parte Beer*, 1 M. D. & D. 390 ; *Ex parte Dean*, 2 M. D. & D. 127. It was said by Parke, J., that no case has yet gone the length of deciding that, where the appointment is to meet the creditor at the creditor's place of residence, and the debtor breaks that appointment, such conduct amounts to an act of bankruptcy ; *Lees v. Marton*, 1 Mood. & Rob. 212 ; but see *Robson v. Rolls*, 9 Bing. 648 ; and the Court of Chancery in Ireland has decided that it does ; *Re O'Neill*, 9 Ir. Ch. Rep. 279.

Where a trader, who on being arrested had obtained his liberty upon a promise to attend and execute a bail-bond, did not attend, it was held no act of bankruptcy ; *Schooling v. Lee*, 3 Stark. 149.

Beginning to keep house.] This applies to traders only, ante p. 691. In order to prove a beginning to keep house with intent to delay creditors, an authorized denial to a creditor need not be proved ; such actual denial is only one mode of proof by which the act of bankruptcy may be established ; it may be proved by any evidence to the same effect. Thus where a trader withdraws from his counting-house on the ground-floor to his parlour up-stairs for privacy and seclusion, and with a view to avoid the fair importunity and personal solicitation of his creditors, it is an act of bankruptcy ; *Dudley v. Vaughan*, 1 Camp. 271 ; and see *Lloyd v. Heathcote*, 2 B. & B. 388 ; *Key v. Shaw*, 8 Bing. 320. Where the partners in a banking-house, being present on the spot, order the door and shutters of the bank to be closed during hours of business, this is "a beginning to keep house ;" *Cumming v. Baily*, 6 Bing. 363. But the closing the bank is not an act of bankruptcy in those partners who are not present ; *Mills v. Bennett*, 2 M. & S. 556 ; *Ex parte Mavor*, 19 Ves. 543. Where a trader, having been before arrested, desired his servants not to let into the house any person whom they did not know, and the doors of the house were kept shut, and no person was admitted without ascertaining who he was, it was held an act of bankruptcy, though no creditor was actually denied ; *Harvey v. Ramsbottom*, 1 B. & C. 55. So if a trader secretes himself in the house of a friend where he is lodging, and where persons are in the habit of calling upon him, and desires to be, and is, denied to them ; *Curteis v. Willes, Ry. & Mood*. 58 ; 4 D. & R. 224. And though the trader was seen by the creditor at the time of the denial, it is still an act of bankruptcy ; *Ex parte Bamford*, 15 Ves. 449. Where a trader gave a general order to be denied, and was denied to a particular creditor, it was held such a beginning to keep house as constituted an act of bankruptcy, though the trader immediately followed the creditor, and told him he was not afraid of him but of another creditor ; *Mucklow v. May*, 1 Taunt. 479 ; and see *Colkett v. Freeman*, 2 T. R. 59. But a mere direction given by a trader to deny him is not an act of bankruptcy, unless that direction be followed by an actual denial, or by his concealing himself, or by some other act that is evidence of a beginning to keep house ; *Fisher v. Boucher*, 10 B. & C. 705. It

must be proved that the order to deny was given by the trader; *Dudley v. Vaughan*, 1 Camp. 271; *Ex parte Foster*, 17 Ves. 416. But if a trader in his own house knowingly permits himself to be denied to a creditor, this, if done with an intent to delay creditors, is an act of bankruptcy, though he has given no directions to be denied; *Smith v. Moon, Mood. & M.* 458. •

In answer to this general evidence of denial it may be shown that the order was not given with intent to delay; as that it was to deny the trader to any one who should come whilst he was at dinner, or engaged in business; *Shew v. Thomson, Holt, N. P.* 159; *Lloyd v. Heathcote*, 2 B. & B. 392. So a trader may order himself to be denied at unseasonable hours, as at night, or at meal-times, and on other occasions which may be easily imagined, without meaning to delay the creditor, and therefore without committing an act of bankruptcy; *per Lord Ellenborough, C. J., Smith v. Currie*, 3 Camp. 350. Where the debtor appointed Sunday to settle with a creditor, and when the creditor called ordered himself to be denied, Lord Eldon held this not an act of bankruptcy; *Ex parte Preston*, 2 V. & B. 312. But where a trader ordered his servant to say, if any creditors called, that he was not at home, and he was accordingly denied, being ill in bed at the time, it was held that it was properly left to the jury whether this was an act of bankruptcy, and that they were warranted in finding it was; for the creditor should have been informed that the trader was at home, but ill; *Lazarus v. Waithman*, 5 B. Moore, 313.

Procuring his goods to be taken in execution, &c.] This applies to a trader only, *ante*, p. 691. Giving a warrant of attorney reluctantly on pressure for a real debt, and thereby causing the debtor's goods to be taken in execution, is not an act of bankruptcy; *Gore v. Lloyd*, 12 M. & W. 463. But warrants of attorney, cognovits, and consents to a judge's order for judgment within two months before the filing of the petition, and in certain other cases, are made void by sects. 135, 136, 137, of the 12 & 13 Vict. c. 106. See *post*, *Actions against Sheriffs*. The act of bankruptcy is not complete till the actual seizure, and there is no relation to any earlier act of the bankrupt; *Belcher v. Gummow*, 9 Q. B. 873; 16 L. J. (Q. B.) 155.

Fraudulent conveyance, &c.] By the 12 & 13 Vict. c. 106, s. 67, two descriptions of fraudulent transactions are made acts of bankruptcy, viz., a fraudulent grant or conveyance of any of the trader's lands, tenements, goods, or chattels,—and a fraudulent gift, delivery, or transfer of any of his goods or chattels. And the 24 & 25 Vict. c. 134, s. 70, is in similar terms as to a non-trader; see *ante*, p. 691.

It should be observed, however, that a fraudulent conveyance is made an act of bankruptcy *as to a trader*, if he make it or cause it to be made, “either within this realm or elsewhere,” but *quære* whether these words extend to the subsequent clauses of s. 67; and they are altogether omitted in the 24 & 25 Vict. c. 134, s. 70, as to a non-trader; and no act abroad can be an act of bankruptcy, unless expressly made so by the statute; see *Ex parte Smith*, cited *Cowp.* 402; *Ingliss v. Grant*, 5 T. R. 530.

A fraudulent delivery of goods will not be an act of bankruptcy, unless it is in the nature of a gift or transfer; so that where goods are removed with intent to delay a creditor, but the person in whose custody they are placed has no interest given to him in them, this is not an act of bankruptcy; *Cotton v. James, Mood. & M.* 273.

As the acts which have been determined to be fraudulent preferences, will, in general, under the existing provisions, be also acts of bankruptcy, it will be most convenient to consider them together hereafter; *post*, pp. 700, *et seqq.* It should be observed that a creditor who has executed, or been privy to, or acted under, the fraudulent deed, cannot himself set it up as an act of bankruptcy; *Bamford v. Baron*, 2 T. R. 594 (n); nor can the assignees where the petitioning creditor was privy to it; *Tope v. Hocking*, 7 B. & C. 101. The intent, express or implied, to defeat or delay creditors must exist. Under the old acts, when a non-trader could not be made a bankrupt, there was no distinction between the delay of trade and other creditors; *Smith v. Cannan*, 2 E. & B. 35; 22 L. J. (Q. B.) 290.

A conveyance fraudulent under the 13 Eliz. c. 5, is an act of bankruptcy; see 1 Sm. L. C. 19. And any deed that is fraudulent at common law will be void as a fraud upon assignees and contrary to the policy of the bankrupt laws; see 1 Sm. L. C. 19, and *post*, *Actions against Sheriffs*.

The cases decided under the old law relative to assignments by deed of all a trader's property are now, under the 12 & 13 Vict. c. 106, s. 67, and 24 & 25 Vict. c. 134, s. 70, *ante*, p. 691, applicable to all assignments, whether under seal or not. The assignment of all a debtor's property whether upon trust for the benefit of one creditor, *Wilson v. Day*, 2 Burr. 827, or of several, *Compton v. Bedford*, 1 W. Bl. 362, or of all to the exclusion of one, *Ex parte Foord*, cited, 1 Burr. 477, is an act of bankruptcy. An assignment of all a debtor's effects, or of all but a colourable exception, even upon trust for the benefit of all his creditors, is an act of bankruptcy; *Stewart v. Moody*, 1 C., M. & R. 771; *Dutton v. Morrison*, 17 Ves. 193; *Compton v. Bedford*, 1 W. Bl. 362; *Hale v. Alnutt*, 18 C. B. 505; *Smith v. Cannan*, 2 E. & B. 35; 22 L. J. (Q. B.) 290. But such an assignment for the benefit of creditors by a trader is now protected on certain conditions, by sect. 68 of 12 & 13 Vict. c. 106, *ante*, p. 691. See also ss. 192-200 of 24 & 25 Vict. c. 134, *post*, pp. 730-2. But such a deed was available to a creditor as an act of bankruptcy if he petitioned before the requisite majority of creditors had signed or executed it; *Ex parte Alsop*, 1 De G. F. & J. 289; 29 L. J. (Bank.) 7; unless the petitioning creditor has acquiesced in the deed; *S. C.* See under the act of 1861; *Ex parte Morgan*, 1 De G. J. & Sm. 288; 32 L. J. (Bank.) 15. That such a deed unstamped and unregistered as required by s. 194, can be given in evidence as an act of bankruptcy, see *Ex parte Wensley*, 32 L. J. (Bank.) 23; 1 De G. J. & Sm. 273; and *Ex parte Potter*, 13 W. R. 189, that it cannot; *post*, p. 733. Such assignment is an act of bankruptcy, though none of the creditors have executed it, and though it has never been acted upon, or out of the trader's possession; *Botcherby v. Lancaster*, 1 Ad. & E. 77. An assignment by a trader in insolvent circumstances of all his stock in trade is an act of bankruptcy; but it is not absolutely essential, in order to make an assignment an act of bankruptcy, that it should prevent the trader carrying on his trade; *Smith v. Cannan*, 2 E. & B. 35; *Young v. Waud*, 8 Ex. 221; *Oriental Banking Co. v. Coleman*, 3 Giff. 11; 30 L. J. (Ch.) 635. It is not sufficient to prove that, under pecuniary pressure, the bankrupt parted with some articles essential to the carrying on of his business; as where a miller transferred his waggon and horses to a creditor who had arrested him; *Wedge v. Newlyn*, 4 B. & Ad. 831. An assignment by a trader of all

his property for the benefit of creditors is not less an act of bankruptcy that it was delivered to an attorney in the presence of the person to whom the assignment was made, in order that it might be used only in certain circumstances; *Turner v. Hardcastle*, 31 L. J. (C. P.) 193; 11 C. B., N. S. 683.

A distinction is to be observed between an assignment by a debtor, of all his effects for the benefit of his creditors or for securing a pre-existing debt, and an assignment of all his property for a valuable consideration, the latter not being fraudulent. Thus, it is said by Lord Kenyon, that in all the cases, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, it had been made for a by-gone and pre-contracted debt; but that it never could be taken to be law that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him, as a security for advances to be made to him; *Whitwell v. Thompson*, 1 Esp. 72; see *Lindon v. Sharp*, 6 M. & G. 895; *Manton v. Moore*, 7 T. R. 67; *Hunt v. Mortimer*, 10 B. & C. 44; and *Hutton v. Cruttwell*, 1 E. & B. 15; where a mortgage to secure a present advance was held not to be an act of bankruptcy, though it contained a power to take and dispose of future acquired property; see also *Pennell v. Reynolds*, 11 C. B., N. S. 709; *Shrubsole v. Sussams*, 16 C. B., N. S. 452. *Aliter*, if to secure a by-gone debt, though also for future advances; *Graham v. Chapman*, 12 C. B. 85; *Lacon v. Liffen*, 32 L. J. (Ch.) 315; 4 Giff. 75. In *Bittlestone v. Cooke*, 6 E. & B. 296, an assignment of all present and future stock made to secure future advances was held not to be an act of bankruptcy. So an assignment of all a trader's goods, worth 2000*l.*, in consideration of the assignee paying off the debts due to two pressing creditors of the assignor, amounting to 1150*l.*; *Whitmore v. Claridge*, 31 L. J. (Q. B.) 141; affirmed in Ex. Ch. 33 L. J. (Q. B.) 87; see also *Baxter v. Pritchard*, 1 Ad. & E. 456; *Harwood v. Bartlett*, 6 N. C. 61. In *Leake v. Young*, 5 E. & B. 955; 25 L. J. (Q. B.) 266, it was held that an assignment of all a trader's effects as security to a surety for liabilities he had incurred, was an act of bankruptcy.

An assignment of *part* of a trader's effects to a particular creditor (unlike, in this respect, to an assignment of the whole), carries with it no intrinsic evidence of fraud; for a trader must in the course of his business have the power to make over part of his property either for past debts or for future advances. Thus it has been held that an assignment of part of a trader's property, upon trust to sell and dispose of the proceeds as he shall direct, is not, in itself, an act of bankruptcy; *Robinson v. Carrington*, 1 Mont. & Ayr. 1. A conveyance of all a debtor's goods in a certain place is not an act of bankruptcy, unless it be shown that he had no other effects; *Chase v. Goble*, 2 M. & G. 930; see *Young v. Waud*, 8 Ex. 221; *Greenwood v. Churchill*, 1 Myl. & K. 546; *Carr v. Burdiss*, 1 C. M. & R. 443; *Abbott v. Burbage*, 2 N. C. 444. If made under pressure it is not an act of bankruptcy; *Smith v. Timms*, 32 L. J. (Ex.) 215; 1 H. & C. 849. But pressure is not essential to negative fraud; if the act be not spontaneous, it is sufficient; *Johnson v. Fesemeyer*, 3 De G. & J. 13; *Harris v. Rickett*, 4 H. & N. 1. And whether such partial assignment is an act of bankruptcy is a question of fact for a jury, who will have to find whether it was voluntary, and made in contemplation of bankruptcy; *Belcher v. Prittie*, 10 Bing. 412; *Bannatyne v. Leader*, 10 Sim. 350. An assignment of

part of a debtor's property, although the rest is large, will be an act of bankruptcy if it be accompanied at the time by such circumstances of insolvency that the general body of the creditors are defeated and delayed in the manner of distribution according to the bankruptcy law; *Ex parte Wensley*, 32 L. J. (Bank.) 23; 1 De G. J. & S. 273; *Young v. Fletcher*, 34 L. J. (Ex.) 154.

A sale by a trader of his goods at prices considerably below their market value, is not of itself a fraudulent transfer within the 67th sect. of the 12 & 13 Vict. c. 106; *Lee v. Hart*, 11 Ex. 880; 25 L. J. (Ex.) 135. To render the transaction fraudulent, not only must the seller have intended by such sale to defeat or delay his creditors, but the purchaser must have had reason to know that such was the object of the seller; *Barter v. Pritchard*, 1 Ad. & E. 456; *Harwood v. Bartlett*, 6 N. C. 61; *Fraser v. Levy*, 6 H. & N. 16; in the last case, however, the necessity of knowledge on the part of the vendee was somewhat questioned. See, however, *Pennell v. Reynolds*, 11 C. B. N. S., 709.

The goods of B., a trader, having been seized under five executions, F. paid out the sheriff, who executed a bill of sale to him. B. had other creditors to F.'s knowledge, and it was agreed between B. and F. that F. was to hold the goods for a certain time, and retransfer them to B. on repayment of the sum paid to the sheriff; the jury having found that the object of the transaction was not only to relieve B. from a forced sale under the circumstances, but also with F.'s knowledge to protect the goods from other creditors: Held that the sale was void under the stat. 13 Eliz. c. 5, and an act of bankruptcy; *Graham v. Furber*, 14 C. B. 410; 23 L. J. (C. P.) 51.

[*Fraudulent conveyance—Fraudulent preference.*] It may be laid down generally, that an assignment of part of a trader's property made voluntarily and in contemplation of bankruptcy, and consequently with the intent to give one creditor a preference over the other creditors, was always held void against assignees, as being contrary to the policy of the bankruptcy law, but is now also, in general, available as an act of bankruptcy. A transfer of goods in satisfaction of a *bonâ fide* debt, made voluntarily and in contemplation of bankruptcy, is an act of bankruptcy; *Beran v. Nunn*, 9 Bing. 107. In order to render the conveyance of part of the bankrupt's effects fraudulent, something more than mere voluntariness is necessary; *Gibbins v. Phillipps*, 7 B. & C. 529; *Morgan v. Brundrett*, 5 B. & Ad. 289. To make it an act of bankruptcy, the conveyance must be both fraudulent and in delay of creditors; and contemplation of bankruptcy is evidence of fraud; per Bayley, J., in *Gibbins v. Phillipps*, *supra*. Whether the party contemplated bankruptcy is a question for the jury under all the circumstances of the case; *Poland v. Glyn*, 4 Bing. 22 (n); *Flook v. Jones*, 4 Bing. 20. A voluntary payment made in contemplation of bankruptcy may be void as a fraudulent preference, though the immediate object of it was not to benefit the creditor preferred, but to free the estate of the bankrupt's wife from an incumbrance; *Marshall v. Lamb*, 5 Q. B. 115. But where one of a banking firm about to stop payment gave information to a relation, with a view to his withdrawing his account, and the relation communicated the intelligence (contrary to the intention of the banker) to an insurance company, of which he was a director, and the company's account was accordingly withdrawn by payment of a cheque; this was held no fraudulent preference of the company; for although the payment was

in consequence of the information given by the bankrupt, there was no intention on the part of the bankrupt to prefer the company; *Belcher v. Jones*, 2 *M. & W.* 258.

Proof that a trader is in embarrassed circumstances is not conclusive evidence that he contemplated bankruptcy. A trader purchased goods from B., but finding that he must stop payment, returned them to B., and on the next day stopped payment, though expecting remittances sufficient to pay his debts, and though he had no doubt that his creditors would give him time, which the creditors however refused: Held, that the jury were warranted in finding that the delivery of the goods was not in contemplation of bankruptcy; *Fidgeon v. Sharp*, 1 *Marsh.* 196; 5 *Taunt.* 539; and see *Wheelwright v. Jackson*, 5 *Taunt.* 109; *Moore v. Barthorp*, 1 *B. & C.* 5. To make out a case of fraudulent preference, the trader's knowledge that he was in a state of insolvency is not sufficient, unless actual bankruptcy was contemplated; *Morgan v. Brundrett*, *supra*; *Atkinson v. Brindall*, 2 *N. C.* 225. In these cases the length of time elapsing between the transaction and the bankruptcy is a material consideration; and, with regard to the contemplation of bankruptcy, the question is not what was the *real* state of the trader's affairs, but what was their state *in his own judgment*; *Belcher v. Prittie*, 10 *Bing.* 408.

In order to constitute a fraudulent preference, the transaction on the part of the trader must be *voluntary*. If the assignment or transfer be upon the importunity of a creditor the transaction will be valid, and it is immaterial whether the trader had or had not an act of bankruptcy in contemplation at the time the creditor pressed for payment; *Hartshorn v. Slodden*, 2 *B. & P.* 582; *Crosby v. Crouch*, 11 *East*, 261. If a trader gives a preference to a creditor under an apprehension, however groundless, of legal process, such preference is valid; *Thompson v. Freeman*, 1 *T. R.* 155. And where a creditor, knowing his debtor to be in distressed circumstances and not able to pay his debts, applied to him for a security, and took part of his stock in trade for that purpose, it was held no undue preference, though the creditor did not threaten to sue; *Smith v. Payne*, 6 *T. R.* 152. Where the acceptor of a bill of exchange went to the indorser two days before it was due, and informed him privately of his insolvent circumstances, upon which the indorser said that the amount of the bill must be paid to him immediately, and the acceptor accordingly paid it, and four days after became bankrupt; this was held evidence for the jury of a fraudulent preference; *Singleton v. Butler*, 2 *B. & P.* 283. But where A., a shopkeeper, procured B. to discount accommodation bills drawn by him and accepted by third persons, and B. afterwards required A. to give him a collateral security for the payment of the bills, upon which A. *secretly* deposited with him goods to be sold for B.'s benefit if the bills should not be paid; and soon after A. became a bankrupt, and the bills were dishonoured; it was held that the depositing of the goods in this manner as a security was not a fraudulent preference; *Crosby v. Crouch*, 2 *Camp.* 166; 11 *East*, 256. "If the creditor was entitled to demand and to receive a security in goods for a running debt, upon what principle is he obliged to insist upon the transaction being conducted by his debtor with any particular circumstances of publicity, which might be, in other respects, injurious to the general credit of such debtor?" *per* Lord Ellenborough, C. J., *S. C.*, 11 *East*, 261. The consideration upon which a payment, made to an importunate creditor of a debt

actually due, has been allowed to be valid, is not that he might resort to a suit to enforce payment, but that his demand repels the presumption that the bankrupt, upon the eve of bankruptcy, made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of further security for a debt not yet due has the same effect, and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to the bankruptcy can be set aside; *per* Lord Ellenborough, C. J.; *S. C.*, 2 *Camp.* 168. A payment by a trader, who contemplates bankruptcy, of a debt not then due, upon a *bonâ fide* request of a creditor, is not in law a voluntary payment, the fact of the debt not being due is merely a circumstance for the jury in considering the question of fraudulent preference; *Strachan v. Barton*, 11 *Ex.* 647; 25 *L. J. (Ex.)* 182; *Hartshorn v. Slodden*, 2 *B. & P.* 582; *Crosby v. Crouch*, 11 *East*, 260. Where a trader, without solicitation, and in contemplation of stopping payment, put three cheques into the hands of his clerk to be delivered to a creditor at the counting-house of the latter; but while the clerk was absent and before the delivery, the creditor called upon the trader and demanded payment of his debt, it was ruled that the intention of making a voluntary preference not having been consummated before the demand, the payment stood good; *Bayley v. Ballard*, 1 *Camp.* 416. But this case has been questioned; see *Cook v. Rogers*, 7 *Bing.* 446; and it seems inconsistent with the later cases, where the question has been held to be what operated on the mind of the debtor in making the payment; see *Brown v. Kempton*, and other cases *infra*. A debtor, being insolvent and in prison, went under a day rule to receive a sum of money due to him at an office; a creditor met him there, and demanded and received out of the money payment of his debt, having no notice of the debtor's insolvency and imprisonment; eight days afterwards a commission issued against the debtor. It was held that this was no fraudulent preference; *Churchill v. Crease*, 5 *Bing.* 177. A trader had property to a considerable amount standing in the Custom House in his own name, but in fact purchased on account of A. A bill deposited with A. by the trader as a security appearing to be a forgery, A. insisted upon having the property transferred to himself, which was done on the 15th of January. On the 17th the trader became bankrupt. Lord Ellenborough said that the question for the jury was, whether the transfer was voluntary, or made under the apprehension of force, *civil or criminal*; *De Tastet v. Carroll*, 1 *Stark.* 88; and see *Atkins v. Seward*, *Manning's Index*, 62-63.

Where a trader, being pressed by a creditor for payment, gave a bill of sale of the whole of his stock, and immediately left his business and home and became bankrupt, it was held that, inasmuch as the act done did not redeem the trader even from any present difficulty, which is the ordinary motive for such an act when done under the pressure of a threat, there was evidence that it was not done under such a pressure, but voluntarily, and with a view to prefer the particular creditor; *Thornton v. Hargreaves*, 7 *East*, 544. If evidence of a threat is given to show that the transaction was not voluntary on the part of the bankrupt, it is still matter of consideration for the jury whether that threat had any operation or not, and the motives of the trader may be properly inquired into; *Cook v. Rogers*, 7 *Bing.* 438. The following direction was upheld by the Exchequer Chamber: If the bankrupt was induced to make the payment by pressure of the creditor, it was not a fraudulent preference. If he

was not influenced by the pressure, but acted voluntarily, and with a view to give a preference to the creditor in the event of bankruptcy, it was a fraudulent preference. If the payment was made under the influence of pressure, *and also* with a desire to give a preference in the event of bankruptcy, it was not a fraudulent preference; *Brown v. Kempton*, 19 *L. J. (C. P.)* 169. If the pressure exercises any influence on the bankrupt's mind in making the assignment, there is no fraudulent preference; *Hale v. Allnutt*, 18 *C. B.* 527; 25 *L. J. (C. P.)* 267; *Edwards v. Glyn*, 2 *E. & E.* 29; 28 *L. J. (Q. B.)* 350. The pressure need not be by the creditor himself, pressure by a surety for the bankrupt is sufficient; *Edwards v. Glyn*, *supra*. Nor need the pressure be more than a request for payment; *Strachan v. Barton*, 11 *Ex.* 647; 25 *L. J. (Ex.)* 182.

Nor is the absence of any application on the part of the creditor conclusive of the payment being a fraudulent preference, as where the debtor pays money on a particular day in pursuance of a promise made when he borrowed it to pay it on that day; *Bills v. Smith*, 34 *L. J. (Q. B.)* 68. In that case, Blackburn, J., ruled that if the bankrupt, though he was aware that bankruptcy was unavoidable, and though no application had been made for payment, paid the debt simply in discharge of the obligation he had entered into to pay on that day, without any view of giving a preference to the particular creditor at the expense of the rest, the payment need not be a fraudulent preference. The jury having found in favour of the payment, this ruling was upheld by the Court of Queen's Bench. The Court, after reviewing the authorities, thus laid down the law on the subject: "The whole question turns on the intention of the trader in disposing of his effects to the particular creditor. *Prima facie*, a trader who, on the eve of bankruptcy, transferred to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law; but if circumstances exist which tend to explain and give a different character to the transaction, and to show the debtor acted from different motives, these circumstances must be left to the jury, who should be told that unless they come to the conclusion that the debtor had the intention of defeating the law, and preventing the due distribution of his assets by preferring one creditor at the expense of the rest, the transaction will stand good in law."

The motive operating on the trader's mind is the question, and the declarations of the trader connected with the fraudulent assignment, whether before or after it, are evidence towards establishing the act of bankruptcy; *Ridley v. Gyde*, 9 *Bing.* 349; and cases cited under *Departing the realm*, &c., *ante*, p. 694. To prove that goods had been fraudulently given to certain creditors by the bankrupt, evidence was tendered that they had, since the fiat, returned them to the assignees: Held inadmissible against a third person; for it only amounted to the expression of an opinion by the creditors that they were not entitled; *Backhouse v. Jones*, 6 *N. C.* 65.

Although a transfer by way of fraudulent preference amounts in general to an act of bankruptcy, yet it is not always available as an act of bankruptcy; thus, under the old act 7 & 8 Vict. c. 96, when a fiat and adjudication had proceeded on the bankrupt's own petition under sect. 41, it was held that the assignees' title could not relate back to a previous assignment by way of fraudulent preference as an act of bankruptcy, for their title in such a case could not relate back further than the declaration of insolvency; *Stevenson v. Newnham*,

13 C. B. 285. In *Nicholson v. Gooch*, 5 E. & B. 999, 1010, 25 L. J. (Q. B.) 137, there was a similar decision as to the relation of the title of assignees under sect. 223 of 12 & 13 Vict. c. 106; and in *Paull v. Best*, 32 L. J. (Q. B.) 96; 3 B. & S. 537, under sect. 86. (*ante*, p. 692) of 24 & 25 Vict. c. 134. The distinction is material; for the transfer, if available as an act of bankruptcy, is void; but if only a fraudulent preference, it is merely voidable, and it passes the property until the assignees elect to avoid it by demand or other disaffirmance, and therefore a third person cannot set up the title of the assignees against that of the transferee, before the assignees have interfered; *Newnham v. Stevenson*, 10 C. B. 713; *Stevenson v. Newnham*, *supra*; for on a sale or other transfer voidable for fraud, till avoided, the property vests in the transferee, and all mesne assignments to persons not cognizant of the fraud are valid; *White v. Garden*, 10 C. B. 919; 20 L. J. (C. P.) 166; *per cur.* *Stevenson v. Newnham*, *supra*. In such a case too the assignees themselves cannot recover against the transferee, as for a conversion, without a previous demand and refusal; *Nixon v. Jenkins*, 2 H. Bl. 135.

Lying in prison.] This applies to trader, and, with some modifications, to a non-trader, *ante*, pp. 691-2. This act of bankruptcy does not relate to the first day of the imprisonment; *Higgins v. McAdam*, 3 Y. & J. 1; *Moser v. Newman*, 6 Bing. 556. When a debtor lies in prison more than the given time, he only commits one act of bankruptcy, which is committed at the expiration of the given time from the arrest; and if this is more than twelve months before the petition, the lying in prison is not available as an act of bankruptcy on which to found the petition; *Wallace v. Blackwell*, 25 L. J. (Ch.) 644; 3 Drew. 538. In order to render a lying in prison an act of bankruptcy, the arrest must be for a subsisting legal debt; *Eden on Bankr.*, 35. A penalty due to the crown has been considered a sufficient debt; *Cobb v. Symonds*, 5 B. & A. 516. Under the old acts the time of lying in prison was held to commence from the first arrest, and the time was reckoned *inclusive* of the day of arrest; *Glusington v. Rawlings*, 3 East, 407; *Higgins v. McAdam*, *supra*; but by the 24 & 25 Vict. c. 134, s. 229, when any particular number of days is prescribed for doing any act, or for any other purpose, they are to be reckoned *exclusive* of the first and *inclusive* of the last. Where bail is put in, and the debtor surrenders in discharge of his bail, the time is computed from the surrender; *Tribe v. Webber*, *Willes*, 464; see *Rose v. Green*, 1 Burr. 437. If the debtor is suffered to go at large after the arrest, and afterwards returns into custody, the time is computed from the return; *Barnard v. Palmer*, 1 Camp. 509. Where the debtor at the time of the arrest was sick, and consequently suffered to remain some time in his own house, the key of which was kept by the officer's follower not named in the warrant, the time was held to run from the arrest; *Stetens v. Jackson*, 4 Camp. 164; 6 Taunt. 106. In *Ex parte Crabb*, 25 L. J. (Bank.) 45; 8 De G. M. & G. 277, a trader was arrested on the same day for felony and debt, and it was held that an act of bankruptcy had been committed after remaining in the jail for twenty-one (now fourteen) days.

The arrest may be proved by an examined copy of the writ, and return of *cepi corpus*; or by proof of the writ, the warrant, and the arrest of detainer. The fact of lying for the given time in prison, may, it is said, be proved by the production of the prison books;

Salte v. Thomas, 3 B. & P. 188. But the cause of the commitment must be proved by the production of the *committitur*; *S. C.*

Filing a declaration of insolvency.] This applies to trader or non-trader; see *ante*, p. 692. The filing is complete when the instrument reaches its final destination in the proper office, and not when it first comes to the hands of an officer of the court if he has to hand it to another officer; *Garlick v. Sangster*, 9 Bing. 46. The filing of a declaration followed by a fiat within two months, was held an act of bankruptcy sufficient to support a second fiat after the two months, the first fiat having been annulled; *Ex parte Hunt*, 3 De G. & S. 572.

Filing a petition for adjudication.] The words, whether trader or non-trader, are omitted in sect. 86, *ante*, p. 692; but in practice this act of bankruptcy has been constantly applied to a non-trader as well as a trader; see *Paull v. Best*, *ante*, p. 704.

When the adjudication is on the bankrupt's own petition, as in this and the preceding case, there can be no relation back to a previous act of bankruptcy; see *Stevenson v. Newnham*, and other cases cited, *ante*, pp. 703-4.

Non-payment of debt on summons.] As to this see 12 & 13 Vict. c. 106, ss. 78-84, and 24 & 25 Vict. c. 134, ss. 76-84, *ante*, pp. 693-4.

Evidence of proceedings in bankruptcy.] Before the 12 & 13 Vict. c. 106, the proof of commissions and of other proceedings in bankruptcy was regulated by 6 Geo. 4, c. 16, ss. 96 & 97, and by the 2 & 3 Wm. 4, c. 114. The last act is unrepealed, but has in great part become useless.

The 236th sect. of the 12 & 13 Vict. c. 106, is also unrepealed, but sect. 203 of 24 & 25 Vict. c. 134 is nearly identical, and provides, that any petition for adjudication, or arrangement, adjudication of bankruptcy, assignment, appointment of official or creditors' assignee, certificate, deposition, or other proceeding or order in bankruptcy, or under any of the provisions of this act, appearing to be sealed with the seal of any court under this act, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of such court, without any further proof thereof; and no such copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided. In s. 236 of 12 & 13 Vict. c. 106, there is this additional proviso:—All proceedings recorded before 2 & 3 Wm. 4, c. 114, or purporting to have been sealed before the commencement of this act (11th October, 1849), with the seal of the Court of Bankruptcy theretofore in use, or a writing purporting to be a copy of such document, and to have been so sealed, shall, on production thereof, and, in the case of proceedings recorded before the last-mentioned act, with the certificate thereon purporting to be signed by the person duly authorised to enter proceedings in bankruptcy, or his deputy, be received as evidence of the same, and of the same having been duly

entered of record, and of such proceedings having respectively taken place.

By sect. 204 of the 24 & 25 Vict. c. 134, all courts, &c., shall take judicial notice of the signature of any commissioner or registrar of the courts, and of their seal attached to any judicial or official proceeding or document to be made or signed under the act.

By sect. 206, a copy of a petition filed in the Insolvent Debtors' Court in England, or in any insolvency or bankruptcy court in any of the Queen's dominions, colonies, or dependencies, and of any vesting order, schedule, order of adjudication, or other proceedings, purporting to be signed by the officer in the custody of it, or his deputy, certifying the same to be a true copy, and appearing to be sealed with the seal of the court, shall be admitted, *under this act*, as sufficient evidence of the same, and of the proceedings having taken place, without any other proof whatever.

By sect. 207, affidavits, declarations, and affirmations required by the act, are to be sworn or made—1. In the United Kingdom before the Courts of Bankruptcy, or registrar or master, or a commissioner in chancery or common law, or before a magistrate. 2. In British colonies, &c., before any court, judge, or person authorised to take affidavits, &c. 3. In foreign parts, before a judge or magistrate, his signature being authenticated by the official seal of the court to which he is attached, or by a public notary, or before a British minister, consul, or vice-consul. And all courts, &c., are to take judicial notice of the seal and signature of any such court, &c., appended to such affidavit, or any other document to be used for the purpose of the act, or other acts in relation thereto.

By sect. 240, of the 12 & 13 Vict. c. 106, a copy of the *London Gazette*, and of any newspaper containing an advertisement directed or authorised by the act, shall be evidence of any matter therein contained, and of which notice is by this act directed or authorised to be given by such advertisement; and all proceedings or notices required to be inserted in the *Gazette* shall be marked by the seal of the court, and certified by one of the registrars.

By sect. 242 (similar to sect. 25 of 5 & 6 Vict. c. 122), in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any previous or future bankruptcy, the deposition of such deceased witness, purporting to be sealed with the seal of the Court of Bankruptcy, or a copy thereof purporting to be so sealed, shall in all cases be received as evidence of the matters therein respectively contained.

Strict proof of title, when dispensed with by statute.] By the 12 & 13 Vict. c. 106, s. 233 (almost verbatim the same as the repealed act, 5 & 6 Vict. c. 122, s. 24), if the bankrupt shall not (if he was within the United Kingdom at the date of the adjudication) within *two calendar months* (by 17 & 18 Vict. c. 119, s. 24) after the advertisement of the bankruptcy in the *Gazette*, or (if in any other part of Europe at the same date), within three months after such advertisement, or (if elsewhere at the same date), within twelve months after such advertisement, have commenced an action, suit, or other proceeding, to dispute or annul the fiat or petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be *conclusive evidence* in all cases *as against such bankrupt, and in all actions at law or suits in equity, brought by the assignees for any debt or demand for*

which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person became a bankrupt before the date and suing forth of such fiat, or the date and filing of such petition, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the *Gazette* to bear date.

The following cases were decided under the similar enactment, 92 of 6 Geo. 4, c. 16.

If there are some counts on causes of action in respect of which the bankrupt might have sued, and others on which he could not, it seems that this section will apply if the plaintiffs elect to proceed for the former causes of action only; *Jones v. Fort, Mood. & M.* 196. If property be deposited by a bankrupt with a person for a special purpose, and converted by him in breach of the bailment, this section will apply in an action against him by the assignees, though the conversion was *after* the act of bankruptcy; *Fox v. Mahoney*, 2 C. & J. 325; *Kitchener v. Power*, 3 Ad. & E. 232; *Alsager v. Close*, 10 M. & W. 576. (The section now in force is stronger in favour of this construction, as the words "had he not been adjudged bankrupt," are not in the act of Geo. 4.) It is only in actions or suits brought by the bankrupt's own assignees for a debt or demand for which *he* might have sued, that the proceedings are made evidence; and therefore, if the assignees of *another* bankrupt were petitioning creditors, and notice of disputing the petitioning creditor's debt be given, the depositions under the latter commission are not made evidence by this section; *Muskett v. Drummond*, 10 B. & C. 153; see *Skaipe v. Howard*, 2 B. & C. 560.

As to meaning of the words "conclusive evidence," see *Young v. Timmins*, 1 C. & J. 148; *Hare v. Waring*, 3 M. & W. 362.

Section 24 of 5 & 6 Vict. c. 122, was held not to apply to adjudications before the passing of it; *Edwards v. Sherren*, 11 M. & W. 595.

Proof of title—Notice of intention to dispute.] By the 12 & 13 Vict. c. 106, s. 234, "In any action, other than an action brought by the assignees for any debt or demand for which the bankrupt might have sustained an action had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the Court, for anything done under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt, or of the trading, or act of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee or other person that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may, if he think fit, grant a certificate of such proof or admission; and such assignees or other person shall be entitled to the costs occasioned by such notice; and such costs shall, if such assignees or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignees or other person." The last prior enactment on this subject, differing, however, from the above, was the 6 Geo. 4, c. 16, s. 90.

The following cases were decided under the old acts; but are applicable to the present enactment:—

Where the assignees are strangers to the record, and their title comes in incidentally, it must be strictly proved in the regular manner; *Doe v. Liston*, 4 Taunt. 741. But if they were parties to the record, though not named assignees, the proceedings were held to be sufficient evidence, at least if the other party must have been aware that they made title under the commission; *Simmonds v. Knight*, 3 Camp. 251; *Faucett v. Fearn*, 6 Q. B. 25 (n). So, though there are other defendants on the record, if these defendants have justified as servants of the assignees; *Gilman v. Cousins*, 2 Stark. 182.

Sect. 90 of 6 Geo. 4, c. 16, was held to apply to actions of ejectment by an assignee; *Doe v. Liversedge*, 11 M. & W. 517; but not to a feigned issue; *Lott v. Melville*, 3 M. & G. 40.

Notice to dispute "the bankruptcy" is too general; the notice must specify which of the three matters, trading, petitioning creditor's debt, or act of bankruptcy, is intended to be disputed; *Trimley v. Unwin*, 6 B. & C. 537. Where a notice to dispute the act of bankruptcy only was given, and at the trial one act of bankruptcy only was proved, it was held that the plaintiffs could not be called upon to prove a good petitioning creditor's debt at the date of that act of bankruptcy; *Porter v. Walker*, 1 M. & G. 686. So notice to dispute the trading will not let in defendant to show that the petitioning creditor's debt was incurred after the trading had ceased; *Hernemann v. Barber*, 14 C. B. 583; 23 L. J. (C. P.) 145 (under the present enactment). And, without notice, an objection to the petitioning creditor's debt or the act of bankruptcy cannot be taken, though it be apparent on the face of the proceedings put in; *McBeath v. Cooke*, 12 B. Moo. 122; *Beran v. Lewis*, 1 Sim. 376.

Service of the notice on the attorney of the assignee is sufficient; *Howard v. Ramsbottom*, 3 Taunt. 526. *Semble*, if not served on the attorney, it must be served personally; *S. C.*

In suits by assignees, the notice may be proved at the commencement of the plaintiffs' case, and will immediately put them upon proof; *Decharme v. Lane*, 2 Camp. 324.

The judge on the reference of a cause cannot certify under the act; *Barthrop v. Anderton*, 8 Bing. 268.

Proof of title, when dispensed with by implied admission.] Strict proof of the title of the assignees is dispensed with in cases where the defendant's conduct has been an express or implied admission of their title; *Eden, Bank*. 354. As where the assignees sought to recover the price of some goods that belonged to the bankrupt which the defendant, as auctioneer, had sold, describing them as the goods "of D., a bankrupt;" *Maltby v. Christie*, 1 Esp. 340. Where the defendant had attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, and afterwards made a part payment to the plaintiff, as assignee, on that account; it was held to be *prima facie* evidence, as against the defendant, that the plaintiff was assignee; *Dickinson v. Coward*, 1 B. & A. 677. So where the defendant, on being applied to by the assignee, said he would call and pay the money; this was held to dispense with the usual proofs of the assignee's title; *Pope v. Monk*, 2 C. & P. 112. Such an admission is evidence even when the title is put directly in issue; *Inglis v. Spence*, 1 C. M. & R. 432. The affidavit of a witness, used by the petitioning creditor to prove the act of bankruptcy, is evidence against such creditor of such act, and of the time of it;

Gardner v. Moulton, 10 *Ad. & E.* 464. But the fact that one of the defendants had proved his debt under the commission, was held no evidence against him of the petitioning creditor's debt; *Rankin v. Horner*, 16 *East*, 191. As to admissions implied from the act of a party, see further, *ante*, pp. 57 *et seqq.*

In some cases the conduct of the party is conclusive of the title of the assignees. Thus, where the bankrupt obtained his discharge from arrest under 49 Geo. 3, c. 121, s. 14, on the ground of his bankruptcy, it was held that he could not deny it as against his assignees; *Watson v. Wace*, 5 *B. & C.* 153. So the affidavit of the petitioning creditor that a person is indebted to the deponent in the sum of 100*l.* and upwards, and is become bankrupt, is, as against the deponent, conclusive evidence of the bankruptcy; *Ledbetter v. Salt*, 4 *Bing.* 623. But a party against whom a commission had issued was held not precluded from disputing it merely because he applied to a commissioner to appoint an official assignee to investigate the sufficiency of the debt; *Munk v. Clark*, 2 *N. C.* 299.

Proof of title of assignees under joint and separate commissions, or fiats, &c.] The following cases were determined before the 12 & 13 Vict. c. 106, and 24 & 25 Vict. c. 134, at a time when commissions or fiats issued to give jurisdiction in bankruptcy. How far they may apply to the present proceeding by petition for adjudication, is a matter for consideration.

Where separate fiats have been issued against several persons, and the same persons are appointed assignees under each, they may describe themselves as assignees of those bankrupts generally, and may give evidence of a joint demand due to all the bankrupts; *Scott v. Franklin*, 15 *East*, 428; *Streatfield v. Halliday*, 3 *T. R.* 779. But in such action they cannot recover also for separate demands due to each of the bankrupts; *Hancock v. Haywood*, 3 *T. R.* 433. And where there are separate fiats against several partners, and different assignees under each fiat, in declaring for a joint debt the assignees must not describe themselves as joint assignees, but as assignees of each bankrupt respectively; *Ray v. Davies*, 8 *Taunt.* 134; 2 *B. Moore*, 3. The assignees under a joint fiat against A. and B., in suing on a separate contract made with A., may describe themselves generally as the assignees of A., without noticing B.; *Stonehouse v. De Silva*, 3 *Camp.* 399; *Harvey v. Morgan*, 2 *Stark.* 17. And the assignees under a joint fiat against two partners, may recover in the same action debts due to the partners jointly and debts due to them separately; *Graham v. Mulcaster*, 4 *Bing.* 115. But assignees under a joint fiat against A. and B., who have committed different acts of bankruptcy, cannot recover the proceeds of an execution levied against the two between the two acts of bankruptcy, either as money received to the use of the bankrupts, or to the use of the assignees; *Hogg v. Bridges*, 8 *Taunt.* 200; see 2 *Wms. Saund* 47 *aa* (n).

To what property and time the title of the assignees has relation.] By 12 & 13 Vict. c. 106, s. 141, when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed or come to him, before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same

may be found or known, and the property, right, and interest in such debts shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt, by virtue of their appointment; and, after such appointment, neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt.

And by sect. 142, all lands, tenements, and hereditaments, except copy or customaryhold (as to which see 24 & 25 Vict. c. 34, s. 114,) in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to her Majesty, to which such bankrupt is entitled, and all interest to which such bankrupt is entitled, in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt, by virtue of their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose.

After adjudication, therefore, all the bankrupt's real (except copyhold) and personal estate present and future, including choses in action, becomes absolutely vested in the assignees *on their appointment*. The title of the assignees (subject to the many exceptions introduced by the modern statutes) has still a general relation back to the act of bankruptcy; (see *per cur.*, *Cannan v. South-Eastern Ry. Co.*, 7 Ex. 851); that is, to any act of bankruptcy by which the particular adjudication can be supported; which must be an act of bankruptcy within twelve months of the petition, and committed after the petitioning creditor's debt. See the judgment in *Stevenson v. Newnham*, 13 C. B. 285; and see that and other cases, *ante*, p. 704.

All rights of action for breaches of contract, though for unliquidated damages, pass to the assignees; *Wright v. Tunfield*, 2 B. & Ad. 727; and the right to enforce unexecuted contracts, such as may be performed on the part of the bankrupt by the assignees, and such as would pass to his executors if he died, which would not include contracts in which the personal skill of the bankrupt would form a material part of the consideration; *per Parke, B.*, *Gibson v. Carruthers*, 8 M. & W. 333.

The question what rights of action arising from breach of contract or wrong unconnected with contract, and involving personal injury to the bankrupt, pass to the assignees, has been much discussed. In *Rogers v. Spence*, 12 Cl. & F. 700, it was held that a right of

action for trespass to a house and disturbing the bankrupt in the enjoyment of it, by which he was prevented carrying on his business, did *not* pass to the assignees. But where the bankrupt had been wrongfully dismissed from the service of the defendants, the right of action was held to pass to the assignees; *Beckham v. Drake*, 2 H. L. C. 579. The result of these two cases is thus summed up by the court in *Wetherell v. Julius*, 10 C. B. 280; 19 L. J. (C. P.) 370: "A cause of action, arising out of a wrong personal to the bankrupt, and for which he would be entitled to a remedy, whether his property were diminished or impaired or not, does not pass to the assignees; but where pecuniary loss or damage is the substantial and primary cause of action, it does pass to the assignees, although such pecuniary loss may produce inconvenience to the bankrupt." Accordingly, in that case it was held that an insolvent could sue an attorney for negligence in the conduct of a cause, whereby the insolvent was taken in execution; but that where, owing to the negligence charged, a *sequestrari facias* issued, and the profits of the insolvent's benefice taken, that was a cause of action which passed to the assignees. In *Knight v. Burgess*, 33 L. J. (Ch.), 727 it was held that the trustees under a deed of composition, under 24 & 25 Vict. c. 134, s. 192, were not entitled to complete a building contract entered into by the debtor, the contract being on behalf of himself, his executors and administrators, but not assignees.

Where the right of action of the bankrupt's wife is such, that if vested in the bankrupt alone it would pass to his assignees, the interest of the bankrupt in such right of action passes to the assignees; therefore, where goods of the bankrupt's wife had been converted before marriage, the assignees, and not the bankrupt, must join with the wife in suing; *Richbell v. Alexander*, 30 L. J. (C. P.) 268; 10 C. B. N. S. 324.

It should be observed that the assignees take only what the bankrupt was equitably as well as legally entitled to; see cases cited, *post*, pp. 721, 723.

Where the appointment of an assignee is duly vacated, and a new assignee is appointed, the latter is assignee from the first appointment by relation; *Aldritt v. Kettridge*, 1 Bing. 355.

Evidence in particular actions—Actions on contracts by bankrupt.] In many transactions between the bankrupt and others after an act of bankruptcy [committed, the assignees have the option either of adopting the contract made by the bankrupt, and suing the party in an action *ex contractu*, or of disaffirming the contract and suing him for damages in an action of tort. If they have once affirmed the transaction, they cannot treat the party as a wrongdoer, as that would be disaffirming it; *Brewer v. Sparrow*, 7 B. & C. 310. Where assignees had recovered a sum of money from the bankrupt's banker, which had been received by him, and the amount of which had been paid over to a creditor of the bankrupt, both parties having a knowledge of the bankruptcy; it was held that they could not also sue the creditor who had received it; for, having disaffirmed the banker's acts in the former action, they could not now affirm them as payments of their money; *Vernon v. Hanson*, 2 T. R. 287. So where the bankrupt, before his bankruptcy, had purchased goods on credit and re-sold them at under prices, it was ruled that assumpsit for goods sold and delivered could not be maintained by the assignees against the purchaser to recover the difference in value;

Burra v. Clarke, 4 *Camp.* 355. See *Cook v. Culdecott*, *Mood. & M.* 522; *Lee v. Hart*, 11 *Ex.* 880; 25 *L. J. (Ex.)* 135.

Defendant gave an order to a bankrupt for certain work, which was partly executed before fiat; the provisional assignee advanced money to the bankrupt to complete it; and it was completed after the appointment of the creditors' assignees: Held that the several assignees might recover jointly in an action for goods sold to the defendant by the plaintiffs, and that it was a question for the jury whether the bankrupt acted as their agent; *Whitmore v. Gilmour*, 12 *M. & W.* 808.

Evidence in particular actions—Conversion.] Where the goods of the bankrupt have been converted by the defendant either before or after the bankruptcy, the assignees may recover their value in an action for conversion. Where there has been a tortious taking since the bankruptcy, such taking is a sufficient conversion; but where there has been a collusive sale of the goods by the trader, in contemplation of bankruptcy, there will be no conversion without a demand and refusal, unless the sale amount to an available act of bankruptcy; *Nixon v. Jenkins*, 2 *H. Bl.* 135; *Stevenson v. Newnham*, 13 *C. B.* 285, cited *ante*, p. 704. And see *Young v. Billiter*, 30 *L. J. (Q. B.)* 153 (in *H. L.*); a decision under the 1 & 2 *Vict. c.* 110, s. 59.

Before the 12 & 13 *Vict. c.* 106, it was held that neither the sheriff nor execution creditor of the bankrupt could be sued as for a conversion of goods, if the execution creditor had no notice of the act of bankruptcy till after the seizure in execution; and if he received notice *before the sale*, though after seizure, the creditor was not liable to such an action, if he did not actively interfere in the levy, though he might be liable to refund the proceeds to the assignees; *Whitmore v. Greene*, 13 *M. & W.* 104. And if the sale takes place after the filing of the petition, it is the duty of the sheriff, having notice of the bankruptcy, to pay the amount of it to the assignees; and if he pays it over to the execution creditor, the sheriff will be liable to an action by the assignees for money had and received; *Notley v. Buck*, 8 *B. & C.* 160. The last-mentioned act contains more extensive protection clauses for creditors against secret acts of bankruptcy than previous acts. They will be found, with cases, *post*, pp. 723-6. And see *Actions against Sheriffs*, *post*.

Reputed ownership.] By the 12 & 13 *Vict. c.* 106, s. 125, if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of the 8 & 9 *Vict. c.* 89, intitled *An Act for the Registering of British Vessels*, or any of the acts therein mentioned. See 17 & 18 *Vict. c.* 104 (the Merchant Shipping Act, 1854) s. 72, noticed *post*, pp. 718-9.

The old act, 21 *Jac.* 1, c. 19, s. 11, on which many of the cases were decided, was "order and disposition" instead of "order or disposition." See observations on this, *Belcher v. Bellamy*, 2 *Ex.* 303.

The question of reputed ownership is one of fact, depending on all the circumstances attending the possession; *Edwards v. Scott*, 1 M. & G. 962; *Hamilton v. Bell*, 10 Ex. 545.

Goods in the order and disposition of a bankrupt as reputed owner do not vest in the assignees on their appointment under sect. 141, *ante*, pp. 709-10; but an order, under sect. 125, is necessary; *Heslop v. Baker*, 6 Ex. 740; 20 L. J. (Ex.) 350. But after the order has been obtained, the title of the assignees relates to the act of bankruptcy, and therefore it affords a defence, under not possessed, to an action of trover brought by the owner before the order was made; *Heslop v. Baker*, 8 Ex. 411; 22 L. J. (Ex.) 333. The order must specify the particular goods on which it is to operate; *Quartermaine v. Bittleston*, 13 C. B. 133; 22 L. J. (C. P.) 105. But it need not state the name of the owner; *Freshney v. Carrick*, 1 H. & N. 653; 26 L. J. (Ex.) 129. The order is to be made *ex parte*; *Ex parte Barlow*, 2 De G., M. & G. 921; 22 L. J. (Bank.) 15; and is not conclusive on the owner as to the title of the assignees; *Graham v. Furber*, 14 C. B. 134; 23 L. J. (C. P.) 10.

All personal goods and chattels are within the section, as ships; *Stephens v. Sole*, cited 1 Ves. Sen. 352; *Ex parte Burn*, 1 J. & W. 378; machinery and utensils of trade; *Lingard v. Messiter*, 1 B. & C. 308; *Sinclair v. Stevenson*, 2 Bing. 514; *Horn v. Baker*, 9 East, 215; *Brown v. Bellaris*, 5 Madd. 53. So bills of exchange, debts; *Ryall v. Rolle*, 1 Atk. 165; *Belcher v. Bellamy*, 2 Ex. 303; *Hornblower v. Proud*, 2 B. & A. 327; stock, shares in a public company; *Nelson v. London Assur. Co.*, 2 Sim. & S. 292; *Ex parte Vallance*, 3 Mont. & Ayr, 224; except where the funds arise from real estate and there is no special provision that the shares shall be personal property; *Ex parte Vauxhall Bridge Co.*, 1 Gl. & J. 101. So shares in a newspaper; *Longman v. Tripp*, 2 N. R. 67. A contingent reversionary interest in stock may be within the order and disposition of the bankrupt; *Re Raebone*, 26 L. J. (Ch.) 588; 3 Kay & J. 476; *Bartlett v. Bartlett*, 26 L. J. (Ch.) 577.

As reputed owner.] In order to bring the case within the section, the assignees should, in general, give some evidence beyond that of mere possession. Where it is shown that the bankrupt has once been the owner of the property in question, the mere fact of continued possession raises a presumption that he continues in possession in the character of owner; *Lingard v. Messiter*, 1 B. & C. 308; but where the bankrupt has never been the real owner, possession may not, of itself, be sufficient to show him to be reputed owner, and it would then be necessary for the assignees to establish that fact by other evidence; *per Bayley, J.*, S. C. Where machinery and utensils of trade belong to the landlord and are let with the premises, they are within the section; *Lingard v. Messiter*, *Sinclair v. Stevenson*, *supra*; *Horn v. Baker*, 9 East, 215; unless there is a known usage of trade for utensils to be so let; *per* Ld. Ellenborough, S. C., *id.* 239. Where it appears that, in some instances, articles used in collieries belong to the tenants, and that in others they do not, that, though in some cases the landlord, in demising collieries, permits the lessee, on certain conditions, to have the use of such articles during the demise, yet in other instances they belong absolutely to the lessee; in such cases the possession, being equivocal evidence of ownership, ought not to raise an inference that the person in possession is the owner; *per* Abbott, C. J., *Storer v. Hunter*, 3 B. & C. 376; see *Fairburn v.*

Eastwood, 6 M. & W. 679; *Hamilton v. Bell*, 10 Ex. 545. So a notorious custom in the trade which the bankrupt carries on may prevent reputed ownership, as in the coal trade, to paint the name of the mere hirer of a barge upon it, and the custom need not be shown to be notorious to the world at large; *Watson v. Peache*, 1 N. C. 327. Where casks of wine were by agreement left in the vendor's possession, but the purchaser marked them with his initials, they were held to pass to the vendor's assignees, although the sale was notorious in the wine-trade of the place; *Knowles v. Horsfall*, 5 B. & A. 134. A., a dyer, having purchased plant of B., resold it to him, and B. never took actual possession, but demised it to A. for three years, during which time A. became bankrupt: the plant was held to pass to his assignees; *Bryson v. Wylie*, 1 B. & P. 83 n. (a). So where a creditor purchased under a bill of sale from the sheriff certain machinery of his debtor taken in execution at his suit, and, having marked them with his initials, demised them to his debtor, it was held that, as the change of ownership was not notorious, the machinery passed to the assignees of the debtor; *Lingard v. Messiter*, 1 B. & C. 308; see *Storer v. Hunter*, 3 B. & C. 368; *Horn v. Baker*, 9 East, 215; *Clark v. Crownshaw*, 3 B. & Ad. 804. B. was a clockmaker, and kept clocks in his shop for sale, and also clocks belonging to other people for repair. In July, 1853, the plaintiff bought a clock which was in B.'s shop, but desired it might be kept until he had removed into a new house. In March, 1854, he bought two other clocks, and left them with the bankrupt to be cleaned, which might have been done in two or three days. On the 7th of April, a petition in bankruptcy was filed against B., at which time the three clocks were in his shop. Held that they were not liable to seizure by the assignees; *Hamilton v. Bell*, 24 L. J. (Ex.) 45; 10 Ex. 545; and *per Parke, B., S.C.*, "I do not quarrel with the decision in *Lingard v. Messiter*, although, had it appeared that it was the custom to hire machinery, the decision might be questionable. In *Knowles v. Horsfall*, the bankrupt had in his possession a stock of wine apparently his; for the leaving a stock of wine in the hands of a man conveys no intimation to the public that it has been sold, and *prima facie* it may be considered his. It would be otherwise if it had been shown that the merchant was in the habit of receiving into his possession the goods of other people." Where it was the usual course for purchasers of hops to leave them in the vendor's warehouse for resale *undistinguished from his own stock*, hops so left were held to pass to his assignees; to exclude this consequence, the custom must be such that persons dealing with the trader may see and know that the goods, though in his possession, may possibly not be his property; *Thackwaite v. Cook*, 3 Taunt. 487. Where wine sold by the bankrupt was, for the purchaser's convenience, bottled and deposited in the bankrupt's cellar, set apart in a particular bin, marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser, it was held not to pass; *Ex parte Marrable*, 1 Gl. & J. 402; accord. *Carruthers v. Payne*, 5 Bing. 270. But where an hotel was let with a covenant to determine the lease on the lessee committing an act of bankruptcy, and by another deed the furniture of the hotel was demised subject to a similar covenant, it was held that the furniture passed to the assignees of the lessee, the jury having found that he was the reputed owner of the furniture; *Hickenbotham v. Groves*, 2 C. & P. 492; see *Lingham v. Biggs*, 1 B. & P. 82.

A., an innkeeper, mortgaged his effects to B., who had A.'s name painted out, and took formal possession of the whole concern, and then left A. in possession to manage the business for him until he could effect a sale; the jury having found that B. had notoriously taken possession before A.'s bankruptcy, it was held that the goods were not in his order or disposition as reputed owner; *Shrubsole v. Sussams*, 16 C. B., N. S., 452.

In order to prove the bankrupt to be reputed owner, evidence of reputation is admissible; *Oliver v. Bartlett*, 1 B. & B. 269. And on the other hand, evidence of a contrary reputation is admissible for the defendant; *Gurr v. Rutton*, *Holt*, N. P. 327. Thus evidence of the bankrupt being in possession of furniture, &c., under an agreement which was notorious in the neighbourhood, was held to take the case out of the statute; *Muller v. Moss*, 1 M. & S. 335.

At the time he becomes bankrupt.] Goods which have come to the possession of the bankrupt after the act of bankruptcy are not within the statute; *Lyon v. Weldon*, 2 Bing. 334: for the time of becoming bankrupt means the time of the act of bankruptcy; S. C.; *Fawcett v. Fearne*, 6 Q. B. 20. But where goods in the bankrupt's possession at that time were afterwards, before the fiat, taken possession of or sold by the real owner, *bonâ fide*, and without knowledge of the act of bankruptcy, it was held that the transaction was protected by the operation of 2 & 3 Vict. c. 29, s. 1; *Young v. Hope*, 2 Ex. 105; and such a transaction is now protected by sect. 133 of the 12 & 13 Vict. c. 106, cited *post*, p. 723; *Brewin v. Short*, 5 E. & B. 227; *Graham v. Furber*, 14 C. B. 134; 23 L. J. (C. P.) 10.

Under sect. 103 of the 24 & 25 Vict. c. 134, *ante*, p. 693, where a debtor in prison petitions and is adjudicated a bankrupt under ss. 98, 99, the adjudication relates back to the date of the committal to prison, and goods which were then in the order and disposition of the bankrupt; though taken possession of by the true owner before the adjudication, pass to the assignees; *Bramwell v. Eglinton*, 33 L. J. (Q. B.) 130; 5 B. & S. 39; and as sect. 103, makes the adjudication relate back to the commitment *absolutely*, and not merely as an act of bankruptcy, sect. 133 of 12 & 13 Vict. c. 106, affords no protection; S. C.

If the goods are taken out of the possession of the bankrupt before the act of bankruptcy, they will not pass to the assignees, however long the true owner may have allowed the bankrupt to retain possession; *Jones v. Dwyer*, 15 East, 21; *Arbouin v. Williams*, Ry. & Mood. 72. But it was held by Lord Gifford at Nisi Prius, that a removal on the same day, but before the act of bankruptcy, would not take the case out of the statute; *Arbouin v. Williams*, *supra*.

By consent and permission of the true owner.] A demand of possession made by the owner of the goods before the act of bankruptcy, is sufficient to determine the consent; *Smith v. Topping*, 5 B. & Ad. 674; *Brewin v. Short*, 5 E. & B. 227; 24 L. J. (Q. B.) 297.

Where goods are assigned by a trader subject only to a condition for redemption on payment of a debt on demand, with a stipulation that he shall retain possession of them until default, the goods so retained by him under such a deed will be deemed to be in his order and disposition with the consent of the true owner; *Fröhney v. Carrick*, 1 H. & N. 653; 26 L. J. (Ex.) 129; *Hornsby v. Miller*,

28 *L. J. (Q. B.)* 99; 1 *E. & E.* 192; *Spackman v. Miller*, 31 *L. J. (C. P.)* 309; 12 *C. B., N. S.*, 659; and it makes no difference whether the ownership is acquired by the mortgagee by one transaction and the goods are redemised by another, or whether the transfer by way of mortgage and the redemise are simultaneous; *per Willes, J.*; *S. C.*, citing *Lingham v. Biggs*, 1 *B. & P.* 82; and *Bryson v. Wyllie*, *id.* 83 (*n.*). The fact that the assignment has been registered under the Bills of Sale Act (17 & 18 Vict. c. 36, s. 1) does not affect the question under the 125th section; *Stansfield v. Cubitt*, 27 *L. J. (Ch.)* 266; *Badger v. Shaw*, 29 *L. J. (Q. B.)* 73; 2 *E. & E.* 472.

Where the trustee of an infant contracted to sell plant, and let the vendee into possession, who became bankrupt, it was held that the plant passed to the assignees, for by "true owner" is meant the person having the legal right to possession; *Ex parte Dale, Buck.* 365. So stock, transferred by the accountant-general into the name of the mortgagor without the privity of the mortgagee, will not pass to the assignees of the mortgagor; *Ex parte Richardson, Buck.* 480. The goods of a woman, *de facto* married to and living with an insolvent as his wife, he having a former wife living, do not pass to his assignees (although such goods were in his possession) if she was ignorant of the former marriage. But if she has allowed him the control and management of her property after discovery of the former marriage, such property passes to the assignees; *Miller v. Demetz*, 1 *Mood. & Rob.* 479; (and see *post*, p. 718). The statute "refers to chattels, where the possession, order, or disposition, is in a person who is not the owner, to whom they do not properly belong, or who ought not to have them, but whom the owner permits *unconscientiously*, as the act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of property to which he was not entitled; but the possession must be of the goods of *another*, with the consent of the true owner"; *per Lord Redesdale*, in *Joy v. Campbell*, 1 *Sch. & Lef.* 336. Thus goods were bought of A. by the bankrupt with the fraudulent intention of never paying for them, and were kept by him till his bankruptcy; after which A. sought to recover them back; and it was held, that they were not in the possession of the bankrupt with the consent of the true owner, for at the time of the bankruptcy, A. not having then avoided the contract, the bankrupt was the real owner; *Load v. Green*, 15 *M. & W.* 216. So where, under a parol contract, corn above the value of 10*l.* was bought by sample, and the bulk delivered to the vendee's warehouseman, to hold to his order, and the vendee, three days after the delivery, became bankrupt, before he had seen or done anything with the bulk; and the vendor, two days after the bankruptcy, demanded the corn back: it was held that as the vendee had not "accepted" the bulk, the property remained in the vendor, and that the vendee was not in possession as reputed owner with the consent of the vendor, within the meaning of the statute; *Smith v. Hudson*, 34 *L. J. (Q. B.)* 145.; and see *Ex parte Geaves*, 25 *L. J. (Bank.)* 53; 8 *De G. M. & G.* 291.

It is not sufficient to show that the goods were in the order and disposition of the bankrupt with the consent of a person who was permitted by the true owner to deal with them as his own; but the consent must move directly from the true owner to the bankrupt; *Fraser v. Swansea Canal Co.*, 1 *Ad. & E.* 354. No consent of the true owner can be implied, where such owner is ignorant of the

existence of the property, or of his own right to it; *Re Rawbone*, 26 *L. J. (Ch.)* 588; 3 *Kay & J.* 476; or where, from the circumstances of the case, he is unable to take possession of the property before the bankruptcy, as where goods on board a ship of A., then abroad on a seeking voyage, were assigned to B., and before the ship arrived in England, when B. was first enabled to give notice of the assignment to the master, A. became bankrupt; *Acraman v. Bates*, 29 *L. J. (Q. B.)* 78; 2 *E. & E.* 456. See *Mair v. Glennie* and other cases, *infra*.

Where a person entitled to take out letters of administration neglected to do so, but remained in possession of the goods of the intestate and became bankrupt, the case was held within the statute as against a person who subsequently took out letters of administration; *Fox v. Fisher*, 3 *B. & A.* 135. But where a testator directed, in case his eldest son should carry on his trade, that his lease and furniture should not be sold, but that his trustees should permit his widow and children to reside in his dwelling-house and have the use of the furniture, it was held that the furniture did not pass to the assignees of the mother and son, who had carried on the trade; *Ex parte Martin*, 2 *Rose*, 331. So furniture left to trustees to be enjoyed by the owner for the time being of the mansion-house, and not to be removed without the leave of the trustees, will not pass on the bankruptcy of the owner for the time being; *Shaftesbury v. Russell*, 1 *B. & C.* 666.

In the bankrupt's possession, order, or disposition.] Where a warrant was directed to a trader's servant and another person, as special bailiffs, who took possession of the goods in the shop, but the business, without the trader's interference, was carried on apparently as usual, it was held that the possession of the servant was the possession of the master, and that the case was within the statute; *Jackson v. Irvin*, 2 *Camp.* 48. So where the execution creditor directed the sheriff to leave a man in possession, and the debtor's business was carried on as usual; *Toussaint v. Hartop*, *Holt*, *N. P.* 335; and see *Doker v. Husler*, 2 *Bing.* 479. But the possession of a pawnee is not the possession of the bankrupt pawnor, so as to bring the goods pawned within the statute as against the true owner; *Greening v. Clark*, 4 *B. & C.* 316.

Where A. deposited with B., as a security, certain warrants of the W. I. Dock Company for sugars lying in their warehouses and entered in his name in their books, and the company assented to the transfer, and A. afterwards became a bankrupt, it was held that the sugars did not pass to A.'s assignees, as the transfer of the warrants was a complete transfer of the possession before the bankruptcy; *Lucas v. Dorrien*, 1 *B. Moore*, 29. And wines standing in another's name in the London Docks, which are only delivered according to the indorsement of the warrants, are not in the order and disposition of the bankrupt, he not having the warrants in his possession; *Ex parte Davenport*, *Mont. & Bl.* 165.

If a symbolical delivery only can be made, it is sufficient to take the case out of the statute, as when the goods are of great bulk, as timber; *Monton v. Moore*, 7 *T. R.* 67. Or when goods on board a ship at sea are assigned, and the bills of lading, &c., handed to the assignee; *Brown v. Heathcote*, 1 *Atk.* 160; but if the ship arrive, and the assignee has an opportunity of taking possession and does not, the property will pass to the assignor's assignees; *Mair v. Glennie*, 4 *M. & S.* 240.

Goods, the property of the plaintiff, remained by his consent in the possession, order, and disposition of A. The sheriff, at the suit of a third person, seized the goods under a *fi. fa.* issued against A., but allowed him to continue in possession of them as before; A. then became bankrupt. It was held, that the seizure by the sheriff, being a mere wrongful act, did not affect the possession which A. had by the consent of the plaintiff, and that the goods were therefore liable to pass to his assignees under the 125th sect.; *Barrow v. Bell*, 5 E. & B. 540; 25 L. J. (Q. B.) 2.

Goods sent on sale or return.] Goods left with a trader "upon sale or return," are within his possession, order, and disposition, and pass to his assignees; *Livesay v. Hood*, 2 Camp. 83. But where goods, sent to be returned if not approved of, arrived only the day before the trader's bankruptcy, they were held not to pass to his assignees; for he should be allowed a reasonable time to select such goods as he was disposed to retain; *Gibson v. Bray*, 8 Taunt. 76; and see *Smith v. Hudson*, and other cases cited, *ante*, p. 716.

Goods belonging to a feme covert.] Goods belonging to a woman living with the trader as his wife, if she assert herself to be his wife, or if she has allowed him to deal with the goods as his own, will pass to his assignees; *Mace v. Cadell*, Cowp. 232. But where, on marriage, goods are vested in trustees for the separate use of the wife in order to enable her to carry on a separate trade, and the husband lives with her, if there be no fraud, such effects will not pass to the assignees of the husband; but whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; and if they find a joint trading the effects will pass to the assignees; *Jarman v. Woolloton*, 3 T. R. 618. Where household goods, even of the husband, are *bonâ fide* vested in trustees for the sole use of the wife, and he becomes bankrupt while resident with her in the house in which the furniture is, the goods will not pass; *Simmons v. Edwards*, 16 M. & W. 838. See further *Dean v. Brown*, 5 B. & C. 336; *Miller v. Demetz*, 1 Mood. & Rob. 479; *ante*, p. 716.

Case of partners, and other tenants in common.] It was formerly held that the share of a dormant partner was not within the statute, the ostensible partner having become bankrupt; but this doctrine may be considered as overruled by the following decision. A. and B. were partners, but the whole business was carried on by, and in the name of A., B. not appearing to the world as a partner. At the dissolution of the partnership all the joint stock and effects were left, by agreement, in the hands of A., who was to receive and pay all the debts due to and from the concern. After carrying on the business for a year and a half, A. became bankrupt. It was held that the partnership property passed to his assignees; *Ex parte Enderby*, 2 B. & C. 389; see *Smith v. Watson*, *id.* 408, 412; and see *Ex parte Barrow*, 2 Rose, 252. And in the case of a partnership, like any other tenancy in common, the vesting of the property in the assignees depends on the question whether the one tenant in common allowed the other to have the apparent ownership of the whole; *per* Bayley, J., *Kirkley v. Hodgson*, 1 B. & C. 601.

Ships.] By the 17 & 18 Vict. c. 104 (the Merchant Shipping Act,

1854) s. 72, no registered mortgage of any ship or of any share therein, shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage, notwithstanding such mortgagor, at the time of his becoming bankrupt, may have in his possession and disposition, and be reputed owner of such ship or share thereof; and such mortgage shall be preferred to any right, claim, or interest in such ship or any share thereof which may belong to the assignees of such bankruptcy. See cases under the repealed acts; *Robinson v. Macdonnell*, 5 M. & S. 228; *Kirkley v. Hodgson*, 1 B. & C. 588; see 12 & 13 Vict. c. 106, s. 125, ante, p. 712.

Debts, shares, reversionary interests, &c.] Where a simple contract debt is assigned, the assignor is considered as having the order and disposition of the debt with the consent of the true owner until the debtor has notice of the assignment; for the assignment, after notice to the debtor, but not before, is equivalent to delivery of moveable goods; *Buck v. Lee*, 1 Ad. & E. 804; and see *Gibson v. Overbury*, 7 M. & W. 561; *Belcher v. Campbell*, 8 Q. B. 1. It seems to be sufficient if the notice be given before the filing of the petition, if the transaction be *bonâ fide* and without notice of the act of bankruptcy, the transaction being then protected under the 12 & 13 Vict. c. 106, s. 133, post, p. 723. *In re Styant*, 1 Phill. 105; and see *Young v. Hope*, 2 Ex. 105; *Graham v. Furber*, 14 C. B. 134. If the assignee of a debt takes all possible steps to get possession of the debt by sending notice to the debtor, although it do not reach him till after the bankruptcy, the debt does not continue in the order and disposition of the assignor in the meantime, so as to pass to his assignees; *Belcher v. Bellamy*, 2 Ex. 303. When the freight to be earned by a ship is assigned and notice given to the party who is to pay it, the freight is no longer in the order and disposition of the assignor; *Douglas v. Russell*, 4 Sim. 524; 1 Myl. & K. 468. Shares in a joint-stock company pass to the holder's assignees, notwithstanding an assignment or mortgage of them, if they continue in his name, or no notice be given to the company; *Nelson v. London Assur. Co.*, 2 Sim. & S. 292; *Ex parte Littledale*, 24 L. J. (Bank.) 9; *Ex parte Boulton*, 26 L. J. (Bank.) 45. But where a transfer had been executed by the transferor in blank, and a certificate by an officer of the company indorsed on the transfer, at the request of the purchaser, that the certificates of shares (the shares not having been issued) were at the office, it was held that the shares did not pass to the assignees; *Morris v. Cannan*, 31 L. J. (Ch.) 425. Notice of an assignment of a reversionary interest given to the solicitor of the trustees, is notice to them so as to take the interest out of the order and disposition of the bankrupt; *Rickards v. Gledstones*, 2 Giff. 298. On a sub-mortgage of a policy of insurance, notice of the mortgage having been given to the office, in order to take the policy out of the order or disposition of the mortgagee, notice of the sub-mortgage must be given to the office; *Thompson v. Tomkins*, 2 Drew. & Sm. 8; 31 L. J. (Ch.) 633.

Fixtures.] As the statute provides only for the case of personal chattels, fixtures will not pass to the assignees of a bankrupt, as being in his order and disposition; *Freshney v. Carrick*, 1 H. & N. 653. The lessee of land having erected a distillery thereon, demised the same to persons who became bankrupt: Held that the stills, &c., being fixed to the freehold, did not pass to the assignees; *Horn v. Baker*, 9 East, 215; accord. *Clark v. Crownshaw*, 3 B. & Ad. 804.

A steam-engine was erected at the joint expense of landlord and tenant for the purpose of working a colliery, to be used by the tenant during the term, but to be held as the property of the landlord, subject to such use: The court held this case not to be within the statute; *Coombs v. Beaumont*, 5 B. & Ad. 72. There is no distinction between fixtures removable as between landlord and tenant, and fixtures not so removable; *per* Parke, J., S. C.; *Ex parte Gawan, Walmsley v. Milne*, *infra*. The tenant in fee simple of a cotton mill, which contained a steam-engine, boilers, &c., mortgaged it with those articles, but remained in possession till his bankruptcy; the plate of the engine (which formed no part of the working apparatus) was fixed to the freehold of the mill. Every other part of the machine was secured by bolts and screws, and might be removed without injury to the building: It was held that the steam engine, &c., were not chattels in the order and disposition of the mortgagor at the time of his bankruptcy; *Hubbard v. Bagshaw*, 4 Sim. 326. A trader mortgaged premises on which were a steam-engine and other fixtures erected for the purposes of trade; having become bankrupt while continuing in possession, the court held this not to be a case of reputed ownership; *Ex parte Lloyd*, 1 Mont. & Ayr. 494, and other cases, 2 Mont. & Ayr. 61, 160. See also *Ex parte Gawan*, 25 L. J. (Bank.) 1; 5 De G. M. & G. 403; and *Walmsley v. Milne*, 29 L. J. (C. P.) 97; 7 C. B., N. S., 115, where the authorities on this subject are reviewed. In the last case trade fixtures were put up by the mortgagor after the mortgage, but the court held they did not pass to his assignees.

In the bankrupt's possession as executor.] Goods of a testator or intestate, in the possession of the bankrupt as executor or administrator, are not within the statute; *Ex parte Ellis*, 1 Atk. 101; *Farr v. Newman*, 4 T. R. 629. And in such case even money, if it can be specifically distinguished, will not pass to the assignees; *per* Lord Mansfield, C. J., *Howard v. Jemmett*, 3 Burr. 1369; *Taylor v. Plumer*, 3 M. & S. 578. But where a bankrupt had remained in possession of the intestate's goods for some years, without having taken out administration, though entitled to do so, the goods were held to pass to the assignees; *Fox v. Fisher*, 3 B. & A. 135. See *ante*, p. 717.

In the bankrupt's possession as factor.] Goods in the bankrupt's possession as factor will not pass to his assignees; B. N. P. 42; *per cur.* in *Mace v. Cadell*, Coup. 233. If the factor has sold the goods and received the proceeds before the bankruptcy, the principal must come in with the rest of the creditors and prove; *Scott v. Surman, Willes*, 400. But if the factor takes notes in payment; S. C.; or invests the proceeds of the original goods in other goods; *Whitecomb v. Jacob*, 1 Salk. 160; the notes or goods are the specific property of the principal, and do not pass to the assignees, although the investment was a breach of trust; *Taylor v. Plumer*, 3 M. & S. 562. In that case a draft was entrusted to a broker to purchase Exchequer bills, and he cashed it and purchased American stock and bullion, but after an act of bankruptcy handed them to his principal, who sold the whole and received the proceeds; and it was held that he was entitled to retain them against the assignees. In such a case the right to the proceeds, even money if it can be distinguished, remains in the principal; *per curiam*, S. C. So if the goods have been sold, but the price has not been paid before the bankruptcy of the factor,

and the assignees receive the money, the principal may sue them; *Scott v. Surman*, *supra*. Books deposited with a bookseller for sale on commission, though not separated from his general stock, do not pass to his assignees; *Whitfield v. Brand*, 16 M. & W. 282; and see the cases *infra*.

[*In the bankrupt's possession for a particular purpose.*] Where goods are in the bankrupt's possession for a particular purpose, he has not such a disposition of them as to make them pass, under the statute, to his assignees; *Collins v. Forbes*, 3 T. R. 316; *Clarke v. Spence*, 4 Ad. & E. 448. As where a ship-builder sold an unfinished ship, and agreed to complete it, and it remained at the time of his bankruptcy in his yard for completion; *Holderness v. Rankin*, 29 L. J. (Ch.) 753; 28 Beav. 180; 2 De G. F. & J. 258. Thus bills deposited by a customer with his banker, and entered as cash (whether indorsed by the customer or not) for the purpose of obtaining payment, which by the London bankers are usually entered short (that is, not carried to the customer's credit as cash till paid), do not pass to the assignees of the banker on his becoming bankrupt; *Giles v. Perkins*, 9 East, 12; *Ex parte Sargeant*, 1 Rose, 153. And even where the bills are not entered short, but are treated as cash, if they remain in specie they do not generally pass to the assignees; *Parke v. Eliason*, 1 East, 544; *Thompson v. Giles*, 2 B. & C. 422. See *Ex parte Armitstead*, 2 Gl. & J. 371, and *Ex parte Thompson*, Mont. & Mac. 108 (n). Bills of exchange were paid by a customer to his account with a banker, and entered as cash, with a distinct interest account. The customer had credit to the amount of the bills so entered, but in fact never over-drew the account. There was evidence of a custom in the country to circulate bills, but no express authority was given by the customer to the banker to circulate the bills in question. It was held by the Lord Chancellor, that, on the bankruptcy of the banker, these bills did not pass to his assignees; *Ex parte Benson*, Mont. & Bligh, 120. But where bills are remitted to be discounted, and they are discounted accordingly; they pass to the assignees; *Curstairs v. Bates*, 3 Camp. 301; *per Holroyd, J.*, in *Thompson v. Giles*, 2 B. & C. 432. So where bills are sent by one trader to another trader on a general running account; *Bent v. Puller*, 5 T. R. 494; or where there is an exchange of bills for bills; *Hornblower v. Proud*, 2 B. & A. 327.

[*In the bankrupt's possession as trustee.*] Property, which is in the bankrupt's hands as trustee only, will not pass to his assignees; *Winch v. Keeley*, 1 T. R. 619; *Taylor v. Plumer*, 3 M. & S. 576; *Sinclair v. Wilson*, 24 L. J. (Ch.) 537; 20 Beav. 324; and see 12 & 13 Vict. c. 106, s. 130, enabling the Lord Chancellor, on petition, to order all trust property held by the bankrupt to be assigned to a new trustee.

It will have been seen that many of the above cases as to factors, trustees, &c., were decided chiefly on the ground that, the bankrupt having only a qualified property in the goods or property clothed with a trust, the property did not pass to the assignees, with but slight reference to the question of reputed ownership; as were also the following cases:

A. and B. agreed that B. should purchase of A. the light gold coin, which he should send, at a stated price, and that A. should from time to time draw upon B. for the money due upon such sale, and that B.

should also from time to time accept other bills drawn by A. for his own convenience, for which A. was to remit value. After they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A., not knowing of the bankruptcy, in order to enable B. to discharge the acceptances, sent him a quantity of light gold and bills, which were taken to B.'s assignees. It was held that A., who had since paid B.'s acceptances, might recover back the gold and bills sent after B.'s bankruptcy, on the ground that they were sent for the particular purpose of paying those acceptances, and that, as the purpose was not answered, the property in the gold, &c., remained or became re-vested in A.; *Tooke v. Hollingworth*, 5 T. R. 215; S. C. in Ex. Ch., 2 H. Bl. 501. See also *Taylor v. Plumer*, 3 M. & S. 562; *ante*, p. 721. Where A., having agreed to lend B. 200*l.* to be applied to a specific purpose, drew a check on his banker for that sum, and delivered it to B., who afterwards became bankrupt, and B., not having used the check, returned it to A., after having committed an act of bankruptcy; it was held that B.'s assignees could not maintain trover for the check; *Moore v. Barthrop*, 1 B. & C. 5. Where A. advanced money to B., then lying in prison, for the purpose of settling with his creditors, and, the purpose failing, part of the amount was repaid to A. by B., who became bankrupt by lying two months in prison, it was held that the assignees could not recover the money so repaid; *Thorpe v. Milne*, 2 B. & A. 683. So where money was obtained by means of a guarantee given expressly to enable bankers to meet a run upon their bank, but, finding their case hopeless, they at once returned the money, and suspended payment the next day, and afterwards became bankrupt: it was held by Erle and Crompton, JJ., that the money did not pass to the assignees; the principle of the above cases being that the money being clothed with a trust for a specific object, the object failing, the bankrupts, as between themselves and their sureties, were bound to return it; *Edwards v. Glyn*, 28 L. J. (Q. B.) 350; 2 E. & E. 29.

Defence to Actions by Assignees.

Plea denying that the plaintiffs are assignees.] A plea, denying that the plaintiffs are assignees *modo et formâ*, puts them upon proof of strict title, *i. e.*, of trading, petitioning creditor's debt, act of bankruptcy, &c.; *Butler v. Hobson*, 4 N. C. 290; *Buckton v. Frost*, 8 Ad. & E. 844. This plea is rendered necessary by R. 5, H. T., 1853, which directs that in all actions by assignees of a bankrupt, the character in which the party is stated on the record to sue shall not in any case be considered as in issue unless specially denied. As to its being also necessary in some cases to give notice of disputing the petitioning creditor's debt, &c., at or before the time of pleading, see *ante*, p. 707. Strict proof of title may be wholly or partially dispensed with by the operation of the statutes already referred to, or by implied admission; see *supra*, pp. 706-7 and 708-9.

It was held in *Jones v. Smith*, 1 Ex. 831, that in an action on contract a plea that "plaintiff was not assignee" *modo et formâ*, let in evidence of the nonjoinder of a co-assignee.

Plea of Not guilty in action for conversion.] Where the declaration alleged a possession by the plaintiffs as assignees and a conversion after the bankruptcy, and the plea was Not guilty, it was held that a sale of the bankrupt's goods by the defendant under an execution

before the bankruptcy did not support the issue, though there had been a demand and refusal by the defendant afterwards; for the sale was the only conversion; *Edwards v. Hooper*, 11 M. & W. 363; see also *Action for Conversion*, ante, p. 600.

Plea denying property or possession in action for conversion.] It seems, that, under a plea of "not possessed," to trover by the assignees of a bankrupt, a defence, that the goods were taken in execution, without notice of any act of bankruptcy having been committed, may be shown; *Unwin v. St. Quintin*, 11 M. & W. 286; *Turquand v. Hawtrey*, 9 M. & W. 727. Where the plaintiffs were assignees of A. when the conversion took place, and afterwards became assignees of A. and B., and declared in trover alleging the property in themselves as assignees of A. and B., it was held they could not recover even a moiety; for they were not, at the time of conversion, possessed as assignees of both bankrupts; *Edwards v. Hooper*, 11 M. & W. 363. See further, ante, p. 709.

The defendant may show that the equitable interest passed from the bankrupt before the bankruptcy; for the assignees only take what the bankrupt is equitably, as well as legally, entitled to, and therefore an equitable assignment made before bankruptcy prevents the property from vesting in the assignees; *Castelli v. Boddington*, 1 E. & B. 66; *S. C.* in error, *Id.* 879. The same doctrine applied to the assignees of an insolvent; *Mogg v. Baker*, 3 M. & W. 195; *Tibbitts v. George*, 5 Ad. & E. 107. But the equity must be a clear and definite one; if not, the property passes, and the claimant on it must resort to a court of equity; *Carvalho v. Burn*, 4 B. & Ad. 382; *Best v. Argles*, 2 C. & M. 394.

Protection against known act of bankruptcy.] By sect. 134 of the 12 & 13 Vict. c. 106, no purchase from any bankrupt, *bonâ fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless a fiat or petition for adjudication of bankruptcy shall have been sued out or filed within twelve [calendar] months after such act of bankruptcy. There was a like provision in 6 Geo. 4, c. 16, s. 86.

Protection against unknown acts of bankruptcy.] The defendant may also protect himself by insisting that he comes within the clauses of the Bankrupt Act, by which, in various cases, transactions with the bankrupt, without notice of his bankruptcy, are declared good. And where the defence is, in substance, a denial that the property in the goods, for which the plaintiffs sue in trover as assignees, passed to them, a simple traverse of such property is sufficient; *per Parke, B.*, in *Carr v. Burdiss*, 1 C., M. & R., 787; *Turquand v. Hawtrey*, 9 M. & W. 727; ante, p. 709.

By the 12 & 13 Vict. c. 106, s. 133, All payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before the date of the fiat or filing of the petition for adjudication of bankruptcy, to any creditor of the bankrupt, and all payments so made to any bankrupt before the date, &c.; and all conveyances by any bankrupt *bonâ fide* executed before the date, &c.; and all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date, &c., and all executions and attachments against his lands and tenements *bonâ fide* executed by seizure, and all executions and attachments, against his goods and chattels

bonâ fide executed and levied by seizure and sale *before* the date, &c., shall be deemed valid, notwithstanding any *prior act* of bankruptcy; *Provided* the person so dealing with, or paying to, or being paid by the bankrupt, or at whose suit the execution or attachment issued, had not at the time of the payment, conveyance, contract, dealing or transaction, or at the time of executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any *prior act* of bankruptcy: *Provided* also that nothing herein shall be taken to give validity to any payment, delivery, or transfer of goods and chattels, or to any conveyance or equitable mortgage, or to any execution on a warrant of attorney, cognovit, or judge's order obtained by consent, made or given by way of *fraudulent preference* of any creditor of the bankrupt. The former enactments on this subject were the 6 Geo. 4, c. 16, ss. 81, 84; 2 & 3 Vict. c. 11, s. 12; and 2 & 3 Vict. c. 29.

And by 12 & 13 Vict. c. 106, s. 184, "No creditor having security for his debt, or having made any attachment in London or in any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any *execution or extent served and levied by seizure and sale* upon, or any mortgage of or lien upon, any part of the property of such bankrupt *before the date* of the fiat, or *the filing of a petition* for adjudication of bankruptcy: *Provided* that nothing herein contained shall be deemed to give validity to any warrant of attorney, cognovit, or consent to a judge's order, declared to be null and void by any provision of this act (see ss. 135-7), nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or consent, or to any execution or extent executed or levied under or by virtue of any such warrant of attorney, cognovit, or consent.

Protected payments and transactions.] The effect of sections 133 and 184, in cases to which they apply, is to limit the relation of the title of the assignees to the petition for adjudication, instead of going back to the act of bankruptcy; see, *per cur.* *Whitmore v. Robertson*, 8 M. & W. 476. A delivery of goods, *bonâ fide* made in part payment of a previous debt after a secret act of bankruptcy committed by the debtor, was a protected payment under the previous acts; *Cannan v. Wood*, 2 M. & W. 465. It was not necessary that the payment should be of a precedent debt to bring the case within those statutes, *Hill v. Farnell*, 9 B. & C. 45; see also *Churchill v. Crease*, 5 Bing. 177. But there must have been a debt actually accrued at the time of payment; *Bishop v. Crawshay*, 3 B. & C. 415. Giving cash for a bank post bill was a payment protected by the above acts; *Willis v. Bank of England*, 4 Ad. & E. 21. The true owner of goods has a right at any time before the petition to take or demand back his goods of which he has allowed the bankrupt to have possession as the reputed owner, provided he does so without notice of any prior act of bankruptcy; it being "a transaction" with the bankrupt within the meaning of the 133rd section, and therefore protected; *Graham v. Furber*, 14 C. B. 134; *Brewin v. Short*, 5 E. & B. 227. It has been questioned whether a distress by the landlord was an "attachment" or "transaction" within the 2 & 3 Vict. c. 29; *Lackington v. Elliott*, 7 M. & G. 538. A right of general lien arising before fiat may be protected by this section; *semb.* *Bowman v. Malcolm*, 11 M. & W. 833.

As to what constitutes a fraudulent preference, see *ante*, pp. 700, *et seqq.*

Without the provision at the end of s. 133, it had been held that if the transaction amount to a fraudulent preference, or is otherwise itself an act of bankruptcy, it is not protected; *Bevan v. Nunn*, 9 Bing. 107.

Protected executions.] The effect of sections 133 and 184 is to protect executions upon chattels, only where they are executed by seizure *and sale* before the filing of the petition for adjudication, whether the seizure be before or after the act of bankruptcy; *Hutton v. Cooper*, 6 Ex. 159; 20 L. J. (Ex.) 123; *Ward v. Dalton*, 7 C. B. 643; *Young v. Roebuck*, 2 H. & C. 296; 32 L. J. (Ex.) 260. But if the execution be completed by sale before the filing of the petition, it is valid, notwithstanding a notice previous to the sale of an act of bankruptcy committed *after* the seizure; *prior* act of bankruptcy in section 133 meaning, as in former enactments, *prior to the execution*: *Edwards v. Scarsbrook*, 3 B. & S. 280; 32 L. J. (Q. B.) 45. It may be as well to observe that the contrary *was assumed* in *Edwards v. Gabriel*, *post*, p. 726.

The execution will not be in any case protected where it is in itself an act of bankruptcy; as, where it is brought about by the debtor's own procurement or the like; *Hall v. Wallace*, 7 M. & W. 358; *Belcher v. Magnay*, 12 M. & W. 102.

Where a clergyman is a bankrupt, the profits of his benefice do not pass to the assignees except by a sequestration under sect. 135 of 24 & 25 Vict. c. 134, and therefore a sequestration by a creditor takes priority of a subsequent sequestration by the assignees; and it is not within sect. 184 of 12 & 13 Vict. c. 106; *Hopkins v. Clarke*, 33 L. J. (Q. B.) 93; 4 B. & S. 836; S. C. in *Ex. Ch.*, 33 L. J. (Q. B.) 334.

Notice of prior act of bankruptcy.] What is meant by *prior* act of bankruptcy, see *supra*. Notice of an act of bankruptcy means *knowledge* thereof, or wilfully abstaining from acquiring such knowledge; *Bird v. Bass*, 6 M. & G. 143. Where an act of bankruptcy has been committed, any communication which brings to the knowledge of the execution creditor the alleged fact in a way which ought to induce him as a reasonable man to believe that the notification was true, is sufficient notice; *per cur. Hope v. Meek*, 10 Ex. 845; 25 L. J. (Ex.) 16. A notice that the debtor has executed a conveyance of all his property for the benefit of his creditors is sufficient; *Lackington v. Elliott*, 7 M. & G. 538. So is a general notice that he has committed an act of bankruptcy, without stating the nature of it; *Udall v. Walton*, 14 M. & W. 254; *Ramsey v. Eaton*, 10 M. & W. 22; *Turner v. Hardcastle*, 31 L. J. (C. P.) 143; 11 C. B., N. S. 683; but notice that a docket has been struck was not sufficient; *Hocking v. Acraman*, 12 M. & W. 170. Where the plaintiff's attorney in the cause was informed that the defendant had executed an assignment of all his effects to trustees in trust for the general body of his creditors, that it would be impossible to carry out the trusts thereof, and that the measure must end in a bankruptcy, and he, after such information, issued execution; it was held, that the plaintiff, at the time of the execution, had notice of a prior act of bankruptcy; *Rothwell v. Timbrell*, 1 Dowl. N. S. 778. So a notice of the filing of a declaration of insolvency before

execution, was held sufficient, a fiat having afterwards issued, under the 5 & 6 Vict. c. 122, s. 22, within the two months; *Green v. Laurie*, 1 *Ex.* 335; 17 *L. J. (Ex.)* 61. So notice of the filing of a petition for arrangement with creditors, provided it be afterwards dismissed, and so made an act of bankruptcy by relation under sect. 76 of 12 & 13 Vict. c. 106; *Edwards v. Gabriel*, 30 *L. J. (Ex.)* 245; 6 *H. & N.* 701; *S. C.* in *Ex. Ch.* 31 *L. J. (Ex.)* 113; 7 *H. & N.* 520.

It has been ruled that if the assignee from the sheriff of the goods had notice of a prior act of bankruptcy, he is not protected, although the execution creditor had no such notice; *Fawcett v. Fearne*, 6 *Q. B.* 20; decided under the 6 Geo. 4, c. 16, and 2 & 3 Vict. c. 29; *sed quære*; see *Green v. Steer*, 1 *Q. B.* 710-11; 1 *Sm. L. C.* 439.

Notice of prior act of bankruptcy, to whom.] It seems that notice to one of two execution creditors is sufficient; *Edwards v. Cooper*, 11 *Q. B.* 33. Notice to the chief office of a bank is notice to its branch banks, at all events if reasonable time has elapsed to transmit it; *Willis v. Bank of England*, 4 *Ad. & E.* 21. By the 12 & 13 Vict. c. 106, s. 87, "If any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be deemed to have had such notice." Notice to plaintiff's attorney is sufficient; *Rothwell v. Timbrell*, *supra*; but it is not sufficient to deliver a notice of the act of bankruptcy at an attorney's chambers in the same way as a notice in a cause is delivered; *Pike v. Stephens*, 12 *Q. B.* 465; *Bird v. Bass*, 6 *M. & G.* 143. And it seems that notice to the attorney's clerk, unless he communicates the same to his principal, is not notice to the execution creditor; *Pennell v. Stephens*, 7 *C. B.* 987; at least, unless the clerk is a managing clerk acting in the matter in place of his principal; *Pike v. Stephens*, *supra*. But notice to a country attorney, employed as agent by the plaintiff's town attorney with a certain discretion to act for him in the matter of the execution, under which the sheriff was then in possession but had not sold, was held notice to the plaintiff; *Brewin v. Briscoe*, 28 *L. J. (Q. B.)* 329; 2 *E. & E.* 116. Notice to the sheriff, or to a sheriff's officer having the execution of the writ, is not notice to the execution creditor; *Ramsey v. Eaton*, 10 *M. & W.* 22.

Notice of prior act of bankruptcy, when given.] If the sale and notice of an act of bankruptcy were on the same day, it is open to inquiry at what time of the day each took place; and if the goods were actually sold before the notice, the execution will be valid; *Giles v. Grover*, 9 *Bing.* 128; *Whitmore v. Green*, 13 *M. & W.* 104; *Godson v. Sanctuary*, 4 *B. & Ad.* 255. So if the seizure took place and the fiat issued on the same day, it was open to inquiry at what time of the day each respectively took place; *Pewtress v. Annan*, 9 *Dowl.* 828. The leaving of a notice of an act of bankruptcy at the residence of the party intended to be affected by it, is no notice until it is received by him; *Christie v. Winnington*, 8 *Ex.* 287.

Evidence on plea of mutual credit.] By sect. 171 of the 12 & 13 Vict. c. 106 (corresponding with sect. 50 of 6 Geo. 4, c. 16), where there has been "mutual credit or mutual debts" between the bankrupt and another, one "debt or demand" may be set against another notwithstanding a prior act of bankruptcy; and the balance alone shall

be claimed or paid; and every debt or demand proveable (*post*, p. 729) against the estate may be set off against it, provided the person claiming the set-off had not, when credit was given, notice of an act of bankruptcy committed.

The Decisions under 6 Geo. 4, c. 16, and the previous acts, are applicable to the present acts, and are therefore retained.

The term mutual credit is held to have a more extensive meaning than mutual debt; *Ex parte Prescott*, 1 *Atk.* 230. A mutual credit may be constituted, though the parties did not mean particularly to trust each other; as where a bill of exchange, accepted by A., gets into the hands of B., and B. buys goods of A., it is a mutual credit between A. and B., though A. did not know that the bill was in B.'s hands; *Hankey v. Smith*, 3 *T. R.* 507 (n). It is, however, settled that the term mutual credit is confined to such credits only as must, in their nature, terminate in debts; as where a debt is due from one party, and credit is given by him on the other side for a sum of money payable on a future day, and which will then become a debt; or where there is a debt on one side, and a delivery of property on the other, with directions to turn it into money; in such cases the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will, in all respects, be complied with. But where there is a mere deposit of property without any authority to turn it into money, no debt can arise out of it, and, therefore, it is not a credit within the meaning of the statute; *per cur.*, *Rose v. Hart*, 8 *Taunt.* 499, 506; *Young v. Bank of Bengal*, 1 *Deac. Bank. Ca.* 622. See *Gibson v. Bell*, 1 *N. C.* 743. Thus a guarantee against contingent damages, which cannot terminate in a debt, is not the subject of mutual credit; *Sampson v. Burton*, 2 *B. & B.* 89; and see *Bell v. Carey*, 8 *C. B.* 887. The decisions on the older repealed acts may be considered as authorities upon the present Bankrupt Acts, though the word "demand" has been added to "debt" in these and some of the preceding acts. See *Eden on Bankruptcy*, 194; *Ex parte Marshall*, 1 *Mont. & Ayr.* 139.

Set-off, or "mutual credit," must be specially pleaded.

In *Makeham v. Crow*, 15 *C. B., N. S.*, 847, to an action by the assignees of a bankrupt for the price of machinery supplied by the bankrupt, the court allowed the defendant to plead an equitable plea of set-off for unliquidated damages arising out of the same contract, giving the plaintiffs leave to reply and demur; see 24 & 25 *Vict. c.* 134, s. 153; and *ex parte Mendel*, 33 *L. J. (Bank.)* 14.

Action by vendee of assignees.] By the 24 & 25 *Vict. c.* 134, s. 137, after twelve months from adjudication, or earlier with the approbation of the court, the assignees may sell by auction, or, with sanction of the court, by private contract, any of the book debts, &c., of the bankrupt, and assign them to the purchaser, and he, by virtue of the assignment, shall in his own name have the same power and privileges as to proof and other matters as the assignees. As to what are book debts under this section, see *Shipley v. Marshall*, 14 *C. B., N. S.* 566; 32 *L. J. (C. P.)* 258; *McEvoy v. Bent*, 11 *W. R.* 314 (*Ex.*); *Ex parte Roberts*, 33 *L. J. (Bank.)* 8; and see s. 188 (repealed) of 12 & 13 *Vict. c.* 106.

Actions by trustees under a composition deed.] See *Topping v. Veysell*, *post*, p. 739.

ACTIONS AGAINST ASSIGNEES OF BANKRUPTS.

Actions against assignees are usually brought either by a bankrupt to try the validity of the proceedings against him, or by creditors and others who assert a title to property taken by the defendants.

By *R. 5, H. T.*, 1853, in all actions against assignees of a bankrupt, the character in which the defendant is stated on the record to be sued shall not in any case be considered as in issue unless specially denied. In such actions as this, the character of the defendant, as assignee, is *not* commonly stated in the declaration.

In actions against assignees, if the plaintiff intends to dispute the petitioning creditor's debt, the trading, or act of bankruptcy, he must, "before issue joined" give notice in writing to the defendant of his intention to dispute some and which of such matters, otherwise no proof shall be required at the trial of the facts above mentioned; 12 & 13 Vict. c. 106, s. 234, *ante*, p. 707. Service of this notice at the time of delivering the issue will not be sufficient; *Richmond v. Heapy*, 4 Camp. 207. As to the form, sufficiency, and service of such notice, see the cases already cited, *ante*, p. 708.

We have seen that the bankrupt may be estopped by his own acts or admissions from disputing his bankruptcy; See *Watson v. Wace*, 5 B. & C. 153; *Munk v. Clark*, 2 N. C. 299, cited *ante*, p. 709.

The provisions already mentioned, which make the sealed proceedings evidence, and which dispense with strict proof of the title of the assignees as against the bankrupt (see *ante*, pp. 706-7), apply to cases where assignees are defendants, though not named as such; *Fawcett v. Fearn*, 6 Q. B. 25, n. (b). Where the assignees are strangers to the record, as where the defendants set up their title in ejectment, that title must be regularly and strictly proved; *Doe v. Liston*, 4 Taunt. 741; see, *ante*, p. 708.

In trover by the owner of goods against the assignees of a bankrupt, the defence was, that the goods at the time of the bankruptcy were in the order and disposition of the bankrupt with the consent of the plaintiff, the true owner, and that the title to the goods vested in the assignees by virtue of an order of the Court of Bankruptcy: It was held, that such defence was admissible under the plea of not possessed; *Isaac v. Belcher*, 5 M. & W. 139; although the action was brought before the order was applied for; *Heslop v. Baker*, 8 Ex. 411.

Official assignees are not personally liable in case of the insufficiency of the debt, trading, or act of bankruptcy; 12 & 13 Vict. c. 106, s. 41.

Limitation of actions, &c.] It would seem that the 159th sect. of 12 & 13 Vict. c. 106, as to the limitation of actions, &c., against persons for anything done in pursuance of the act, does not apply to actions against assignees; *Edge v. Parker*, 8 B. & C. 697; *Worth v. Budd*, 2 B. & Ad. 172; *Knight v. Turquand*, 2 M. & W. 101.

ACTIONS BY OR AGAINST BANKRUPTS.

The case of actions by bankrupts against assignees to try the validity of the fiat, is noticed under the last head.

Evidence on plea of bankruptcy of the plaintiff.] This defence must in general be pleaded specially. By sect. 141 of the 12 & 13 Vict. c. 106, *ante*, pp. 709-10, neither the bankrupt nor any one claiming under him has power to recover the debts or other property vested in the assignees. As to what rights of action pass to the assignees, see *ante*, pp. 710-11. As before noticed, *ante*, p. 723, it is only debts, in which the bankrupt is beneficially interested, that pass to his assignees; therefore, when he has assigned before his bankruptcy, a debt due to him, an action for the recovery of it must be brought in his name, and not in the name of his assignees. The proof of the proceedings in bankruptcy is facilitated by sect. 236 of the above act, and by sect. 203 of 24 & 25 Vict. c. 134, *ante*, p. 705; and the Gazette is conclusive evidence of bankruptcy, after the lapse of the time allowed for disputing it; see sect. 233, *ante*, p. 706. The certificate (now order of discharge) being obtained upon the bankrupt's application, was *prima facie* evidence as against him, of everything essential to a valid bankruptcy; *Fyson v. Chambers*, 9 M. & W. 460.

As to proof of the certificate or order, see *ante*, p. 705.

Evidence on plea of bankruptcy of the defendant.] By 24 & 25 Vict. c. 134, s. 161, the order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands, *proveable under his bankruptcy*, (save as therein provided); and if thereafter he shall be arrested, or any action shall be brought against him for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and the order of discharge shall be sufficient evidence of the bankruptcy, and the proceedings precedent to the order of discharge.

As to proof of the order, see *ante*, p. 705.

As to what debts and demands are proveable, see 12 & 13 Vict. c. 106, ss. 149-165, 172-181, and 24 & 25 Vict. c. 134, ss. 149-154. See the cases collected *Schw. N. P.* 12th edit. pp. 324 *e*—324 *o*. To which add *Betteley v. Stainsby*, 12 C. B., N. S. 477; 31 L. J. (C. P.) 337; and *General Discount Co. v. Stokes*, 34 L. J. (C. P.) 25.

The defence of the defendant's bankruptcy cannot be given in evidence under the general issue, but must be pleaded; *Gowland v. Warren*, 1 Camp. 363. Under the general form of plea a certificate, allowed after the commencement of the suit but before plea pleaded, may be given in evidence; *Harris v. James*, 9 East, 82; but if allowed after plea pleaded, it should be pleaded *puis d'arrain*; *Lungmead v. Beard*, cited 9 East, 85. Where a commission issued against a person by a wrong name, and he obtained a certificate under it, and an action was afterwards brought against him in his right name, on a plea of bankruptcy he was admitted to show that he was the person against whom the commission issued, and that he had gone by the name by which he was described in the commission; *Stevens v. Elizee*, 3 Camp. 256.

When proceedings were by commission, a certificate under a joint commission was sufficient in an action for a separate debt, and *vice versa*; *Horseys case*, 3 P. Wms. 23; *Ex parte Yale*, *Id.* 24 (n).

By the 24 & 25 Vict. c. 134, s. 163, the order of discharge shall not release or discharge any person who was a partner with the bankrupt at the time of bankruptcy, or was then jointly bound or had made any joint contract with him.

[*Contract after bankruptcy.*] By 24 & 25 Vict. c. 134, s. 164, after the order of discharge takes effect, the bankrupt shall not be liable to pay or satisfy any debt, claim, or demand proveable under the bankruptcy, or any part thereof, upon any contract, promise, or agreement, verbal or written, made after adjudication; and if sued on any such contract, &c., he may plead generally that the cause of action accrued pending proceedings in bankruptcy, and give this act and the special matter in evidence.

Under sect. 204 (repealed) of 12 & 13 Vict. c. 106, similar in its terms to the above 164th section, it was held that although the agreement could not be enforced by the creditor against the bankrupt, a bill of exchange given for the purpose was not void, but might be enforced by a *bonâ fide* holder; *Goldsmid v. Hampton*, *infra*.

The previous acts, 5 & 6 Vict. c. 122, s. 43, and 6 Geo. 4, c. 16, s. 131, only required that such contract, &c., should be in writing, signed by the bankrupt, or his agent authorised in writing.

By 24 & 25 Vict. c. 134, s. 166, any contract, covenant, or security made or given by a bankrupt or other person with, to, or in trust for, any creditor to induce him to forbear opposing the order of discharge, &c. is void, and the party sued on such contract or security may plead in general that the cause of action accrued pending proceedings in bankruptcy, and give the act and special matter in evidence; but if the security be negotiable, it shall not be void against a *bonâ fide* holder for value, without notice.

Sect. 202 of the 12 & 13 Vict. c. 106 (now repealed), was in similar terms, but without the additional clause as to *bonâ fide* holders.

The 166th sect. is not retrospective, and a bill (within the repealed sect. 202) given before the act passed (6th August, 1861) is therefore void in the hands of a *bonâ fide* holder, though it was indorsed and became due after the act passed; *Reed v. Wiggins*, 13 C. B., N. S. 220; 32 L. J. (C. P.) 131.

A bill accepted by the bankrupt in blank before, but not dated, drawn, or filled up, till after the certificate, was held not within the 202nd sect.; *Goldsmid v. Hampton*, 5 C. B., N. S., 94; 27 L. J. (C. P.) 286. See *ante*, p. 208, where these two statutes should have been noticed.

[*Plea of composition deed.*] The Act of 1861, 24 & 25 Vict. c. 134, enables a debtor to enter into a deed, binding on non-assenting creditors, and affording him a defence to an action, or protection as in bankruptcy, without actually becoming bankrupt.

Sect. 192. Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee, on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed:—1. A majority in number, representing three-fourths in value of the creditors of such debtor, whose debts shall respectively amount to 10*l.* and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument. 2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same. 3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor. 4. Within 28 days from

the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered. 5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value, of the creditors of the debtor whose debts amount to 10% or upwards, have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed. 6. Such deed or instrument shall before registration bear such ordinary and *ad valorem* stamp duties as are hereinafter provided (s. 195, *infra*). 7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees.

Sect. 193. The date, names, and descriptions of the parties to every such deed or instrument, not including the creditors, together with a short statement of the nature and effect thereof, shall be entered by the chief registrar in a book to be kept exclusively for the purposes of such registration. Such entry shall be made within 48 hours after the deed shall have been left with the registrar, and a copy of such entry shall be published in the *London Gazette* within four days after the making of it.

Sect. 194. Every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys or covenants or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding-up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall within 28 days from and after the execution thereof by such debtor, or within such further time as the court in *London* shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence.

Sect. 195. No deed or instrument whatever required to be registered as aforesaid shall be registered unless in addition to the ordinary stamp-duty it also be impressed with, or have affixed to it, a stamp denoting a duty computed at the rate of 5s. upon every 100% or fraction of 100% of the sworn or certified value of the estate or effects comprised in, or to be collected or distributed under, such deed or instrument: Provided, that the maximum or *ad valorem* duty payable in respect of any such deed or instrument shall be 200%.

Sect. 196. Every such deed, on being so registered as aforesaid, shall have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the chief registrar for registration.

Sect. 197. From and after the registration of every such deed or instrument, in manner aforesaid, the debtor, and creditors, and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of, and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved and the trustees had been appointed creditors' assignees under such

bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy; and except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed, according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor had been adjudged bankrupt, and his estate were administered in bankruptcy.

Sect. 198. After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy.

Sect. 199. In case a petition be presented for adjudication in bankruptcy against a debtor after his execution of such deed or instrument as is hereinbefore described, and pending the time allowed for the registration of it, all proceedings under such petition may be stayed if the court shall think fit; and in case such deed, &c., shall be duly registered, the petition shall be dismissed.

Sect. 200. If a debtor cannot obtain the assent of a majority in number representing three-fourths in value of his creditors, by reason of his being unable to ascertain by whom bills of exchange, promissory notes, or other negotiable securities, accepted, drawn, made, or indorsed by him, are holden, or by reason of the absence of creditors in a foreign country, or other similar circumstances, it shall be sufficient if he obtain the consent of a majority representing three-fourths in value of all his other creditors; provided that notice shall have been inserted in one or more newspapers published in the county or place in which he shall have *carried on business* immediately prior to the date of the deed or instrument, requiring his creditors to signify their assent to or dissent from the same by notice in writing, addressed to the trustee thereof, within 14 days from the insertion of such notice, and that the affidavit, or certificate of the trustee, shall state the circumstances of the case, and the same shall be allowed by the court; and provided the deed or instrument be in the form in Sch. D, which shall vest *all* the estate and effects of the debtor in the trustees of such deed, and provided all such other conditions as are hereinbefore required, shall be duly complied with.

The form, Sch. D., is a simple conveyance of all the debtor's effects to trustees, to be administered for the benefit of the creditors as if he had been adjudged a bankrupt at the date of the deed.

The following are the chief decisions upon the above sections.

Effect of non-registration.] A deed which purports to be a deed of arrangement between a debtor and *all* his creditors, whether it be framed under sect. 192 or not, is within sect. 194, and cannot be

given in evidence against a creditor who has executed it if unregistered; *Hodgson v. Wightman*, 32 L. J. (Ex.) 147; 1 H. & C. 810. In *Ex parte Wensley*, 32 L. J. (Bank.) 23; 1 De G. J. & S. 273, the Lord Chancellor held that an unregistered deed might be given in evidence as an act of bankruptcy; but in *Ex parte Potter*, 13 W. R. 189, the Lord Chancellor is reported to have overruled his previous decision.

Registration, when good.] The power given to the Bankruptcy Court in London under sect. 194, to enlarge the time for registration beyond the 28 days after execution, may be exercised after the 28 days have elapsed, and after a prior application for extension of time has been refused; and a deed registered within the time so enlarged is admissible in evidence; *Wishart v. Fowler*, 33 L. J. (Q. B.) 125; 4 B. & S. 674. In that case the deed was intended, no doubt, to operate under sect. 192; but for the purposes of the action (an interpleader) it would have been equally effective without the aid of that section. In the more recent case of *In re Skinner*, 34 L. J. (Bank.) 9, the Lord Chancellor thought the Court had no power to extend the time for registration under clause 4 of the 192nd section; but allowed the registration after the 28 days under sect. 194, without prejudice to the conditions of the 192nd section.

Effect of registration.] The certificate of registration, though necessary, is no evidence that the conditions of the 192nd sect. have been complied with; *Ex parte Rawlings*, and other cases, *post*, p. 734; and is of no effect unless the deed be a valid one. See *infra*, and *post*, p. 738.

Assenting creditors, how ascertained and counted.] In ascertaining whether the requisite majority of creditors in number and value have assented to the deed, secured as well as unsecured creditors and their debts are to be taken into account; *Ex parte Godden*, 32 L. J. (Bank.) 37; 1 De G. J. & S. 260 (L. J.); *Turquand v. Moss*, 33 L. J. (C. P.) 355; 17 C. B., N. S., 15; where see the dicta to the contrary discussed. The Lord Chancellor, in *Ex parte Smith*, 10 L. T., N. S. 803, has expressed an opinion *contra* as to the debts: but the Court of Exchequer, in *Whittaker v. Lowe*, East. T. 1865, 12 L. T., N. S. 500, followed *Turquand v. Moss*. All the creditors and debts in the schedule must be taken into consideration, whether such debts be disputed or not; *Ex parte Middleton*, 33 L. J. (Bank.) 36 (L. C.).

A conditional assent of a creditor is not sufficient; *Ex parte Rawlings*, 32 L. J. (Bank.) 27.

Quere, whether, where there are joint and separate creditors of the two debtors, who execute the deed of composition with both classes of creditors, there must be a majority in number of the requisite value of each class; *Walker v. Nevill*, 34 L. J. (Ex.) 73. The affidavit required by the 5th clause of sect. 192 need not distinguish the joint from the separate debts of the debtors; *S. C.*

Validity of deeds.] A deed, although registered, will not be available as against non-assenting creditors, unless it be such a deed as the act contemplates; and it must be a deed substantially for the equal benefit of all creditors, and containing no unreasonable covenants on the part of the creditors to be bound by it.

A trustee is not necessary to the validity of a deed under sect. 192; *Dewhurst v. Jones*, 3 H. & C. 60; 33 L. J. (Ex.) 294. Nor need it contain a schedule of creditors; *Stone v. Jellicoe*, 34 L. J. (Ex.) 11; 3 H. & C. 263.

A *cessio bonorum* is not necessary to the validity of the deed, under sect. 192; *Ex parte Morgan*, 32 L. J. (Bank.) 15; *Ex parte Rawlings*, *id.* 27; *Ex parte Cockburn*, 33 L. J. (Bank.) 17; *Clapham v. Atkinson*, 33 L. J. (Q. B.) 81; S. C. (in *Ex. Ch.* 34 L. J. (Q. B.) 49; 4 B. & S. 722, 730.

A deed is invalid unless it inures for the benefit of all creditors; *Walter v. Adcock*, 31 L. J. (Ex.) 380; 7 H. & N. 541; *Ex parte Morgun*, 32 L. J. (Bank.) 15; *Ex parte Rawlings*, *id.* 27; *Ex parte Godden*, *id.* 37; 1 De G. J. & S. 260. If the deed be made with the creditors executing of the second part, and the payment is to be to the said creditors of the second part, it is bad; *Ilderton v. Castrigue*, 32 L. J. (C. P.) 206; 14 C. B., N. S. 99; *Ilderton v. Jewell*, 33 L. J. (C. P.) 148; 16 C. B., N. S. 142 (*Ex. Ch.*). So if it contain a trust for such creditors only as shall execute it within a certain time; *Ex parte Morgan*, 32 L. J. (Bank.) 15; or exclude such creditors as shall not execute within a given time; *Dewhurst v. Kershaw*, 32 L. J. (Ex.) 146; 1 H. & C. 726. So if the payment of the composition is to be on executing or signing the deed; *Martin v. Gribble*, 34 L. J. (Ex.) 108; 3 H. & C. 631; *Dingwall v. Edwards*, 33 L. J. (Q. B.) 161; 4 B. & S. 738; and see *Spitzer v. Chaffers*, 33 L. J. (C. P.) 7; 14 C. B., N. S. 686. And if the deed be *inter partes*, as between the debtor of the first part and the creditors who execute of the second part, and there be a covenant with the said parties of the second part to pay all and every of the creditors of the debtor a composition on their respective debts, as the non-executing creditors are no parties, they cannot avail themselves of the covenant, and so are in a worse position than the executing creditors, and the deed is therefore void; *Benham v. Broadhurst*, 34 L. J. (Ex.) 61; 3 H. & C. 472 (*Ex. Ch.*). And the objection is the same if the deed be between the debtor and the creditors executing, assenting, or approving, though the covenant be with all the creditors who are or shall be bound by the deed; *The Chesterfield, &c. Colliery Co. v. Hawkins*, 34 L. J. (Ex.) 121; 3 H. & C. 677; *Gurran v. Kopera* L. J. 128; 3 H. & C. 694. In *Ex parte Cockburn Re Laxton*, 33 L. J. (Bank.) 17, (cited in the previous cases), the deed was between the debtor of the first part, the creditors whose names and seals were thereunto subscribed and set in the schedule annexed of the second part, and all other (if any) the creditors of the debtor of the third part, and the covenant was with the parties of the second and third parts to pay all the creditors a certain dividend; there was a schedule of all the creditors (some of whom had assented and some not) appended to the deed, but no reference to it in the deed, except with regard to those creditors who had executed; the L. C. held the deed invalid on the ground (*inter alia*) that the creditors who had not executed the deed could not sue on the covenant, as they were not parties to the deed of the third part, because there was no statement in the deed itself, nor any reference in it to the schedule, of the creditors who had not executed. See, however, *Dewhurst v. Jones*, 3 H. & C. 60; 33 L. J. (Ex.) 294.

But although the deed purport to be made between the debtor of the first part, and the creditors executing of the second part, and

contain covenants with them, yet if it appears that no creditor has actually executed, the objection of inequality taken in *ex parte Cockburn* and the other cases *supra*, is obviated; and after verdict, in the absence of all allegations to the contrary, the court will assume that no creditor did execute; *Scott v. Berry*, 34 *L. J. (Ex.)* 193. In that case the court doubted whether, if there had been a covenant directly with the executing creditors, and with them or a trustee on behalf of the other creditors, it would be such an inequality as would vitiate the deed.

If the deed, though made between the debtor and the undersigned creditors, contain no covenant to pay, but simply amount to an agreement on the part of the creditors to accept a composition in discharge of their debts, and to execute a release on payment of the composition, the deed is good, and not unequal, as in default the remedy is the same to all, viz., the recovery of their whole debt; *Clapham v. Atkinson*, 4 *B. & S.* 730; 34 *L. J. (Q. B.)* 49 (*Ex. Ch.*). The fact that there was no obligation under the deed on the debtor to pay the composition, is not a valid objection; *S. C.*; and the same point was ruled in *Garrod v. Simpson*, 34 *L. J. (Ex.)* 70; 3 *H. & C.* 395; and *Scott v. Berry*, *supra*; but see *Gurrian v. Kopera*, 34 *L. J. (Ex.)* 128; 3 *H. & C.* 694.

If by the deed the composition is to be paid down to those who execute the deed previously to the registration, and there be only a covenant to pay the other creditors, the deed is unequal; *Ex parte Cockburn*, 33 *L. J. (Bank.)* 17.

A covenant that every creditor would indemnify the debtor against any bills and promissory notes on which the debtor had incurred any liability, is unreasonable; *Woods v. Foote*, 32 *L. J. (Ex.)* 199; 1 *H. & C.* 841 (*Ex. Ch.*). So, a clause, "that all creditors to whom bills or other negotiable instruments might have been given by the debtor for debts due to such creditors, should indemnify the debtor and his estate against all claims or demands by other persons than themselves in respect of such bills or instruments, and all losses, damages, and costs by reason or in respect thereof; and should if any such bills had been indorsed or transferred to any other persons take the same up and retire the same before or when they should become due, and so as to prevent any claim or demand in respect thereof being made upon the debtor or his estate," is unreasonable; *Balden v. Pell*, 33 *L. J. (Q. B.)* 200; 5 *B. & S.* 213; *Inglebach v. Nichols*, 14 *C. B., N. S.* 85, accord.

In *Ex parte Spyer*, 32 *L. J. (Bank.)* 62; 1 *De G., J. & S.* 318, a clause that the trustee might pay creditors under 10*l.* in full, was rejected as inconsistent with the intention apparent, that the estate should be distributed as in bankruptcy; but, notwithstanding that case, in *Leigh v. Pendlebury*, 33 *L. J. (C. P.)* 172, 15 *C. B., N. S.* 815, such a clause was held fatal to the deed.

A clause that each creditor should verify his debt in such manner as the trustee shall think fit, or lose the benefit of the deed, was held unreasonable; *Leigh v. Pendlebury*, *supra*; and the effect is the same without the latter clause; *Coles v. Turner*, 34 *L. J. (C. P.)* 198. See *Strick v. De Mattos*, *post*, p. 737.

By a composition deed between a debtor of the first part, his surety of the second part, and the several persons, creditors, whose names and seals were set and affixed to the schedule, and all other the creditors of the debtor, of the third part,—reciting that the creditors, parties to the deed of the third part, approved of the debtor's pro-

posal to pay his creditors a composition of 7s. 6d. in the pound, by two instalments, secured by the surety, and that bills of exchange drawn by the surety upon and accepted by the debtor had been delivered to the creditors,—it was witnessed that the creditors, parties thereto of the third part, covenanted with the debtor that unless and until default should be made in meeting the said bills, the said creditors would not sue or molest the debtor; and further, that if any of them should break or contravene the said covenant, then the debtor and his estate and effects should be thenceforth absolutely released and discharged from all and singular the debts, claims, and demands of the creditor, and the deed should operate as a defeasance pleadable in bar, or might be otherwise set up as a defence to any action theretofore or thereafter brought by such creditor. It was held, the last covenant violated the deed; *Dell v. King*, 33 L. J. (Ex.) 47; 2 H. & C. 84; *Leigh v. Pendlebury*, 33 L. J. (Q. B.) 172; 15 C. B., N. S. 815; *Lyne v. Wyatt*, 18 C. B., N. S. 593; 34 L. J. (C. P.) 179. So, if the deed extend to relieve a joint debtor with the debtor executing the deed, it is unreasonable; *Andrew v. Macklin*, 34 L. J. (Q. B.) 89. Or if it amount to an absolute release, so as to discharge sureties; *Keyes v. Elkins*, post, p. 738. And see *Gurrian v. Koperu*, ante, p. 735.

A deed of arrangement made between a debtor of the first part, E. H. (one of his creditors) of the second part, L. J. (a trustee) of the third part, E. H. and the other creditors who sealed or assented to the deed of the fourth part, and the non-assenting creditors of the fifth part, contained covenants by the debtor and E. H. with L. J. to pay him, on registration of the deed, 7s. 6d. in the pound on all the debts, and before the expiration of twelve months from the date of the deed 2s. 6d. in the pound on all the debts but that of E. H.; a covenant by the debtor with E. H. to pay him, on the registration, and on or before the expiration of the twelve months, the dividends in respect of his debt; an undertaking by L. J. to stand possessed of the money so paid to him in trust after the registration of the deed and demand in writing by E. H. and the other creditors to pay the first dividend, and after the expiration of the said twelve months, and such a demand to pay the several creditors the second dividend; and E. H. and the parties of the fourth part released their debts (saving rights against sureties). It was held there was no such inequality in favour of E. H. as to avoid the deed; and that, by force of the statute the release was by the non-executing as well as by the executing creditors; *Wells v. Hacon*, 33 L. J. (Q. B.) 204; 5 B. & S. 196; *Hernulewicz v. Jay*, 34 L. J. (Q. B.) 201.

A deed of inspectorship with the following clauses was held reasonable:—(1) That the proceeds of the debtor's estate be first applied to the payment of all costs, &c., incurred, or to be incurred, in or relating to his suspension of payment, &c., the costs of the deed, and of carrying the same into effect. (2) That every creditor, before being entitled to a dividend, shall, if required by the inspectors, deliver a statement in writing of his claim, with all the particulars usual in a proof in bankruptcy. (3) That when any dividends shall be made before all the creditors have executed or assented to the deed, a sufficient sum shall be set apart for paying the dividends of such creditors, and also the dividends of creditors whose debts have not been ascertained; and that, if no such sum be set apart, then such creditors shall receive dividends out of the first monies applicable

thereto, not disturbing former dividends. (4) That the deed shall be binding on creditors executing, assenting to, or approving of it, though it cannot operate as a deed of inspectorship under the statute. (5) That the estate and effects of the debtor shall be administered on the principles of the Bankruptcy Laws, and the rights of the creditors dealt with and regulated on the same principles; and that anything in the deed to the contrary may be treated as expunged; *Strick v. De Mattos*, 33 L. J. (Ex.) 276; 3 H. & C. 22.

A deed containing a release, reserving remedies against sureties, or a covenant not to sue, is not unreasonable; *Keyes v. Elkins*, 34 L. J. (Q. B.) 25; 5 B. & S. 240; *semble*, it would be unreasonable if it had no saving clause; S. C. And it is to be observed, that, in *Wells v. Hacon*, *supra*, in which a deed containing a release was held a good defence in bar, there was also a saving clause; and in *Whitehead v. Porter*, *post*, p. 738, the deed was not set out, but only pleaded generally as a release. And see *Andrew v. Macklin*, *ante*, p. 736, and *Gurrian v. Kopera*, *ante*, p. 735.

A deed of composition and inspection entered into by two debtors and their creditors, and purporting to be made under sect. 192, showed that there were joint and separate creditors and joint and separate estates of the compounding debtors, and that both classes of creditors were to receive a uniform composition of 18s. in the pound; and it was held, that, although the deed placed the joint and separate creditors on the same footing, it was a valid deed under sects. 192 and 197; *Walker v. Nevill*, 34 L. J. (Ex.) 73; 3 H. & C. 403. *Quære*, whether the deed would have been valid if it had been a deed of assignment, and for a distribution of the debtor's estate; S. C.

A composition-deed contained a clause, (5,) That no creditor who should have executed or otherwise acceded thereto, should negotiate any bills of exchange, or other negotiable instruments on which the debtor was liable, without having first indorsed thereon a memorandum of the execution of or other accession to the deed by such creditor. (8,) That each of the creditors who should have executed or otherwise acceded to or be bound by the deed, should not, nor should their respective heirs, executors, or administrators, or partners, or assigns, except to enforce rights and remedies against other persons than the debtor, at any time commence or prosecute any action or suit, or other proceedings, or obtain any adjudication of bankruptcy against the debtor; and this deed may be pleaded to any action contrary to it, as if it were an actual release. (11,) That if there was anything in the deed not authorised by the Bankruptcy Act, 1861, it shall be obligatory on those only, who shall have acceded to or executed it. (13,) The trustees shall, upon the request and at the cost of the creditors, take proceedings to enforce the covenants, upon being indemnified against costs; held (in the Ex. Ch., reversing judgment of Ex.), that these clauses were none of them unreasonable, so as to vitiate the deed; as the 5th clause only bound those creditors who executed or assented to the deed, and not the other creditors; and that the position that a deed was unequal if it did not place all the creditors on an equal footing, did not extend to a clause by which the assenting creditors voluntarily put themselves in a worse position than the others. That the 8th clause amounted to a simple covenant not to sue (reserving rights against third parties), and was therefore good, and distinguishable from the clause rightly held bad, in *Dell v. King*, *ante*,

p. 736, which was a covenant not to sue, with a proviso that creditors infringing the covenant should forfeit all benefit under the deed; *Hidson v. Barclay*, 3 H. & C. 361.

Deed of composition, how available.] A deed of composition, &c., if it contain a clause that it may be pleaded in bar, or a release by the creditors, may be pleaded in bar to an action by a non-assenting creditor; *Strick v. De Mattos*, 33 L. J. (Ex.) 276; 3 H. & C. 22; *Whitehead v. Porter*, 5 B. & S. 193; *Wells v. Hacon*, ante, p. 736; *Keyes v. Elkins*, 34 L. J. (Q. B.) 25; 5 B. & S. 240; *Hidson v. Barclay*, supra. A deed containing a covenant not to sue for a limited time, with a clause that during the time it may be pleaded in bar, may be so pleaded; *Walker v. Nevill*, 34 L. J. (Ex.) 73; 3 H. & C. 403; but not without such a clause; *Ray v. Jones*, 34 L. J. (C. P.) 306. A deed containing an agreement on the part of the creditors to accept a composition, and on payment of it to execute a release, together with a tender to the plaintiff, and payment into court of the amount of composition, was pleaded as an equitable defence, and upheld, in *Clapham v. Atkinson*, 4 B. & S. 730; 34 L. J. (Q. B.) 49 (Ex. Ch.). So, in *Garrod v. Simpson*, 34 L. J. (Ex.) 70; 3 H. & C. 395, a deed by which the creditors agreed to accept a composition in discharge of their debts, together with a tender of the composition to the plaintiff, a non-assenting creditor, was held a good defence; see also *Scott v. Berry*, 34 L. J. (Ex.) 193.

When such a deed is pleaded in bar to an action, on a contract made with the plaintiff abroad, payment or tender of the composition is not excused by the plaintiff being still abroad when it became payable; *Pessard v. Mugnier*, 18 C. B., N. S. 286; 34 L. J. (C. P.) 126.

If the deed contain no clause of release, though it convey all the debtor's estate for the benefit of all his creditors, it cannot alone be pleaded in bar under sect. 192 to an action by a non-assenting creditor; *Ipstones Park Iron Ore Co. v. Pattinson*, 33 L. J. (Ex.) 193; 2 H. & C. 828. Nor can a deed under sect. 200 in the form schedule (D); *Eyre v. Archer*, 33 L. J. (C. P.) 296; 16 C. B., N. S. 638; *Clarke v. Williams*, 3 H. & C. 508; 34 L. J. (Ex.) 60; affirmed in *Ex. Ch.*, *id.* 189. Nor can such a deed be pleaded in bar to an action by an assenting creditor; *Jones v. Morris*, 34 L. J. (Q. B.) 90. A debtor can only avail himself of the deed as a protection against an execution under sect. 198; *S. CC.* Under sect. 198, the certificate of registration will not protect the debtor nor his property, unless the deed of composition be a valid one; and a certificate of an invalid deed may be treated as void, without taking proceedings to set it aside; *Dewhurst v. Kershaw*, 32 L. J. (Ex.) 146; 1 H. & C. 726; *Ilderton v. Jewell*, 14 C. B., N. S. 665; 32 L. J. (C. P.) 256; *S. C.* in *Ex. Ch.*, 33 L. J. (C. P.) 148; 16 C. B., N. S. 142. But a certificate showing on the face of it the registration of a valid deed, justifies the sheriff, as against a non-assenting creditor, in discharging the debtor, though the deed be in fact invalid; *per Crompton, Mellor, and Shee, JJ.*; *Cockburn, C. J.*, dissenting; *Lloyd v. Harrison*, 34 L. J. (Q. B.) 97.

If the deed be valid, and duly registered, execution issued by a non-assenting creditor after notice, will be set aside by the court out of which it issued; *Stone v. Jellicoe*, 34 L. J. (Ex.) 11; 3 H. & C. 263. And a debtor who has executed a valid deed before his

arrest on a *ca. sa.*, will be discharged on the deed being duly registered; *Baersalman v. Langlands*, 34 *L. J. (Ex.)* 3; 3 *H. & C.* 433. The Court of Bankruptcy also has jurisdiction to discharge the debtor; *In re Castleton*, 31 *L. J. (Bank.)* 71; *Ex parte Godden*, 32 *L. J. (Bank.)* 37; 1 *De G. J. & S.* 260 (*semble*). A deed by which one of several partners assigned all his estate to trustees for the benefit of creditors, no reference being made to the partnership, or its assets, or liabilities, protects the debtor from arrest by a creditor of the partnership; *In re Castleton, supra*.

The leave of the court, sect. 198, means the leave of the Court of Bankruptcy; *Welch v. Buck*, 31 *L. J. (Q. B.)* 263.

In *Whitmore v. Wakerley*, 34 *L. J. (Ex.)* 83, 3 *H. & C.* 538, the Court of Exchequer appears to have refused to interfere with a levy under a *fi. fu.* issued against the property of a debtor without leave of the court after the registration of a valid deed, on the ground that he had an opportunity of pleading the deed in bar, and did not; but, in *Hartley v. Mare*, 34 *L. J. (C. P.)* 187, 19 *C. B., N. S.* 85, under similar circumstances, the Court of Common Pleas held that a creditor could not make his execution available by levy.

Rights of trustees under a deed of assignment, &c.] If the deed be under sect. 200, in form Sch. D, though the requisite majority of creditors have not assented, it may be a valid deed, and passes the property to trustees; *Symonds v. George*, 3 *H. & C.* 68; 33 *L. J. (Ex.)* 231; *S. C.* in *Ex. Ch.*, 34 *L. J. (Ex.)* 187.

A creditor had filed a petition for adjudication, and it was then agreed that the debtor should execute a deed of assignment of all his property for the benefit of all his creditors, and the deed was accordingly executed; and it was held that, under these particular circumstances, the trustees under the deed, by virtue of sect. 197, had the same rights as if there had been an adjudication of bankruptcy, and they were the assignees; and, therefore, that their title related back to the execution of a fraudulent transfer of the debtor's goods; *Topping v. Keysell*, 33 *L. J. (C. P.)* 225; 16 *C. B., N. S.* 258.

ACTIONS BY AND AGAINST CARRIERS.

See *ante*, pp. 358-377.

ACTIONS BY AND AGAINST COMPANIES, &c.

Under this head will be found the decisions and statutable provisions so far as may be useful for the purposes of this work, relating to—1, Corporations in general; 2, Companies registered under the Companies Act, 1862; 3, Companies registered under the Joint Stock Companies Act, 1844, 7 & 8 Vict. c. 110; 4, Companies incorporated by statute within the Companies Clauses Consolidation Act; 4, Banking companies registered under 7 Geo. 4, c. 46, and other companies entitled to sue and be sued in the name of their public officer, &c.

Companies so incorporated, or *quasi* incorporated, are usually called Public Companies; but whether the term "public" may not extend to unincorporated companies, of which the shares are transferable generally to any one at will, is open to question; see *Macintyre v. Connell*, 1 Sim. N. S. 225; *Nicholls v. Roseworne*, 6 C. B., N. S. 480. The company mentioned in the last case was a "Cost Book Company," of the kind called in *Sibley v. Minton*, 27 L. J. (Ch.) 53, a "monster partnership," the nature of which and the powers and liabilities of its members have been discussed in *Dickinson v. Dalpy*, 10 B. & C. 128; *Tredwen v. Bourne*, 6 M. & W. 461; *Hawtayne v. Bourne*, 7 M. & W. 595; *Hawken v. Bourne*, 8 M. & W. 703; *Ricketts v. Bennett*, 4 C. B. 686; *Watson v. Spratley*, 10 Ex. 222; *Clarke v. Hart*, 27 L. J. (Ch.) 615; 6 H. L. C. 633; *Hybart v. Parker*, 4 C. B., N. S. 209; and in other cases cited in *Collier on Mines*, ch. 3, sects. 5 & 6. Whether a mine is constituted on the Cost-book principle, and what is the meaning of the term, is a question of fact on evidence, and will not be judicially noticed by the court; *Re Bodmin United Mines Co.*, 23 Beav. 370; 26 L. J. (Ch.) 570.

Actions by or against the members of *projected* or *inchoate* companies, or of unincorporated companies, being mere voluntary associations not legally invested with any collective or corporate character, have been noticed, *ante*, pp. 313-315.

For actions for goods sold and delivered to, and work and labour done for, incorporated companies, see those titles, *ante*, pp. 306, 326.

For actions by subscribers or allottees to recover back deposits or money advanced on projects which have failed, or are impeached for fraud, see *Action for Money had and received*, *ante*, pp. 341-2, 346.

Actions against allottees of shares for non-payment of deposits are not distinguishable from ordinary cases of contract, see *Woolmer v. Toby*, 10 Q. B. 691.

Actions against railway companies as carriers, will be found under the head of *Actions against Carriers*, *ante*, pp. 358, *et seqq.* The evidence in actions against corporations for negligence or other torts will be found *post*, pp. 741-3, and under the proper heads, *ante*, pp. 460, *et seqq.*

1.—Corporations in General.

Common law corporations aggregate cannot sue or defend otherwise than by attorney; *Co. Litt.* 66 b.; who must be appointed under their common seal; *Arnold v. Mayor of Poole*, *infra*. But a corporation is bound by the act of their attorney, so far as the opposite party is concerned, although there is no such appointment under seal; *Faviell v. Eastern Counties Ry. Co.*, 2 Ex. 344.

A corporation must sue and be sued in the corporate name. It need not be alleged in declaring against a corporation that it is incorporated, using the name it is known by is sufficient; *Woolf v. City Steam-Boat Co.*, 7 C. B. 103.

Contracts by corporations.] That a corporate body may in some cases sue or be sued as on simple contract, see *Arnold v. Mayor of Poole*, 4 M. & G. 860; and *Tobacco-Pipe Makers' Co. v. Loder*, 16 Q. B. 765, and the case cited there; see the cases cited *ante*, pp. 306, 326; but as a general rule, corporations can only contract under their common

seal. To this general rule there are exceptions which may be classed under one of two heads:—First, when the acts done are such as the corporation, by its very constitution, is appointed to do, as in the case of trading corporations, whose duty, by their very appointment, being to draw bills of exchange, they may do it without affixing the common seal.—Secondly, when the acts are required for convenience, management, and comfort; as when the acts are either trivial in their nature, and of frequent occurrence, so that the doing of them in the usual way, under seal, would be inconvenient or absurd; or are such that an overruling necessity requires them to be done at once; in such cases also the corporation may proceed by parol instead of affixing the seal according to the formal and regular course; *Diggle v. The London and Blackwall Ry. Co.*, 5 Ex. 450, per Alderson, B.

In some cases corporations are liable where a contract, which ought to have been under seal but is not, has been executed, and the benefit enjoyed by the corporation; *Sanders v. St. Neol's Union*, 8 Q. B. 810; *Lowe v. The London and N. W. Ry. Co.*, 18 Q. B., 632, and cases cited *ante*, pp. 306, 326.

Where a company incorporated by charter for the purpose of trading as shipowners and doing all such matters as might be incidental to such undertaking, made a contract with A. to go out to Sydney and bring home a disabled ship belonging to the company: Held, that A. might maintain an action against the company for breach of the contract, though not under seal; *Henderson v. Australian Steam Navigation Co.*, 5 E. & B. 409; 24 L. J. (Q. B.) 322; and see *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341; 26 L. J. (Q. B.) 46. A company incorporated by charter for the like purposes as in the last case, contracted with the defendant by parol, for the supply to the company of a quantity of ale. The ale was delivered and paid for by the company, but turned out to be unfit for use: Held, that the defendant was liable, although the contract was not under the seal of the company; *Australian Steam Navigation Co. v. Marzetti*, 11 Ex. 228; 24 L. J. (Ex.) 273. The subject of parol contracts by incorporated companies was much considered in the cases of *London Dock Co. v. Sinnott*, 27 L. J. (Q. B.) 129; 8 E. & B. 347; and *Ernest v. Nicholls*, 6 H. L. C. 401, 418. In the first it was held, that the plaintiffs (a dock company incorporated by statute) could not sue on the defendant's refusal to execute a parol contract for scavenging the docks not accepted by the plaintiffs under seal. In the last case there are some observations of Lord Wensleydale on the distinction between companies incorporated by statute for trading, and common law incorporations by charter.

If the seal of a corporation is attached to an instrument, it will be presumed, as against them, to have been regularly attached, and it lies on them to give strict proof to the contrary, so as to exclude such presumption; *Clarke v. Imperial Gas Co.*, 4 B. & Ad. 315. The irregularity, if a defence, may be shown under *non est factum*: *Hill v. Manchester Water Works Co.*, 5 B. & Ad. 866; *Royal British Bank v. Turquand*, 5 E. & B. 256.

Torts by corporations.] Trover is sustainable against a corporation as such; see cases, *ante*, p. 597; so is an action for a false return; *Argent v. Dean of St. Paul's*, cited, 16 East, 7; or for a distress, *Smith v. Birmingham and Staffordshire Gas Co.*, 1 Ad. & E. 526; and for a trespass, *Maund v. Monmouth Canal Co.*, 4 M. & G. 452; and for negligence, *Cowley v. Mayor of Sunderland*, 6 H. & N. 565;

30 *L. J. (Ex.)* 127. So an action will lie against a corporation for negligently keeping a mischievous animal, if knowledge of its mischievous propensities be brought home to some one in the company's employ having authority in the matter: *Stiles v. Cardiff Steam Co.*, 33 *L. J. (Q. B.)* 310. An action for libel lies against a Railway, or Electric Telegraph Company, for sending it by telegraph; *Whitfield v. South Eastern Ry. Co.*, *E. B. & E.* 115; 27 *L. J. (Q. B.)* 229. A corporation may be liable for intentional acts of misfeasance by its servants, provided the acts are connected with the scope and object of its incorporation; as, where the defendants were a company established for conveying passengers in omnibuses, for wilfully molesting the plaintiff's carriages on the highway, by driving the defendants' carriages so as to obstruct the plaintiff in the use of his; *Green v. London Omnibus Co.*, 29 *L. J. (C. P.)* 13; 7 *C. B., N. S.* 290. But it has been questioned whether an action will lie for a malicious prosecution against a corporation; *Stevens v. The Midland Counties Ry. Co.*, 10 *Ex.* 352. Trespass lies against a corporation aggregate for an assault or false imprisonment committed by their servant authorised by them to do the act, although such authority was not given by an instrument under seal; *Goff v. Great Northern Ry. Co.*, *infra*: and see the above and following cases. An assault committed on behalf of, and for the benefit of a corporation is capable of being ratified by them, and, if ratified, renders them liable in trespass for the act; *Eastern Counties Ry. Co. v. Broom*, 6 *Ex.* 314; 20 *L. J. (Ex.)* 196; (*Ex. Ch.*); as where the servant of a railway company took the plaintiff, a passenger upon the company's line, into custody, for an alleged breach of one of the company's by-laws, and carried him before a magistrate; but the only evidence of ratification being that the attorney of the company attended before the magistrate to conduct the charge: Held, that this was not evidence that the company ratified the act of their servant; *S. C.*; see also *Roe v. Birkenhead, &c. Ry. Co.*, 7 *Ex.* 36; 21 *L. J. (Ex.)* 9. In trover for quicks against a railway company, it appeared that plaintiff was owner of quicks which had been carried on defendants' railway, and which F., the general superintendent of the company, had given him leave to plant on a piece of ground at one of their stations. Plaintiff demanded the quicks from F., who refused to allow him to remove them. Plaintiff then applied to the managing director, who also refused: Held, that it was the duty of a railway company to have on the spot some person with authority to act on their behalf in all cases, as the exigency of the traffic might require; that there was sufficient evidence that F. had authority to bind the company in all matters within the course of their ordinary business; and that, the quicks having been left with defendants in the course of their business as carriers, there was evidence of a conversion by them; *Giles v. Tuff Vale Ry. Co.*, 2 *E. & B.* 822; 23 *L. J. (Q. B.)* 43 (*Ex. Ch.*). Parke, B., doubted whether F.'s refusal to deliver them up when so planted was an act within the scope of his authority as connected with the ordinary business of the company, so as to make defendants liable; but, by Maule, J., the plants being in the custody of defendants as carriers, plaintiff was entitled to have them upon demanding them from F., even if F. allowed them to be planted without the authority of defendants; and also it was within the scope of F.'s authority to allow plaintiff to store them in defendants' ground, till wanted; see also *Glover v. London and N. W. Ry. Co.*, 5 *Ex.* 66; 19 *L. J. (Ex.)* 172. In *Goff v. Great Northern Ry. Co.*, 30 *L. J.*

(*Q. B.*) 148, the same principle was applied to the case of a railway company, the servants of which by 8 Vict. c. 20, ss. 103, 104, were authorised on behalf of the company to apprehend any person travelling without having paid his fare with intent to avoid payment; and it was held that it might be presumed that the company would have on the spot some one with authority to determine whether the servants of the company should apprehend a passenger accused of the offence; and that the fact of all the subordinate servants referring to the superintendent for directions was sufficient evidence that he was an officer with authority from the company to act in the matter; and that the defendants were therefore liable for false imprisonment directed by him.

As to frauds by corporations, see *Glasgow National Exchange Co. v. Drew*, 2 Macq. 103.

Companies registered under "The Companies Act, 1862."

The 25 & 26 Vict. c. 89, called "The Companies Act, 1862," repeals (s. 205, and sch. 3) all former acts as to joint stock companies,—saving acts done and liabilities incurred under those acts, and the incorporation of companies registered under them, and Table B. annexed to the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47) so far as it applies to any company existing at the commencement of this act;—see also ss. 194-5.

Sect. 3. For the purposes of the act a company carrying on the business of insurance in common with any other business is to be deemed an insurance company.

Sect. 4. No partnership of more than ten persons shall be formed after the commencement of the act (2nd November, 1862) for the purpose of banking, unless registered under this act, or formed under an act of parliament or letters patent (but by sch. 3, it shall be lawful for any number of persons not exceeding ten to carry on the business of bankers in the same way as a company of not more than six persons before the act); and no company or partnership consisting of more than twenty persons shall be formed, unless registered under this act, without an act of parliament or letters patent, unless it be a mining company, or within the jurisdiction of the Stannaries.

Sect. 6. Any association of seven or more persons by subscribing their names to a memorandum of association may form an incorporated company with or without limited liability. By registration of the memorandum the company becomes a body corporate; sect. 18.

By sects. 175-177, the act (except Sch. 1, Table A.) is to apply to companies formed and registered, or registered only, under the Joint Stock Companies Acts, 19 & 20 Vict. c. 47; 20 & 21 Vict. c. 14; and the Joint Stock Banking Companies Act, 20 & 21 Vict. c. 49; and the 21 & 22 Vict. c. 91; except that "the date of registration" is to refer to the registration under the former acts.

Contracts, how made.] The 19 & 20 Vict. c. 47, contained (sect. 41) similar provisions to sect. 97 of the Companies Clauses Act, 8 Vict. c. 16; *post*, p. 755. There is no corresponding section in present act.

By sects. 8 and 9, of 25 & 26 Vict. c. 89, a limited company is to have the word "limited" as the last word in its name. By sect. 42

(corresponding to sect. 31 of the former act), any director or officer of such a company is subject to a penalty for issuing invoices, &c., or accepting, &c., a bill of exchange, &c., without the name mentioned as above, and is made personally liable on such negotiable instruments, unless paid by the company; see *Penrose v. Martyr*, *E. B. & E.* 498; 28 *L. J. (Q. B.)* 28.

By sect. 47, "a promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company; "or if made, accepted, or endorsed by, or on behalf, or on account of the company, by any person acting under the authority of the company."

Sect. 55 enables any company to execute deeds by power of attorney out of the United Kingdom.

What certificates and documents are evidence.] By s. 18, "the certificate of incorporation given by the Registrar shall be conclusive evidence that all the requisitions of this act, in respect of registration, have been complied with."

By s. 67, "the company shall cause minutes of all resolutions and proceedings of general meetings of the company, and of directors or managers, if any, to be duly entered in books, to be from time to time provided for the purpose; and any such minute, if signed by any person purporting to be the chairman of the meeting at which the resolutions were passed, or by the chairman of the next meeting, shall be received in evidence in all legal proceedings; and until the contrary is proved, every general meeting in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened; and all resolutions to have been duly passed; and all appointments of directors, managers, or liquidators deemed to be valid, and their acts valid, notwithstanding any defects afterwards discovered in their appointments or qualifications."

By sect. 56 and subsequent sections, inspectors may be appointed by the Board of Trade or the company to examine into the affairs of the company; and by s. 61, "a copy of the report of any inspectors appointed under this act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding, as evidence of the opinion of the inspectors as to any matter contained in the report."

By s. 154, "where a company is being wound up, all books, accounts, and documents of the company and of the liquidators, shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded."

Sect. 175, and subsequent sections, provide for the registration of existing companies, *ante*, p. 743; and by s. 192, "the certificate of incorporation given to any existing company in pursuance of this act, shall be conclusive evidence that all the requisitions in respect of registration under this act have been complied with, and the date of incorporation mentioned in it shall be deemed to be the date at which the company is incorporated under this act."

Register of shareholders.] By s. 23, subscribers of the memorandum of association are to be deemed to have become members, and upon the registration of the company are to be entered as members

on the register ; and every other person agreeing to become a member, and whose name is entered on the register, is to be deemed a member. By s. 24, a transfer of a deceased member may be made by his personal representative. By s. 25, the company are to keep a register of members, in which the following particulars are to be entered :— The names, addresses, and occupations (if any) of the members of the company, and, where the capital is divided into shares, the shares held by each of them, distinguishing each share by its number ; the amount paid, or agreed as paid, on the shares of each member ; the date at which the name of any person was entered in the register as a member ; the date at which any person ceased to be a member.

By sect. 26, in the case of a company having capital divided into shares, once in every year a list is to be made of all persons who, on the 14th day succeeding the day on which the ordinary general meeting of the company, or, if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company ; and such list is to state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and is to contain a summary specifying the following particulars : The amount of the capital of the company, and the number of shares into which it is divided ; the number of shares taken from the commencement of the company up to the date of the summary ; the amount of calls made on each share ; the total amount of calls that have been received ; the total amount of calls unpaid ; the total amount of shares forfeited ; the names, &c., of all the persons who have ceased to be members since the last list was made, and the number of shares held by each. The list is to be completed within seven days after such fourteenth day ; and a copy thereof is to be forthwith forwarded to the Registrar. And by sect. 37, the register of members shall be *primâ facie* evidence of any matters by this act directed or authorised to be inserted therein.

Evidence of title to shares.] By s. 30, "no notice of any trust, express, implied, or constructive, shall be entered on the register or receivable by the Registrar.

By s. 14, articles of association must in general accompany the registration ; and by s. 15, in the case of a company limited by shares, if the articles of association do not modify or exclude Sch. 1, Table A, the regulations contained in it are to be taken as regulations of the company ; and by this, clauses (8) (9), the instrument of transfer of shares is to be executed both by transferor and transferee, and is to be in the form prescribed ; and the transferor is to be deemed to remain the holder until the name of the transferee is entered on the register.

By s. 31, a certificate under the common seal of the company specifying any share or shares, or stock held by any member, shall be *primâ facie* evidence of the title of the member.

Under the 19 & 20 Vict. c. 47, in a case where the person sued as shareholder had applied in writing for shares, consented to accept them, received an allotment, paid the deposit on them, and applied for certificates, but had neither subscribed the memorandum of association, nor testified his acceptance by writing under his hand in the form directed by the company (as required by Sch. Table B (1)), he was held not liable to be sued for a call, though his name was inserted on the register of shareholders ; *New Brunswick, &c Ry. Co., v. Muggeridge*, 4 H. & N. 160 ; *S. C. in Ex. Ch.* 580 ;

28 *L. J. (Ex.)* 193, 365. The strong negative words in clause (1) of the schedule of the act distinguish it from previous Joint-Stock Companies Acts, under which a person may become a shareholder by estoppel, or other sufficient indication of acceptance. But if no form of acceptance be directed by the company, the application in the form prescribed, and containing the words "and I hereby agree to accept the same," signed by the defendant, is sufficient; *Bog Lead Mining Co. v. Montague*, 30 *L. J. (C. P.)* 380; 10 *C. B., N. S.* 481. This schedule may still apply to companies formed under the 19 & 20 Vict. c. 47 (see s. 205, *ante*, p. 743); but there is no clause in Sch. 1, Table A. to the present act corresponding to Table B. (1) of the 19 & 20 Vict. c. 47.

Calls.] The power to make calls and the conditions for enforcing them depend on the articles of association (if any), see ss. 14, 15; but if there are none, or they do not exclude the regulations of Sch. 1, Table A., by clauses (4) (5), the directors may from time to time make such calls as they think fit upon members in respect of all money unpaid on their shares, provided twenty-one days' notice, at least, is given of each call; and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors; and a call is to be deemed to have been made at the time when the resolution of the directors authorising it was passed. By s. 16, all monies payable by a member to the company in pursuance of the regulations of the company are to be deemed a specialty debt.

By s. 70, in an action by the company against a member for a call or other monies due from him as a member, the special matter need not be set forth, but it is sufficient to "allege that the defendant is a member of the company, and is indebted to the company in respect of a call made and other monies due, whereby an action has accrued to the company."

The appointment, &c., of directors *de facto* who have made the calls, cannot afterwards be questioned; see s. 67, *ante*, p. 744. But where the call was not made by a proper quorum of subscribers to the articles of association, this was held a defence; *Howbeach Coal Co. v. Teague*, 5 *H. & N.* 151; 29 *L. J. (Ex.)* 137 (where there were special pleas); and it was considered doubtful whether calls can be legally made so as to bind subscribers as long as only a small portion of the shares are taken up; *S. C.* But the contrary was decided in the *Ornamental Woodwork Co. v. Brown*, 32 *L. J. (Ex.)* 190; 2 *H. & C.* 63.

By a deed of settlement of a company the capital was to consist of 100*l.* shares. The company subsequently created 50*l.* shares, and the defendant afterwards purchased some of their shares, executed the deed, and received dividends. The company was afterwards registered under the 19 & 20 Vict. c. 47, and the defendant was sued for calls: held, that he was estopped from disputing the legality of the 50*l.* shares, and the company could sue for calls made before incorporation; *Hull Flax Company v. Wellesley*, 30 *L. J. (Ex.)* 5; 6 *H. & N.* 38.

Clause (10), Sch. 1, in Table A., makes it lawful for the directors to refuse to register the transfer of shares made by a member who is indebted to them. A member is not so indebted after a call has been made, but before it is payable; *Reg. v. Inns of Court Hotel Co.*, 32 *L. J. (Q. B.)* 369.

Service of notices.] By s. 62, any summons, notice, order, or other document required to be served *upon* the company, may be served by leaving the same, or sending it through the post in a pre-paid letter addressed to the company, at their registered office.

By sect. 63, "any document to be served by post upon the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service it shall be sufficient to prove that such document was properly directed, and that it was put as a pre-paid letter into the post-office."

By sect. 61, "any summons, notice, order, or proceeding requiring authentication by the company may be signed by any director, secretary, or other authorised officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print."

By Sch. 1, Table A. (95) (97), a notice may be served *by* a company upon any member, either personally or by sending it through the post in a pre-paid letter, addressed to such member at his registered place of abode; and if served by post it is to be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of post; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post-office.

A third mode of service, by *leaving* the notice at the registered abode of the shareholder, is allowed by the 19 & 20 Vict. c. 47, Sch. Table B. (85); and Table A. of the present act does not apply (see s. 176) to companies formed and registered under the repealed Joint-Stock Companies Acts; and as to those registered under the 19 & 20 Vict. c. 47, Table B. of that act is still in operation (see s. 205, *ante*, p. 743).

Official liquidators.] Official liquidators, appointed under the act, have power, with the sanction of the Court (s. 95), amongst other things, to bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company.

3. *Companies registered under the Joint-Stock Companies Act, 1844* (7 & 8 Vict. c. 110).

This act is repealed (*ante*, p. 743), but not as to the incorporation of companies registered, and liabilities incurred under it, and the following cases, &c., may still be useful.

Companies, when completely registered under 7 & 8 Vict. c. 110, become only *quasi* incorporated for the purposes specified in the act. The deed of settlement must contain certain provisions in order to entitle the company to registration; but when a certificate of complete registration has been given by the registrar, the certificate is evidence that the needful provisions are inserted in the settlement, and the conditions fulfilled which entitle the company to such certificate; sect. 7. In the absence of evidence to the contrary, the above certificate, and copies of the return made half-yearly to the registrars of all transfers of shares and changes in the shareholders, are admissible in evidence without proof of signature or seal of office; sect. 15; and certified copies of extracts of all returns and deeds registered shall be received without proof of signature or seal; sect. 18. The certificate of the registration of a joint-stock company

under the hand of the assistant registrar, is admissible in evidence, without any allegation in the certificate, or proof, *aliunde*, of the absence of the registrar, although, by s. 19 of 7 & 8 Vict. c. 110, the assistant registrar is only empowered to act in the absence of his principal; *Baker v. Cuve*, 26 L. J. (Ex.) 190; 1 H. & N. 674.

Actions for calls.] The 7 & 8 Vict. c. 110, s. 55, provides for the recovery of calls. The company may sue for the instalment due in an action of debt; and in the declaration it is enough to state that, at the commencement of the suit, the defendant, as holder of — shares in the company, was indebted to the company in the sum of — for instalments of capital due in respect of the shares, and that defendant has not paid it; and if on the trial it shall be proved that the defendant was holder of any share when the instalment became due, the company shall recover it, with interest at 5 per cent. from the day it became due.

On the trial the plaintiff must prove that the defendant is a shareholder. This may be by a certified copy of the registered list of subscribers; *Turner v. Metropolitan Live Stock Co.*, 2 Ex. 567; 17 L. J. (Ex.) 264; or of the returns of transfers made under sect. 18, cited *supra*; or by proof that he has received dividends or otherwise acted as, or claimed to be, a shareholder, in which case the books of the company, duly kept, will be evidence against him of the number of shares; *Maguire's case*, 18 L. J. (Ch.) 256; 3 De G. & S. 31.

In an action for calls by a company formed under this act, pleas, *nunquam indbitatus*, and that the company was not completely registered; issues thereon; it is not indispensable that the plaintiffs should produce their certificate of registration, but the registration may be proved, *aliunde*; the certificate itself not being in issue; *Agricultural Cattle Insurance Co. v. Fitzgerald*, 16 Q. B. 432; 20 L. J. (Q. B.) 244. If, in such an action, the company's deed of settlement be produced in evidence to prove the defendant to be a shareholder, and therefore liable under sect. 55 of the act, the deed is available for this purpose, though it may appear that, since execution by the defendant, the name of a shareholder, subscribed before that of the defendant, has been erased, and the erasure not accounted for; S. C. It is no defence, either under the general or a special plea, that the company's settlement deed did not comply with the conditions imposed by the act; the registrar's certificate is, for the purposes of such action, conclusive; *Banwen Iron Co. v. Barnett*, C. B. 406; 19 L. J. (C. P.) 17; *Re the Independent Assurance Co.*, 20 L. J. (Ch.) 30; 1 Sim. N. S. 47; *per Rolfe*, V. C.

Contracts.] A joint-stock company completely registered under this act is liable to be sued upon contracts made with the company during the period of provisional registration, provided such contracts be within the powers conferred by the act, s. 23; *Taylor v. Crowland Gas Co.*, 10 Ex. 288, n. See also *Job v. Lamb*, 11 Ex. 539; 25 L. J. (Ex.) 87. But such a company is not liable upon contracts entered into by the promoters before provisional registration; *Hutchinson v. Surrey Gaslight Co.*, 11 C. B. 689; 21 L. J. (C. P.) 1.

As to general contracts, under sect. 44, although the statute or a deed of settlement may restrict the powers of the directors, it is not necessary for a plaintiff, who sues the company, to show that the contract was conformable to the deed, or that the requirements in the statute were observed. The proof of irregularity lies on the

defendants; *Smith v. Hull Glass Co.*, 8 C. B. 668; 19 L. J. (C. P.) 123. See, *contra*, *Smith v. Hull Glass Co.*, 11 C. B. 897; *Ridley v. Plymouth Grinding Co.*, 2 Ex. 711; 17 L. J. (Ex.) 252; but in that case the contract was foreign to the business of the company.

By sect. 45, bills of exchange and promissory notes (where authorised by the settlement, or a by-law), shall be made or accepted by two directors *expressly on behalf of the company*, and countersigned by the secretary or other appointed officer; and indorsement may be in the name of the company by an authorised officer. On such a bill or note the company may sue or be sued as effectively as in case of a contract under their seal. Under this section, if a bill of exchange drawn upon a joint-stock company be accepted by two of the directors, the acceptance is void as against the company, if not "expressed to be accepted" by them "on behalf of such company," though the clause does not contain any words of nullification; *Halford v. Cameron's, &c. Ry. Co.*, 16 Q. B. 442; 20 L. J. (Q. B.) 160. But where a bill, drawn upon the company by their corporate name, and sealed with their seal having the name of the company circumscribed, was accepted by two persons styling themselves directors of the company appointed to accept the bill, and the acceptance was countersigned by the company's secretary: Held, that such acceptance was sufficiently express; *S. C.*; *Edwards v. Cameron's, &c. Ry. Co.*, 6 Ex. 269. The want of the countersignature required by sect. 45 will be no defence on the bill, the act being directory only, *semble*; *Aggs v. Nicholson*, 1 H. & N. 165.

By sect. 46, all deeds bearing the seal of the company shall be signed by two directors at least. Where the seal is apparently regular, the instrument good on the face of it, no excess of authority on the part of the directors will be presumed; and *semble*, if the excess be unknown to the obligee at the time, and if there be no fraud or irregularity, such excess of authority (at least in a matter within the general scope of the company's business) will be no defence; *Royal British Bank v. Turquand*, 5 E. & B. 248; 24 L. J. (Q. B.) 327; *S. C.* in *Ex. Ch.*, 6 E. & B. 327; 25 L. J. (Q. B.) 317; see *Agar v. Athenæum Insurance Co.*, 3 C. B., N. S. 725; 27 L. J. (C. P.) 95.

Whether and for what purposes a party contracting with a company is to be considered as affected with notice of the contents of the registered deed of settlement, was discussed in *Royal British Bank v. Turquand*, *supra*, and the cases there cited, and in *Greenwoods' case*, 23 L. J. (Ch.) 966, 973; 3 De G. M. & G. 459, 479. In *Balfour v. Ernest*, 5 C. B., N. S. 601; 28 L. J. (C. P.) 170, it was treated as settled law that a person contracting with a registered company must be assumed to know and, *semble*, is bound to learn what powers are conferred on directors by the deed of settlement. But it is observable that the bill of exchange there sued on was, plainly and to the knowledge of the plaintiff, not one issued for the ordinary purposes of the company as such.

As to admissions by joint-stock companies, see *ante*, pp. 63, 64.

4. Companies incorporated by Special Acts within the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16.

To what companies the act applies.] The 8 & 9 Vict. c. 16, s. 1, enacts, "That this act shall apply to every joint-stock company which shall, by any act which shall hereafter [8th May, 1845] be

passed, be incorporated for the purpose of carrying on any undertaking; and this act shall be incorporated with such act; and all the clauses and provisions of this act, save so far as they shall be expressly varied or excepted by any such [special] act, shall apply to the company which shall be incorporated by such act, and to the undertaking for carrying on which such company shall be incorporated, so far as the same shall be applicable thereto respectively; and such clauses and provisions, as well as the clauses and provisions of every other act which shall be incorporated with such act, shall, save as aforesaid, form part of this act, and be construed together therewith as forming one act." Sect. 2, the interpretation clause, amongst other things, enacts, That the word *month* shall mean calendar month: The expression *the directors*, shall mean the directors of the company, and shall include all persons having the direction of the undertaking, whether under the name of directors, managers, committee of management, or under any other name: The word *shareholder* shall mean shareholder, proprietor, or member of the company; and, in referring to any such shareholder, expressions properly applicable to a person shall be held to apply to a corporation; and the expression *the secretary* shall include the word clerk.

The reported cases on this act are principally upon railway acts.

The 26 & 27 Vict. c. 118, "Companies Clauses Act, 1863," contains certain general clauses hitherto usually inserted in the special act, as to cancellation and surrender of shares, the creation of additional capital, debenture stock, and the change of name.

Notice of action.] Some railway and other similar companies by statute are entitled to notice of action under the act by which they are incorporated, for things done in pursuance of their act. The absence of notice must be pleaded specially, and statutable power to show it under a general plea is not now usually given to such companies. The plea must show that the action falls within the class described in the statute; *Garton v. Great Western Ry. Co., E. B. & E. 846*; 28 *L. J. (Q. B.) 321 (Ex. Ch.)*. Where "*any person*" acting in pursuance of the act was entitled to notice of action, it was held that the company were included in the word *person*; *Boyd v. Croydon Ry. Co., 4 N. C. 669*. By a railway act no action was to be brought for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by this act, unless twenty days' previous notice in writing should be given; the company, contrary to the provisions of the act, made excessive charges for the carriage of goods, and claimed and received the amount of such charges from the plaintiff: Held, that in an action for money had and received, brought to recover back the sums so extorted, the company were entitled to a notice of action; *Kent v. Great Western Ry. Co., 3 C. B. 714*; 16 *L. J. (C. P.) 72*. But in the case of a like provision, where an action was brought against a railway company in their capacity of carriers for an injury to the plaintiff whilst he was a passenger on the railway, it was held, that no notice of action was necessary, although, for the purpose of showing that the accident occurred from a speed which was improper under the circumstances, evidence was given of the defective state of the rails, which it was contended was an omission in some of the works authorised by the act; *Carpus v. London and Brighton Ry. Co., 5 Q. B. 747*. And the same had been held, where the company's act had similar enactments, in an

action against a railway company for not safely carrying some horses on the railway; *Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 749.

Where the notice is to be served under sect. 138 of 8 & 9 Vict. c. 20, which authorises a notice to be "left at," or sent by post directed to, "the principal office, or one of the principal offices of the company," a subordinate office, however great the traffic at the station attached to it, is not a principal office, when there is another at which the central government of the railway is carried on, and where the secretary and principal officers are usually to be found; *Garton v. Great Western Ry. Co.*, 27 L. J. (Q. B.) 375; *E. B. & E.* 837. The same section authorised service personally on the secretary of a company, or, if there be none, then on any one director.

Shareholders liable to calls.] By the 8 & 9 Vict. c. 16, ss. 21, 22, the directors have power to make calls upon the shareholders in respect of the capital for which they have subscribed; and twenty-one days' notice, at the least, is to be given of each call.

Only shareholders *de jure* who are on the sealed register of shareholders are liable to pay calls; *Newry and Enniskillen Ry. Co. v. Edmunds*, 2 Ex. 118; 17 L. J. (Ex.) 102.

These sections do not authorise an action against a mere subscriber to the undertaking; *Wolverhampton Waterworks Co. v. Hawkesford*, 6 C. B., N. S. 336; 28 L. J. (C. P.) 242. But the register need not be sealed in order to make the persons on it shareholders; *Wolverhampton Waterworks Co. v. Hawkesford*; 31 L. J. (C. P.) 184; 11 C. B., N. S. 456 (Ex. Ch.).

Sect. 9 requires each share held by a shareholder to be distinguished on the register by its number; and a person to whom shares are allotted is not liable to pay calls unless the shares allotted to him are specifically numbered and allotted to him by the number; *Irish Peat Co. v. Phillips*, 30 L. J. (Q. B.) 114; 1 B. & S. 598; on the authority of *Wolverhampton Waterworks Co. v. Hawkesford*, 7 C. B., N. S. 795; 29 L. J. (C. P.) 121. But the Common Pleas did not decide on this ground, but on the right ground that there was no register when the call was made; *per Ex. Ch.*; *Irish Peat Co. v. Phillips*, 30 L. J. (Q. B.) 366; 1 B. & S. 638; and the Court of Exchequer Chamber doubted the propriety of the decision of the Queen's Bench, but affirmed the judgment on the ground that the defendant had not executed the deed of the company when the calls were made; the company being incorporated by charter. See also *London Grand Junction Ry. Co. v. Freeman*, 2 M. & G. 606 (Ex. Ch.), that the register will not be invalid by reason of omission in following strictly the requisitions of the statute; and see *post*, pp. 752-3.

A shareholder who has transferred his shares is liable until the transfer has been registered; s. 15; *Midland Great Western Ry. Co. v. Gordon*, 16 M. & W. 807; 16 L. J. (Ex.) 166; *Sayles v. Blane*, 14 Q. B. 205. And after a call has been made a shareholder cannot transfer until he has paid the call; s. 16; and a call is made at the time when the resolution is passed and not when the notice is given to the shareholder; *R. v. Londonderry, &c. Ry. Co.* 13 Q. B. 998; and see *In re British Provident Insurance Society*, 32 L. J. (Ch.) 633 (on sect. 54, of 7 & 8 Vict. c. 110).

By sect. 21, "shareholder" shall extend to the legal personal representatives of such shareholder; and it seems that executors are

liable for calls due from their testator so long as they are in possession of the shares; *Birkenhead, &c., Ry. Co. v. Cotesworth*, 5 *Ex.* 226, 228; 19 *L. J. (Ex.)* 240; *Wills v. Murray*, 4 *Ex.* 843; but see *Ness v. Armstrong*, 4 *Ex.* 21; 18 *L. J. (Ex.)* 473.

An infant may be liable to calls, and the shares vest in him as in the nature of real estate, until he repudiates them, and this he may do within a reasonable time after full age; *Cork and Bandon Ry. Co. v. Cazenove*, 10 *Q. B.* 935; and the cases cited *ante*, under the plea of *Infancy*, p. 391.

Where a call was made after a shareholder had become bankrupt, it was held, that the property in the shares continuing in the bankrupt, he was liable to the payment of the call even after certificate, inasmuch as it was not proveable as a debt due *in futuro* under the 51st sect. of 6 Geo. 4, c. 16; or as a debt due on a contingency, within the meaning of the 56th sect. of that act; *South Staffordshire Ry. Co. v. Burnside*, 5 *Ex.* 129; 20 *L. J. (Ex.)* 120. See *Wylam's Steam Co. v. Street*, 24 *L. J. (Ex.)* 208; 10 *Ex.* 849; where, upon the construction of the company's deed of settlement, a shareholder in a completely registered company, who had become bankrupt, was held not liable to calls made after he had obtained his certificate. That the assignees of a bankrupt are not liable for calls, unless they accept the shares, see *South Staffordshire Ry. Co. v. Burnside*, *supra*.

Actions for calls—Proof necessary on the trial.] By sect. 26 of 8 & 9 Vict. c. 16, "In any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act."

By sect. 27, "On the trial or hearing of such action or suit it shall be sufficient to prove that the defendant at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within the period."

Proof of being a shareholder.] As to who are shareholders liable to calls, see *ante*, p. 751.

By sect. 28, the production of the register of shareholders is made *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares; but this may be rebutted; *Waterford, &c., Ry. Co. v. Pidcock*, 8 *Ex.* 279; 22 *L. J. (Ex.)* 146. But where the defendant has by his own act induced the company to

register him, he cannot then contradict the register; *Sheffield, &c., Ry. Co. v. Woodcock*, 7 M. & W. 574; *Cheltenham, &c., Ry. Co. v. Daniel*, 2 Q. B. 281. This section refers to the sealed register; *Birkenhead, Lancashire, &c., Ry. Co. v. Brownrigg*, 4 Ex. 426; 19 L. J. (Ex.) 27. The register must, of course, be proved to be, *de facto*, the register of the company, and be regular on the face of it; see s. 9, *ante*, p. 751; but it is evidence without proof that the seal was affixed to it at a general meeting of the company as required by s. 9; *The London and N.-W. Ry. Co. v. McMichael*, 5 Ex. 855; 20 L. J. (Ex.) 6; *Nash's case*, 2 Den. C. C. 493; 21 L. J. (M.C.) 147. The provisions of the Act (s. 9) as to keeping the register must have been substantially complied with, in order to make the register evidence; *Bain v. Whitehaven & Furness Junction Ry. Co.*, 3 H. L. C. 1. But irregularities or omissions will not render it inadmissible; *Southampton Dock Co. v. Richards*, 1 M. & G. 448; *London Grand Junction Ry. Co. v. Freeman*, 2 M. & G. 606. A register book consisted of several large volumes, the last only of which, containing a recapitulation of the previous volumes, was authenticated by the seal of the company: Held, that this was sufficient, and the volumes were properly received in evidence; *Inglis v. Great Northern Ry. Co.*, 16 Jur. 895; 1 Macq. 112.

Proof of the call.] By 8 & 9 Vict. c. 16, s. 98, minutes are to be made in a book of all orders and proceedings of meetings of the company or directors, and are to be signed by the chairman *of* [not *at*] such meeting; and the entry so made shall be received in evidence in all courts without proof that the meeting was duly convened, or that the persons present were shareholders or directors, or of the signature, or that the person signing was chairman; all which matters shall be presumed till disproved.

The resolution for a call, made at a meeting of directors, may be proved by production of the above book. It has been held, under like clauses in other acts that a signature at a subsequent meeting by the same chairman, is sufficient; *Southampton Dock Co. v. Richards*, 1 M. & G. 448; *West London Ry. Co. v. Bernard*, 3 Q. B. 873.

Validity of call.] By sect. 99, acts done by directors are valid, notwithstanding their defective appointment or disqualification.

The special act usually limits the number and amount of calls, and of the aggregate amount of them within any one year and the interval between each. Any deviation from the act in these respects will invalidate the call (s. 22), and is a defence under sect. 27. The call is to be considered as made at the time the resolution was passed, and not when the notice of call was given to the shareholder; *R. v. Londonderry and Coleraine Ry. Co.* 13 Q. B. 998. The resolution need not specify the time and place of payment; *Newry, &c., Ry. Co. v. Edmunds*, 2 Ex. 118; nor the person to whom payment is to be made; *Great North of England Ry. Co. v. Biddulph*; 7 M. & W. 243; *London and Brighton Ry. Co. v. Fairclough*, 2 M. & G. 674; provided a time, place, and person be appointed by the directors, and twenty-one days' notice given; *S. C.C.* A call made payable by instalments is valid; *Ambergate, &c., Ry. Co. v. Norcliffe*, 6 Ex. 629; 20 L. J. (Ex.) 234 (Ex. Ch.)

Proof of notice of call.] By 8 & 9 Vict. c. 16, s. 22, there must be

at least twenty-one days' notice of each call. The notice, if under this act alone, must, it seems, be a special notice to each shareholder; but under the special acts of each company, a general notice by newspaper or otherwise is commonly made sufficient; *per Parke, B., in Newry, &c., Ry. Co. v. Edmunds*, 2 *Ex.* 122. Notice of a call issued by the secretary, and purporting to be in pursuance of a resolution of the directors, will be presumed to be issued by authority; *Great North of England Ry. Co. v. Biddulph*, 7 *M. & W.* 243; *London and Brighton Ry. Co. v. Fairclough*, 2 *M. & G.* 674. Notices by post are in general sufficient; s. 136, *post*, p. 756.

To prove the notice, plaintiffs proved that it was the duty of C., since deceased, to fill up and direct notices; that he had been seen preparing them according to a list of subscribers in his hands, made out from an address-book, and had put them in a basket; that all in the basket had been posted; and that a list in his handwriting had been found, containing the defendant's name and indorsed "letters sent out." Held, that the list might be presumed to be contemporaneous with the preparation of the notices, and that there was evidence of a notice to the defendant; *Eastern Union Ry. Co. v. Symonds*, 5 *Ex.* 237; 19 *L. J. (Ex.)* 287; see also the cases cited *ante*, pp. 47, 195.

In the case of joint holders of shares, notice to the one first on the register is sufficient; s. 137.

Interest.] By s. 23, "If, before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate allowed by law from the day appointed for the payment thereof to the time of the actual payment."

Defence to actions for calls.] The plea of *never indebted*, and a traverse of the defendant being a shareholder, put in issue all the facts which the plaintiff is required to prove in support of the common form of count, and the defendant is enabled to show, that he was not a shareholder at the time of the call made, that the calls were not duly made, or were objectionable on the grounds specified in sect. 27 of 8 & 9 Vict. c. 16, *ante*, p. 752, or that due notice of them was not given. Thus defendant may show that though registered he is not *de jure* a shareholder, because the shares were illegally created by the company; *Shropshire Union Ry. Co. v. Anderson*, 3 *Ex.* 401; 18 *L. J. (Ex.)* 232; *ante*, p. 751. Or that there was no notice; *Edinburgh, &c., Ry. Co. v. Hebblewhite*, 6 *M. & W.* 707; *South-Eastern Ry. Co. v. Hibblewhite*, *infra*. Or that calls were not properly made; *London and Brighton Ry. Co. v. Wilson*, 6 *N. C.* 135; *South-Eastern Ry. Co. v. Hebblewhite*, 12 *Ad. & E.* 497; or that the shares had been forfeited before the call; *London and Brighton Ry. Co. v. Fairclough*, 6 *N. C.* 270; or had been transferred and the transfer registered before the call was made; *Aylesbury Ry. Co. v. Mount*, 4 *M. & G.* 651; 7 *M. & G.* 898. And in general, the plea of *nunq. indebitatus* denies every matter of fact necessary to constitute the debt; *per cur. Birkenhead, &c., Ry. Co. v. Brownrigg*, 4 *Ex.* 426; 19 *L. J. (Ex.)* 27.

Infancy (when it is a defence) must be specially pleaded; *Birkenhead, &c. Ry. Co. v. Pilcher*, 5 *Ex.* 24; 20 *L. J. (Ex.)* 97.

It is no defence that the defendant became a shareholder and was registered with his assent in consideration of an agreement to give

him certain debentures, which could not legally be given by the company; for this is not an inquiry open after actual registration with defendant's consent; *West Cornwall Ry. Co. v. Mowatt*, 15 Q. B. 521; 19 L. J. (Q. B.) 478. In a suit for calls, defendant cannot set up the fraud of the directors, unless he has repudiated his shares as soon as he discovered the fraud practised on him; *Deposit Life Assurance Co. v. Ayscough*, 6 E. & B. 761; 26 L. J. (Q. B.) 29.

If a forfeiture of shares has been declared, and confirmed under sect. 29 of 8 & 9 Vict. c. 16, this is a correlative remedy, and no answer to an action for the calls in arrear before the forfeiture; *Great Northern Ry. Co. v. Kennedy*, 4 Ex. 417; 19 L. J. (Ex.) 11. But where the declaration of forfeiture is under a special act, which gives the remedy as an *alternative* one with that of an action for calls, then it is a defence; *Giles v. Hutt*, 3 Ex. 18; 18 L. J. (Ex.) 53. A mere declaration of forfeiture, without a subsequent confirmation at a general meeting, will not relieve the shareholder from future calls under any of the railway acts, special or general; *London and Brighton Ry. Co. v. Fairclough*, 2 M. & G. 674.

Proof of contracts.] By sect. 97 of 8 & 9 Vict. c. 16, the power of directors or their committees to make contracts on behalf of the company "may be lawfully exercised" as follows:— 1. Any contract which, if made between private persons, is required to be in writing and under seal, may be made, varied, or discharged by such directors or committee in writing and under the common seal. 2. Any contract which, if made between private persons, is required to be in writing signed by the parties to be charged, may be made, varied, or discharged by writing signed by two directors, or by two of the committee. 3. A contract which, as between private persons, may be by parol and without writing, may be made, varied, or discharged by the directors or such committee by parol only, without writing.

By sect. 98, the directors are to cause notes, minutes, or copies of all their appointments and contracts, orders, and proceedings of meetings, to be entered in a book, and every such entry is to be signed by the chairman of such meeting; and the entry so signed shall be received as evidence in all courts, without proof of the meeting having been duly convened or held, or of the persons making or entering the orders, &c., being shareholders, directors, or members of the committee; or of the signature of the chairman, or of the fact of his being chairman; all which matters shall be presumed, until proof to the contrary.

The minutes of an *adjourned* meeting, signed by the chairman, make the original minutes admissible in evidence, though they were not signed; *Inglis v. Great Northern Ry. Co.*; 1 Macq. 112; 16 Jur. 895; see also *ante*, p. 753.

Where a railway company occupied land, and no contract was proved, it was held, that a parol contract with the directors, under sect. 97, would be presumed; *Lowe v. London and N.-W. Ry. Co.*, 18 Q. B. 632; 21 L. J. (Q. B.) 361. In such a case, even a common corporation would be liable; *semble*, *S. C.* But where the directors contracted under seal for certain works, the company was held not liable for work extra the contract, there being nothing from which a parol contract within ss. 97, 98 could be inferred; *Homersham v. Wolverhampton Waterworks Co.*, 6 Ex. 137; 20 L. J. (Ex.) 193; see *ante*, p. 326. Where a clerk of the company ordered goods

for the company, which they received and used in the construction of the railway, it was held that this was evidence of a parol contract under the act, and the court affirmed the ruling in *Lowe v. London and N.-W. Ry. Co.*, *supra*; *Pauling v. London and N.-W. Ry. Co.*, 8 *Ex.* 867; 23 *L. J. (Ex.)* 105. See also *Reuter v. Electric Telegraph Co.*, 6 *E. & B.* 341, which, however, was not decided under the above act. See *ante*, pp. 306, 326.

If a contract be entered into by a director with the company after his election, the contract is not rendered void by ss. 85, 86, but his office of director is vacated; *Foster v. Oxford, Worcester, &c., Ry. Co.*, 13 *C. B.* 200; 22 *L. J. (C. P.)* 99. It is no answer to an action by a secretary for his salary, that no determination as to such salary had ever been exercised at any general meeting of the company as the act (s. 91) requires; *Bill v. Durenth Valley Ry. Co.*, 1 *H. & N.* 305; 26 *L. J. (Ex.)* 81.

The fraud of the company is no defence by a shareholder against a creditor of the company, not being a party to the fraud; *Henderson v. Royal British Bank*, 7 *E. & B.* 356; 28 *L. J. (Q. B.)* 112; *Powis v. Harding*, *post*, p. 758; *Daniel v. Royal British Bank*, 1 *H. & N.* 681.

See in general, as to contracts by corporations, *ante*, pp. 741-2.

As to admissions by corporations or their agents, see *ante*, pp. 63, 64.

Service of notices.] Notices may be served on the company by being left at, or sent by post to, the principal office or one of such offices, or by being given personally to the secretary, or (if none) to any director; 8 & 9 *Vict. c.* 16, s. 135, see *ante*, p. 751.

Service of notice by the company on shareholders, where not required to be personal, may be sent by post to the registered or other known address of the shareholder, so as to admit of delivery in due course within the prescribed time; and proof of posting and proper direction is enough; *Id.* s. 136; see *ante*, p. 754.

A summons or notice may be signed by two directors, the treasurer, or secretary, and need not be under seal, and may be written or printed, or partly in writing and partly in print; *Id.* s. 139.

5. *Banking Companies under 7 Geo. 4, c. 46; and Companies suing and sued by public officers.*

Power to sue by an officer of a company cannot be given by special constitution or resolution of a common law company; *Hybart v. Parker*, 4 *C. B.*, *N. S.* 209; 27 *L. J. (C. P.)* 120.

Certain banking and other companies may, by virtue of different statutes, sue and be sued in the name of one of their public officers, &c. The 7 Geo. 4, c. 46, s. 9, enables certain banking copartnerships to sue and be sued in this manner, and most of the cases decided on this subject have arisen under this statute. Many of these cases will apply to other statutes.

By the Banking Companies Act, 7 Geo. 4, c. 46, s. 9, copartnerships carried on under that act, and by sect. 47 of 7 & 8 *Vict. c.* 113 (re-enacted by 25 & 26 *Vict. c.* 89, s. 205, and sch. 3), other banking companies of more than six persons, within sixty-five miles from London, may sue and be sued in the name of their public officers. "And the death, resignation, removal, or any act of such public officer shall not abate or prejudice any such action or other proceeding

commenced against, or by or on behalf of such copartnership; but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being."

By a deed constituting a banking company, trading under the 7 Geo. 4, c. 46, if any public officer became bankrupt, his office was to become vacant: It was held that this meant that his office was to be void at the election of the company; but if, after the bankruptcy, they treated and held him out to the world as their public officer, they might sue and be sued in his name; *Steward v. Dunn*, 12 M. & W. 655.

Companies formed under the 7 Geo. 4, c. 46, are *quasi* corporations, and not ordinary partnerships; and notice to any one shareholder is not notice to the company so as to affect the whole body; *Powles v. Page*, 3 C. B. 16; *Steward v. Dunn*, *supra*; *per Parke, B.* But the Court in these cases seems to have relied on the effect of sect. 1 of 1 & 2 Vict. c. 96, which specially provides that suits between members and public officers of banking companies shall be conducted as if between strangers.

The act 7 Geo. 4, c. 46, renders it obligatory upon a banking company, in cases within it, to sue in the name of their public officer; *Chapman v. Milvain*, 5 Ex. 61; 19 L. J. (Ex.) 228. So, the creditors of such a company cannot sue an individual member of the company for a debt of the company, but must proceed against their public officer; *Steward v. Greaves*, 10 M. & W. 711; and if the business has been relinquished and there is no officer the creditors cannot proceed against a member; *Davidson v. Farmer*, 6 Ex. 242; 20 L. J. (Ex.) 177. But where a statute stated that *it shall be sufficient*, in all actions against the company, to state the name of the secretary, &c., as the nominal defendant, the Court held, upon the construction of the whole statute, that it was not imperative to sue in this manner, but that a shareholder might be sued; *Beech v. Eyre*, 5 M. & G. 415; *Blewitt v. Gordon*, 1 Dowl. N. S. 815. It seems that the 7 Geo. 4, c. 46, and the 1 & 2 Vict. c. 96, enable banking copartnerships to sue in the name of their public officer for the price of shares therein; *Davidson v. Bower*, 4 M. & G. 626.

If a statute enables a company to sue on covenants in which they are interested in the name of their secretary, an action may be brought in his name upon a covenant, made with third persons, in which the company are interested; *Smith v. Goldsworthy*, 4 Q. B. 430; see *Skinner v. Lambert*, 4 M. & G. 477. And where an act provided that all actions to be instituted "by or on behalf of the company," might be brought in the name of the secretary, it was held that an action of covenant for calls might be brought in his name; *Wills v. Sutherland*, 4 Ex. 211; 18 L. J. (Ex.) 450. The public officer of a company, established under the 7 Geo. 4, c. 46, may, notwithstanding its change of name and the accession of new proprietors, maintain an action on a guarantee given to the company before its change of name; *Wilson v. Craven*, 8 M. & W. 584. Where such a copartnership had begun to carry on the trade and business of bankers, and issued notes accordingly, but subsequently stopped payment, and merely kept the establishment open for the purpose of paying their notes and winding up their affairs, it was held that they were still entitled to sue by their public officer; *Davidson v. Cooper*, 11 M. & W. 778; see *Lyon v. Haynes*, 5 M. & G. 504.

The delivery of a return to the Stamp Office, as required by the 2nd sect. of the 7 Geo. 4, c. 67, is not a condition precedent to the company's right to sue in the name of the public officer; *Bonar v. Mitchell*, 5 *Ex.* 415; 19 *L. J. (Ex.)* 303; see *Wills v. Murray*, 4 *Ex.* 843; 19 *L. J. (Ex.)* 209.

Evidence clauses.] By 7 Geo. 4, c. 46, ss. 4 and 8, before banking copartnerships issue any notes or bills they must return to the Stamp Office the name of the firm, names and abodes of every member of it, the names and places of their banking houses, the names and description of their public officers, and names of the banking towns; and returns are also to be made from time to time of changes in the above particulars. By sect. 6, certified copies of the returns so filed, under the hand of a commissioner of stamps, are made receivable in evidence as proof of the appointment of public officers, and that the persons named as members were such at the date of the return.

The above section 6 requires that the certificate shall be proved to be signed by the person making it, but not that he shall be proved to be a commissioner. Stat. 8 & 9 Vict. c. 113 (*ante*, p. 71) apparently dispenses with proof of the signature.

In *Bosanquet v. Woodford*, 5 *Q. B.* 310, the certified copy was held evidence that defendant was a member at the time of the jurat of the return, though not made within the period limited by the Act; see also *Powis v. Harding*, 1 *C. B.*, *N. S.* 533; 26 *L. J. (C. P.)* 107; and *Prescott v. Buffery*, 1 *C. B.* 41. A certificate showing that the plaintiff was a public officer in March, 1841, was held presumptive proof that he continued to be so in November, 1842; the office not being annual; *Steward v. Dunn*, 12 *M. & W.* 655; which see further as to the affidavit under the 6th section. If the defendant was a shareholder in March, 1847, and the annual return shows him to be one also in March, 1848; this is evidence on the issue that he was one in January, 1849; *Bosanquet v. Shortridge*, 4 *Ex.* 699; 19 *L. J. (Ex.)* 221; see also *ante*, p. 33.

6. Companies established by Letters Patent under the 7 W. 4 and 1 Vict. c. 73.

By this act the crown is empowered to grant to companies by letters patent, certain privileges.

By sect. 3, such letters patent may provide that the company may sue or be sued in the name of their public officer, &c.

The act requires certain returns to be made of the names of shareholders, &c. And all such returns are directed to be made to the enrolment office of the Court of Chancery in England and to be registered by the clerks of enrolment in Chancery, or the deputy; and any person may require a copy of any such return, to be certified by the said clerks or their deputy, and the day of their registration of every return to be made in pursuance of this act is to be written on such return by the said clerks or their deputy; and by sect. 18, a copy so certified of such return, including the date to be marked thereon, is to be reserved in evidence in all proceedings whether civil or criminal, and is also to be reserved in evidence of the day of the registering thereof.

By sect. 22, actions are not to abate or be prejudiced by the death or by any act of such officer, or by his resignation or removal, &c.

By sect. 26, "In all cases wherein it may be necessary for any

person to serve any summons, demand, or notice, or any writ or other proceeding at law or in equity, or otherwise, upon the said company or body, service thereof respectively on the clerk of the said company or body, or by leaving the same at the head office for the time being of the said company or body, or in case such clerk of the said office shall not be found or known, then a service thereof or any agent or officer employed by the said company or body, or by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient service of the same respectively on the said company or body."

By sect. 27, "In all cases wherein it may be necessary for the said company or body to give any summons, demand, or notice of any kind whatsoever to any person or corporation, under the provisions or directions contained in this act, such summons, demand, or notice may be given in writing, signed by the clerk, attorney, or solicitor for the time being of the said company or body, without being required to be under the common seal of the said company or body."

Very few charters have been granted under this act, and it is believed to be now disused.

ACTIONS AGAINST CONSTABLES, JUSTICES, AND OFFICERS.

1. *Actions against Constables.*

Local venue—General issue—Tender of amends, &c.] By 21 Jac. 1, c. 12, s. 5 (enlarging and perpetuating 7 Jac. 1, c. 5), if any action upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor, or bailiff of a city or town corporate, head borough, portreve, constable, tithing-man, churchwarden or overseer of the poor and their deputies, or any other which in their aid or assistance or by their commandment shall do anything touching or concerning his or their office or offices, for or concerning any matter, cause, or thing by them, or any of them, done by virtue or reason of their, or any of their office or offices, the said action *shall be laid within the county* where the trespass or fact shall be done or committed, and not elsewhere; and it shall be lawful to and for all and every person and persons aforesaid to plead the *general issue*, that he or they are not guilty, and give such special matter in evidence as would, if pleaded, have been a good and sufficient matter in law to have discharged the defendants of the trespass or other matter laid to their charge. The act 42 Geo. 3, c. 85, s. 6, and other acts, extend those provisions to other officers having power of commitment. By the 19th section of the 1 & 2 W. 4, c. 41, intituled "An Act for amending the laws relative to the appointment of special constables, and for the better preservation of the peace," it is enacted, "That all actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was committed and shall be commenced within six calendar months after the fact committed, and not otherwise, and notice in writing of such

cause of action shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue and give this act and the special matter in evidence at the trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit or discontinue any such action after issue joined, or if upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless the judge, before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon."

The Municipal Corporation Act, 5 & 6 W. 4, c. 76, by s. 76, provides that constables appointed for a borough shall, not only within the borough, but also within the county in which such borough is situate, have all such powers and privileges, and be liable to all such duties, as any constable duly appointed now has, or hereafter may have, within his constablewick by virtue of the common law or of any statute made or to be made; and, by section 133, in all actions against any person for anything done in pursuance of that act, the defendant may plead the general issue, and give the special matter in evidence thereunder.

Parish constables appointed under the 5 & 6 Vict. c. 109, have the same privileges as other constables; see s. 15.

The county police established under the 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, have the same privileges as constables; and every provision of the 1 & 2 W. 4, c. 41, *supra*, shall be deemed to extend to the constables appointed under this act, except as to any matter therein expressly provided. See *Freegard v. Barnes*, 7 Ex. 827, and the 19 & 20 Vict. c. 69, giving power (s. 6) to county police to act within boroughs, is (s. 31) made part of the 2 & 3 Vict. c. 93.

The defendant, who was a borough constable appointed under the 5 & 6 W. 4, c. 76, was sued in replevin for an act done in discharge of his duty as a constable under that act beyond the limits of the borough, but within the county in which the borough was situate: Held, that he was entitled under *non cepit* to give the special matter of defence in evidence; *Mellor v. Leather*, 1 E. & B. 619.

By the 10 Geo. 4, c. 44, s. 4, the metropolitan police have the same privileges as constables; and by the 2 & 3 Vict. c. 71 (an act for amending the above act), s. 53, "no action, suit, or information, or any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person for anything done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities under this act, unless twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such suit, information, or other proceeding to the intended defendant; nor unless such action, suit, information, or other proceeding shall be brought or commenced within three calendar months next after the act committed; or in case there shall be a continuation of damage, then within three calendar months next after the doing or committing such damage shall have ceased; or unless

such action, suit, or information shall be laid and brought in the county of Middlesex; and if the plaintiff shall become nonsuited, or shall suffer a discontinuance of his suit, information, or other proceeding, after the defendant shall have appeared thereto; or if a verdict shall pass against the plaintiff thereon; or if upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall have his costs, as between attorney and client, and shall have such remedy for recovering the same as defendants have for recovering costs of suit by law in other cases." See the 41st sect. of the 10 Geo. 4, c. 44.

Some other Acts of Parliament also give certain protection to constables acting under them.

By Rule 21, T. T. 1833, in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the plea the words "by statute," together with the year or years of the reign in which the Act or Acts of Parliament, upon which he relies for that purpose, were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue and of the *Nisi Prius* record. The plea itself so pleaded, in its effect and consequences, remains altogether unaltered by this rule; *Bartholomew v. Carter*, 3 M. & G. 125, per Tindal, C. J. Therefore, the plea of Not guilty, when thus pleaded, lets in not only the defences peculiar to the statute under which it is pleaded, but also those which were available under it at common law; *Ross v. Clifton*, 11 Ad. & E. 631; *Williams v. Jones*, id. 643; *Eagleton v. Gutteridge*, 11 M. & W. 465. In a case before the C. L. Pro. Act, 1852, s. 222, an amendment, by insertion of the words "by statute," omitted in the margin of a plea of not guilty on the *Nisi Prius* record, was refused on the trial; *Forman v. Dawes*, Car. & M. 127. But such mistakes or omissions are now amendable; as where the margin omits some or one of the statutes relied upon; *Edwards v. Hodges*, 15 C. B. 477.

[*Cases within the above statutes.*] Where the prosecutor who had obtained the warrant pointed out the party to the constables, Lord Ellenborough held that he was acting in their aid; *Nathan v. Cohen*, 3 Camp. 257; *Derecourt v. Corbishley*, 5 E. & B. 188. But where A. sent for B., a constable, and gave the plaintiff in charge for a felony, Bayley, J., ruled that A. must plead specially the circumstances which induced him to make the charge; *McCloughan v. Clayton*, Holt, N. P. C. 478. Parish officers, sued for goods sold and delivered for the poor, are not within the statute of James; *Blanchard v. Bramble*, 3 M. & S. 131. Commissioners of a court of requests, having power to commit for contempt, are not within the stat. 42 Geo. 3, c. 85; per Patteson, J., *Mackey v. Godden*, 1 Dowl. P. C. 463. The stat. 21 Jac. 1, c. 12, evidently extends only to actions to which Not guilty is a proper plea, i. e., to actions of tort. In what cases persons are entitled to the benefit of statutable provisions of this kind will be further illustrated by the decisions upon notices of action cited, pp. 769 and 774, *et seqq.*

[*Notice of action.*] There is no general provision requiring notice of action against a constable. But by the 1 & 2 Wm. 4, c. 41, s. 19,

special constables are entitled to notice of action. So are the county police established under the 2 & 3 Vict. c. 93; and the metropolitan police; 10 Geo. 4, c. 44, s. 41; 2 & 3 Vict. c. 71, s. 53. Before any action can be brought against the constable or other officer or person for anything done in pursuance of the 7 & 8 Geo. 4, c. 29, or 7 & 8 Geo. 4, c. 30, notice in writing, and of the cause thereof, must be given to the defendant one calendar month at least before the commencement of the action, and the officer, &c., may tender amends, &c.; 7 & 8 Geo. 4, c. 29, s. 75; 7 & 8 Geo. 4, c. 30, s. 41. Constables appointed under local acts are sometimes entitled to notice of action. Where a local lighting act enabled the commissioners to appoint constables having a general jurisdiction, and required notice of action against a person doing anything in pursuance of the act: Held, that a constable so appointed had no protection beyond other constables, and that notice was not necessary in respect of anything which was not directly within the powers of the act; *Shutwell v. Hall*, 10 M. & W. 523.

Where notice is required, the decisions respecting notice of actions, *post*, p. 769, and pp. 774, 815 *et seqq.*, will be found useful.

Demand of copy of warrant.] By 24 Geo. 2, c. 44, s. 6, no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace, until demand has been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith by showing the said warrant to, and permitting a copy to be taken thereof by, the party demanding the same, any action shall be brought against such constable, &c., without making the justice, who signed or sealed the said warrant, defendant, on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant notwithstanding any defect or jurisdiction in such justice. And if such action be brought jointly against such justice and constable, &c., then on proof of such warrant the jury shall find for the constable, &c., notwithstanding such defect of jurisdiction.

This enactment extends only to actions of tort and not to actions on contract (*B. N. P.* 24), of replevin (*Fletcher v. Wilkins*, 6 East, 283), or the like.

What persons are within the statute 24 Geo. 2, c. 44.] Churchwardens and overseers of the poor taking a distress for poor's rates are entitled to the protection of the statute; *B. N. P.* 24; *Harper v. Carr*, 7 T. R. 271. So a goaler, who receives and detains a prisoner under the warrant of a magistrate; *Butt v. Newman*, Gow. 97.

This section is intended to protect the officer in those cases only where the justice remains liable, and it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant. *Per Abbott, C. J., Parton v. Williams*, 3 B. & A. 333; *Peppercorn v. Hoffman*, 9 M. & W. 618. Therefore, when there is no remedy against the justice, no demand of a copy is necessary; *Cotton v. Kadwell*, 2 Nev. & M. 399. Thus where an officer

apprehends a different person from that described in the warrant, he is not protected; *Money v. Leach*, 3 Burr. 1742; although the person apprehended is the party against whom the warrant ought to have issued; *Hoye v. Bush*, 1 M. & G. 775. So where a constable, having a warrant to search for cotton which had been stolen, took also a tin pan and sieve which were claimed by the person robbed, but were not mentioned in the warrant, nor likely to furnish evidence of the identity of the articles stolen; *Crozier v. Cundey*, 6 B. & C. 232. So where, in executing a warrant of distress, he enters a house in such a manner as to become a trespasser *ab initio*; *Bell v. Oakley*, 2 M. & S. 259.

But the officer is not deprived of the protection of the statute though the warrant is not shown to be legal, provided he acted in obedience to it; *Price v. Messenger*, 2 B. & P. 158. And, generally, a want of jurisdiction in the justices will not deprive the officer of the benefit of the statute; *Atkins v. Kilby*, 11 Ad. & E. 777. In an action against overseers for excessive distress for a poor rate, no demand of the warrant is necessary; *Sturch v. Clarke*, 4 B. & Ad. 113. The act does not extend to a warrant granted by a judge of the Court of King's Bench; *Gladwell v. Blake*, 1 C. M. & R. 636.

A sheriff, who is sued for an excessive levy, whether for the King's taxes or for a subject, is not within the protection given by these acts; *Copland v. Powell*, 1 Bing. 369.

Evidence of demand.] The demand may be proved by the production of a duplicate original without a notice to produce, *Jory v. Orchard*, 2 B. & P. 39; and it is sufficient if the demand be signed by the plaintiff's attorney, and left at the defendant's residence by the attorney's clerk; *Ibid.*; *Clark v. Woods*, 2 Ex. 395. Where the declaration does not charge the defendants as officers, the plaintiff need not, in the first instance, prove a demand of a copy of the warrant. If the defendants mean to justify under the warrant, that proof lies upon them, and when they come to that part of the case the plaintiff must prove a demand; *Price v. Messenger*, 3 Esp. 96. Where the warrant was in the hands of the gaoler, and the agent of the plaintiff made no objection to the copy when tendered, it was held, that the perusal of the original was dispensed with; *Atkins v. Kilby*, 11 Ad. & E. 777. The demand need not specify the time within which it should be complied with; therefore, where a copy was required "within three days," the demand was held sufficient; *Collins v. Rose*, 5 M. & W. 194.

If the constable refuse or neglect, for the space of six days, to comply with the demand, the constable may be sued as before the statute, and the mere fact of the justice being joined as co-defendant does not entitle the constable to an acquittal; *Clark v. Woods*, 2 Ex. 395. But if he complies with the demand at any time before action brought, though more than six days after the demand, he will be within the protection of the act; *Jones v. Vaughan*, 5 East, 445. It is no excuse for non-compliance with the demand, that plaintiff has already obtained a copy of the warrant from another person. *Clark v. Woods*, *supra*.

Limitation of action.] By 24 Geo. 2, c. 44, s. 8, no action shall be brought against any constable, headborough, or other officer or person acting as aforesaid (see s. 6, *supra*, p. 762), unless commenced within six calendar months after the act committed; *Freegard v. Barnes*, 7

Ex. 827. In an action for a false imprisonment the six months are to be reckoned exclusive of the day of discharge of the prisoner; *Hardy v. Ryle*, 9 B. & C. 603.

When a person is entitled to the benefit of provisions of this kind, will be noticed under the next head. Where some constables, under a warrant to search for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing at the same time to tell the owner of the house searched whether they had any warrant to do so, it was held that they were within this section of the statute, and that the action ought to have been commenced within six months; *Smith v. Wiltshire*, 2 B. & B. 619. So where a constable, acting under a warrant commanding him to take the goods of A., took the goods of B., believing them to belong to A.: it was held, that the action must be brought within six months; *Parton v. Williams*, 3 B. & A. 330.

Actions against special constables must be commenced within six calendar months after the fact committed; 1 & 2 Wm. 4, c. 41, s. 19, *ante*, p. 761; and see, as to other constables, *ante*, p. 762.

Evidence of arrest.] In actions against constables, it sometimes becomes a question whether the evidence is sufficient to establish an arrest. An arrest is not confined to corporal seizure. Where an officer entered the room in which the defendant was, and locked the door, telling him at the same time that he arrested him, the Court held it to be a good arrest, though not a battery; *Williams v. Jones*, *Cas. t. Hardw.* 300. And if the officer say, "I arrest you," and the party acquiesces, or afterwards goes with him, this is an arrest; *Grainger v. Hill*, 4 N. C. 212. Mere words, however, such as telling a man you arrest him, or the like, cannot of themselves amount to an arrest; *B. N. P.* 62. Where the constable said to the plaintiff, "You must go with me," on which the plaintiff said, "he was ready to go," and went with the constable towards a police office without being seized or touched, this was ruled to be an imprisonment; and *per* Abbott, C. J., "If a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force, expresses his readiness to go, and does actually go, this is an imprisonment;" *Pocock v. Moore*, *Ry. & Mood.* 321; *Chinn v. Morris*, 2 C. & F. 361. The law on this point was thus laid down by Eyre, C. J., in *Simpson v. Hill*, 1 *Esp.* 431: "If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be in point of law an imprisonment; as, for example, if he had tapped her on the shoulder and said, 'You are my prisoner,' or if she had submitted herself to his custody, such would be an imprisonment: but the merely giving her in charge without taking possession of the person, where nothing more passes than merely the charge, is not by law a false imprisonment." In the following case the circumstances were held to constitute an imprisonment. The plaintiff appeared before the defendant, a magistrate, to answer the complaint of A. for unlawfully selling his dog. The defendant advised the plaintiff to settle the matter by paying a sum of money, which the plaintiff declined. The defendant then said, "He would convict the plaintiff in a penalty under the trespass act, in which case he would go to prison." The plaintiff still declined paying, and said he would appeal. The defendant then called in a constable, and said, "Take this man out,

and see if they can settle the matter; and if not, bring him in again, as I must proceed to commit him under the act." The plaintiff then went out with the constable, and settled the matter by paying a sum of money: it was held, that this was an assault and false imprisonment, for which trespass would lie; and which, as no conviction had been drawn up, the defendant could not justify; *Bridgett v. Coyney*, 1 M. & R. 211. But it is no imprisonment to prevent a person from walking in any but one particular direction along a highway; *Bird v. Jones*, 7 Q. B. 742. See *Innes v. Wylie*, 1 C. & K. 257; *Warner v. Riddiford*, 4 C. B., N. S. 180. Where a sheriff's officer, having a warrant to arrest A., sent a message to him to fix a time to call and give a bail bond, and A. fixed a time, attended, and gave bail: Held (in an action for malicious arrest), that this was no arrest; *Berry v. Adamson*, 6 B. & C. 528.

Defence.

The fact of the defendant being a constable or other public officer is sufficiently shown by proof that he was acting as such; and the regularity of his appointment will be then presumed. A constable, having reasonable cause to suspect that a felony has been committed, is justified in arresting the party suspected, though it afterwards appears that no felony has been committed; *Beckwith v. Philby*, 6 B. & C. 635; *Davis v. Russell*, 5 Bing. 354. But it is otherwise in a case of misdemeanor, without a warrant; *Fox v. Gaunt*, 3 B. & Ad. 798; *Bowditch v. Balchin*, 5 Ex. 378; *Griffin v. Colman*, 4 H. & N. 265. And he is in no case justified in handcuffing a prisoner, unless it be necessary to prevent an escape, or an escape be attempted; *Wright v. Court*, 4 B. & C. 596.

2. Actions against Justices.

In an action against a justice of the peace, the plaintiff in addition to his proof of trespass or other grievance, must in general prove the delivery of a notice of action; the commencement of the action in proper time; that the venue is laid in the proper county; and (in certain cases) malice and the want of probable cause. In some cases also it is necessary to prove that the conviction or order, if any, under which the alleged grievance was committed, has been quashed.

[Statute 11 & 12 Vict. c. 44.] By this act, s. 1, after reciting that "it is expedient to protect justices of the peace in the execution of their duty," it is enacted, "that every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable or probable cause, and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."

By sect. 2, "For any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such

justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause:—*Provided*, nevertheless, that no such action shall be brought for anything done under such conviction or order until after such conviction [or order?] shall have been quashed, either upon appeal or application to her Majesty's Court of Queen's Bench; nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to exigency of such summons, in such case no such action shall be maintained against such justice for anything done under such warrant."

By s. 3, "Where a conviction or order shall be made by one or more justice or justices of the peace, and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace *bonâ fide* and without collusion, no action shall be brought against the justice who so granted such warrant, by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice or justices who made the same, but the action (if any) shall be brought against the justice or justices who made such conviction or order."

By s. 4, "Where any poor rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein; and in all cases where a discretionary power shall be given to a justice of the peace by any Act or Acts of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power."

By s. 5, no action lies against a justice for having obeyed a rule made by the Court of Queen's Bench under this section.

The 20 & 21 Vict. c. 43, which enables justices, on summary convictions, &c., to state a case for the opinion of one of the superior courts, gives power (by s. 9), after a conviction or order has been confirmed or amended on appeal, to the justices who stated the case, or any others having the same jurisdiction, to enforce the order or conviction; "and no action or proceeding shall be had against the justices for enforcing such conviction or order, by reason of any defect in the same."

Form and cause of action.] Sects. 1 & 2 of the 11 & 12 Vict. c. 44, are material changes in the law relating to this head. The following cases have been decided on them.

An action of replevin may, it seems, be maintained by the owner against the magistrates who issue a warrant of distress upon his

goods, subject, however, to the provisions of the above act; *Jones v. Johnson*, 5 *Ex.* 862.

In trespass *de bonis*, &c., the grievance was a distress for levying a penalty in a matter within the defendant's jurisdiction, and the conviction had been quashed because it contained an illegal alternative of confinement in the stocks for nonpayment. Held, that the case was within sect. 1, and not sect. 2, and *semble*, if the defendant had committed to the stocks, trespass would have lain; *Barton v. Bricknell*, 13 *Q. B.* 393. Trespass *de bonis* and for imprisonment: The plaintiff had been convicted in a matter within the jurisdiction of the defendant, and the warrant under which the defendant justified recited a conviction *with costs* not really contained in it, and which had been quashed. Held, that this was an excess of jurisdiction, and within sect. 2; *Leary v. Patrick*, 15 *Q. B.* 266. If justices issue a warrant under 2 & 3 Vict. c. 84, s. 1, to distrain on overseers who have been illegally ordered by guardians of a union to pay contribution, it is a case of want of jurisdiction within sect. 2, and trespass lies; *Newbold v. Collman*, 6 *Ex.* 189. Mere informality in orders in a matter in which justices have jurisdiction, as in a levy for church-rates, will not deprive them of the benefit of sect. 1; *Ratt v. Parkinson*, 20 *L. J. (M. C.)* 208; and *per Jervis, C. J., Ib.*, "excess of jurisdiction," in sect. 2, means doing what the justices could not possibly have a legal right to do. A summons to appear *after* conviction is not a summons within the last part of the proviso in sect. 2; and *semb.* if the party summoned *before* conviction appears by counsel or attorney, it is an appearance within the same section; *Bessell v. Wilson*, 1 *E. & B.* 489. If the warrant of the defendant is put in by the plaintiff, it is evidence for the defendant of the previous information on oath recited in it; *Haylock v. Sparke*, 1 *E. & B.* 471. Although sect. 1 seems to assume that an action will lie against a justice of the peace for an act done by him in his judicial capacity and in respect of a matter within his jurisdiction, there appears to be no positive decision in support of any such proceeding. In *Glen v. Hall*, 2 *H. & N.* 379; 27 *L. J. (M. C.)* 78, where the defendant, a justice of the peace, was charged with having maliciously and without reasonable cause convicted the plaintiff upon an unfounded charge substituted for one which had previously failed, the question was raised whether, assuming the defendant to have acted as stated, he was liable; but it became unnecessary for the court to give any express adjudication on the point. Where a justice acts as such out of the territorial limits of his jurisdiction, it is (except in cases authorised by statute) an excess or want of jurisdiction within sect. 2; *semb. Arnold v. Dimsdale*, 2 *E. & B.* 580 (where this is taken for granted). In *Pedley v. Davis*, 10 *C. B., N. S.* 492, 30 *L. J. (C. P.)* 374, the owners and occupiers of abbey lands were empowered to rate themselves, the rates to be enforced by distress warrant issued by a justice of the peace, with an appeal to the quarter sessions whose decision was to be final. The plaintiff, whose land was not abbey land, was distrained upon by virtue of a warrant issued by the defendant, a justice. It was held, that he was entitled to maintain an action of trespass. A justice of the peace, who issues a warrant to enforce payment under a bastardy order, is protected by sect. 1, although he knew that proceedings by appeal had commenced, there being no allegation of malice; for he is acting within his jurisdiction, and granting a case is no suspension of his power. And *quere*, even if it had suspended his power, whether he

would not still have been protected; *Kendall v. Wilkinson*, 4 E. & B. 680. It would seem from the judgment of the court in *Kirby v. Simpson*, 10 Ex. 358 (cited, *post*, under *Notice of Action*, p. 770), that the omission of proper allegations of malice or of reasonable cause would, if necessary, be amended at the trial where the notice is regular. In *Sommerville v. Mirehouse*, 1 B. & S. 652, the declaration stated that the plaintiff was summoned before the defendants, who were justices, for non-payment of a church rate, and that although he proved that, as the rate had been demanded more than six months before the information, the defendants, according to 11 & 12 Vict. c. 43, s. 11, had no jurisdiction, they made an order upon him for payment of the rate, and that he incurred expense in procuring it to be set aside. The defendants pleaded that a fresh demand was made less than six months before the information. It was held that they were not liable, as it did not appear that they had been actuated by malice.

In *Pease v. Chaytor*, 1 B. & S. 658, 31 L. J. (M. C.) 1, the declaration stated that the plaintiff was summoned before the defendants for refusing to pay a church rate, the validity of which he honestly disputed, and gave the defendants notice; that they nevertheless, not acting *bona fide* in the belief that they were acting in conformity with law, and well knowing that they had no jurisdiction, made an order for payment of the rate, and issued a distress warrant against the plaintiff's goods. It was held, on demurrer, that the allegations in the declaration were sufficient to show that the defendants acted without jurisdiction, so that it was not necessary to allege that they had acted maliciously and without reasonable or probable cause. At the trial the judge told the jury that if the plaintiff *bona fide* intended to dispute, and did dispute the validity of the rate, and gave notice to the defendants, who, notwithstanding, determined to proceed, the plaintiff was entitled to recover; but if the jury thought that the objections made by the plaintiff were merely a pretext for the purpose of ousting the jurisdiction of the justices, the defendants must succeed. It was held that the direction was imperfect, as the jury were not asked whether the defendants decided honestly upon the evidence before them, which they might have done, in which case, without malice and want of reasonable cause, they would not be liable, as they had jurisdiction to decide for the time being on the *bona fides* of the plaintiff; *S. C.* 3 B. & S. 621; 32 L. J. (M. C.) 121; *per* Wightman and Blackburn, JJ.; Mellor, J., dissenting.

In an action against a magistrate for a malicious conviction, the question is, not whether there was any actual ground for imputing the crime to the plaintiff, but whether upon the hearing there appeared to be none. The plaintiff must prove a want of a probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender except as they appear from the evidence laid before him; *Burley v. Bethune*, 5 Taunt. 580.

It is not material that a conviction should be drawn up formally at the time when it takes place; for it is only a formal record of what has been done by the court. It will properly bear date at the time when in fact it took place, and the Court will give credit to it as to a conviction made at that time, when produced in a collateral proceeding, such as an action of trespass; *Gray v. Cookson*, 16 East,

20; *Massey v. Johnson*, 12 *East*, 82; *Gimbert v. Coyney*, *M. Cl. & F.* 478; see *Chaney v. Payne*, 1 *Q. B.* 712. But, in general, an order, or a warrant of commitment, cannot be so drawn up *ex post facto*; for it ought to be legal and effectual at the time of enforcing it; *R. v. Cheshire*, 5 *B. & Ad.* 439; *Hutchinson v. Loundes*, 4 *B. & Ad.* 118. Where a justice, instead of drawing up a regular conviction, ordered the offender into custody till he could settle the matter with the prosecutor, which he accordingly did and was dismissed, it was held that the justice could not justify in an action of trespass; *Bridgett v. Coyney*, 1 *M. & R.* 211.

The acts of a justice, who has not duly qualified by taking the oaths, &c., are not absolutely void, so as to make him a trespasser; *Margate Pier Co. v. Hannam*, 3 *B. & A.* 266.

Limitation of Action.] By the 11 & 12 Vict. c. 44, s. 8, "No action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of shall have been committed." The previous enactment was 24 Geo. 2, c. 44, sect. 8, the decisions on which generally apply to the present act.

The six months are to be reckoned exclusive of the day of committing the act; *Clarke v. Davey*, 4 *Moore*, 465; for instance, if the imprisonment or cause of action ends on the 14th of December, it is a sufficient commencement of the action if the writ issue on the 14th of June; *Hardy v. Ryle*, 9 *B. & C.* 603. In case of a continuing imprisonment, a justice is liable to answer for such part of it suffered under his warrant as was within six calendar months before the action commenced; *Massey v. Johnson*, 12 *East*, 67; *Weston v. Fournier*, 14 *East*, 491. In case of an action for a distress for church rate, the three months limited for bringing the action are to be reckoned from the time at which the distress was sold; *Collins v. Rose*, 5 *M. & W.* 194; 7 *Dowl.* 796. In *Pease v. Chaytor*, 3 *B. & S.* 621, 32 *L. J. (M. C.)* 121, the defendants made an order for the payment of a rate on the 6th of January. The distress warrant was signed upon the 3rd of February, and goods of the plaintiff seized on the 14th of March. The order was quashed upon certiorari on the 9th of May, and an action commenced on the 13th of June. It was held that although the action was too late as regarded the making of the order and the expense of quashing it, yet that the seizure was itself a cause of action against which the defendants were not protected by lapse of time.

An action brought under 2 & 3 Vict. c. 47, s. 18, against one of the magistrates of the police courts of the metropolis must be commenced within three calendar months after the act committed, and the *venue* must be laid in the county of Middlesex; see *Barnett v. Cox*, 9 *Q. B.* 617, where the conviction took place in exercise of the jurisdiction given by the 3 & 4 Vict. c. 84, s. 6. So where the act done was within the ordinary province of a county justice; *Hazeldine v. Grove*, 3 *Q. B.* 997.

The *Nisi Prius* Record now always specifies the date of the issuing of the writ of summons by which the action was commenced.

Notice of Action.] By the 11 & 12 Vict. c. 44, sect. 9, "No such action shall be commenced against any such justice of the peace until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual

place of abode, by the party intending to commence such action, or by his attorney or agent, in which said notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated; and upon the back thereof shall be indorsed the name and place of abode of the party so intending to sue, and also the name and place of abode or of business of the said attorney or agent, if such notice have been served by such attorney or agent."

The language of this act differs from that of 24 Geo. 2, c. 44, s. 1, and many of the following cases must therefore be received with caution as existing authorities.

Under 24 Geo. 2, c. 44, it was held that a magistrate was not within the protection of that act, unless he *bonâ fide* believed that the act complained of was done by him in the execution of his duty as a magistrate; *Cann v. Clipperdon*, 10 *Ad. & E.* 582; *Rudd v. Scott*, 2 *Scott, N. R.* 631; see *Hermann v. Seneschal*, 32 *L. J. (C. P.)* 43; 13 *C. B., N. S.* 392; *Roberts v. Orchard*, 2 *H. & C.* 769; 33 *L. J. (Ex.)* 65; *post*, p. 774. And malice and want of reasonable or probable cause will not dispense with notice; *Kirby v. Simpson*, 10 *Ex.* 358; cited *infra*. There must be notice, though the order in respect of which the action is brought was not made "upon complaint" as required by statute; *Norris v. Smith*, 10 *Ad. & E.* 188. Therefore, where one magistrate committed the mother of a bastard child, though two magistrates only had jurisdiction in such a case, he was held entitled to notice; *Weller v. Toke*, 9 *East*, 364. So where he has authority over the subject-matter of the complaint, though the place where the offence is committed is not within his jurisdiction; *Prestidge v. Woodman*, 1 *B. & C.* 12. So where a magistrate committed a driver for being on the shafts of a cart standing still, the act only authorising commitment for riding on them; *Bird v. Gunston*, cited in *Cook v. Leonard*, 6 *B. & C.* 354. Where the capacity in which the party acted is equivocal, as where a lord of a manor, being also a justice of peace, seized a gun in the house of an unqualified person, it will be presumed that he acted as a justice; *Briggs v. Evelyn*, 2 *H. Bl.* 114.

It has been already shown that, whether the action be brought under sect. 1, or sect. 2, of 11 & 12 Vict., the defendant is entitled to notice; but in the case of *Kirby v. Simpson*, 23 *L. J. (M. C.)* 165; 10 *Ex.* 358; cited *post*, p. 774, Parke, B., expressed his opinion that it was for the judge to determine (under sect. 2), whether the defendant was acting *bonâ fide* in the execution of his office as justice, and, therefore, whether a notice of action was necessary. In an action under sect. 1, the plaintiff's own case admits that the defendant was in the execution of his office, and the question of *bonâ fides* does not arise. The defendant cannot claim the benefit of the statute, unless he be in fact a justice; but it is unimportant whether he was qualified; *Margate Pier Co. v. Hannam*, cited *ante*, p. 769.

Where the act in question has not been done in the capacity of a justice, and cannot be referred to that character, notice is not required; *Jamez v. Saunders*, 10 *Bing.* 429; 4 *M. & Scott*, 316; *Morgan v. Palmer*, 2 *B. & C.* 729. Thus, it is not required in an action against a justice for not being duly qualified; *Wright v. Horton*, *Holt*, 458. See further as to notice of action, *post*, p. 774-7. In *Taylor v. Nesfield*, 3 *E. & B.* 724, a notice of action under sect. 1, which did not show that the act complained of was within the defendant's jurisdiction, was held insufficient. Where a notice

of action to a magistrate was signed by the plaintiff himself, but indorsed by his attorney, it was held that the notice was sufficient; *Morgan v. Leach*, 10 M. & W. 558, cited *post*, pp. 776, 777. The notice of action may be served before the quashing of the conviction under which the act complained of has taken place; *Haylock v. Sparke*, 1 E. & B. 471.

The Highway Act, 5 & 6 Wm. 4, c. 50, requires twenty-one days' notice of action; yet if a justice acts under it, as such, he is entitled to his month's notice; *Rix v. Borton*, 12 Ad. & E. 470. See 5 & 6 Vict. c. 97, s. 4, *infra*, p. 775.

As to notice of action against a metropolitan police magistrate, see 2 & 3 Vict. c. 71, s. 53; 10 Geo. 4, c. 44, s. 41, *ante*, pp. 760-1.

As to the form and mode of giving a notice of action, &c., see *post*, pp. 775-7. A threat to "take proceedings" unless the justice complies with a request of the plaintiff to give certain names, is not equivalent to notice; *Norris v. Smith*, 10 Ad. & E. 188. The court in which the action is to be brought must be specified under the new act. It is enough if it give the place of business of the attorney though he resides elsewhere; *Roberts v. Williams*, 2 C. M. & H. 561. If the attorney's name and place of abode are in the body instead of on the back of the notice, it seems it is sufficient; for the intent of the statute is, that the justice may be able to tender amends to the party or his attorney; see *Crooke v. Curry*, cited *Tidd*, 9th ed. 30 (n). If the notice is given and served by the party, it is needless to mention the name or abode of any attorney.

Tender of amends does not dispense with proof of proper notice; *Martins v. Upcher*, 3 Q. B. 662. The notice may be proved by a duplicate original without giving a notice to produce; see *ante*, p. 14, and where the notice is given by an attorney, service by the attorney's clerk is sufficient; *Morgan v. Leach*, *supra*. See further as to notice, *post*, pp. 773-7.

Evidence to connect the justice with the trespass, and the warrant with the conviction.] In case of imprisonment under the warrant of a magistrate, in order to connect the magistrate with the act a notice to produce the warrant should be served upon the defendant, if the warrant be in his possession, so as to enable the plaintiff to give secondary evidence of its contents. But if the warrant remains in the hands of the officer, he must be served with a *subpoena duces tecum*. A copy of it may be obtained by proceeding under 24 Geo. 2, c. 44, s. 6, *ante*, p. 762. The connection between the justice and the officer may likewise be proved, by showing that the former has recognised the acts of the latter.

In order to render the conviction a good defence at common law, it must be connected with the warrant of commitment, and if it be a conviction for an offence differing from that recited in the commitment, it will furnish no justification; *Rogers v. Jones*, 3 B. & C. 409. Where the warrant and conviction state all the circumstances which are essential to give them validity, and are connected by internal reference, no other evidence appears to be necessary than the production of them; *Strickland v. Ward*, 12 East, 74 (n); see further, as to proof of conviction, *ante*, pp. 53, 68.

Venue—General Issue—Tender of Amends, &c.] By the 11 & 12 Vict. c. 44, s. 10, "In every such action the venue shall be laid in the county where the act complained of was committed, or in actions

in the County Court the action must be brought in the court within the district of which the act complained of was committed; and the defendant shall be allowed to plead the general issue therein, and to give any special matter of defence, excuse, or justification in evidence under such plea, at the trial of such action: provided always, that no action shall be brought in any such County Court against a justice of the peace for anything done by him in the execution of his office, if such justice shall object thereto; and if within six days after being served with a summons in any such action such justice, or his attorney or agent, shall give a written notice to the plaintiff in such action, that he objects to being sued in such County Court for such cause of action, all proceedings afterwards had in such County Court in any such action shall be null and void."

The words "by statute" should be inserted in the margin of the plea delivered, otherwise it will have only the same effect as in ordinary cases; and the chapter and section of the act upon which the defendant relies, should also be inserted in the margin of the plea.

Where the act complained of is done in the county of Lancaster, the venue must be laid in the division within which the act was committed; see *Atkinson v. Hornby*, 2 C. & K. 335.

The venue in an action against a metropolitan police magistrate for anything done by him in pursuance of the 2 & 3 Vict. c. 71, and of 10 Geo. 4, c. 44, must be laid in the county of Middlesex, though the act be within the ordinary province of a county justice; see *Hazeldine v. Grove*, 3 Q. B. 997.

By 11 & 12 Vict. c. 44, sect. 11, after notice, and before action, the justice may tender amends, and after action, and before issue joined, he may pay amends into court; and such tender and payment may be given in issue under Not guilty; and if the jury are of opinion that the plaintiff is not entitled to more damages than the sum so tendered or paid, or so tendered and paid, they shall give a verdict for the defendant, and the plaintiff shall not be nonsuited.

When plaintiff to be nonsuited or verdict found for defendant.] By the 11 & 12 Vict. c. 44, s. 12, "If at the trial of any such action the plaintiff shall not prove that such action was brought within the time hereinbefore limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced; or if he shall not prove the cause of action stated in such notice, or if he shall not prove that such cause of action arose in the county or place laid as venue in the margin of the declaration, or (when such plaintiff shall sue in the County Court) within the district for which such court is holden, then and in every such case such plaintiff shall be nonsuit, or the jury shall give a verdict for the defendant."

As to the jury finding a verdict for the defendant when they are of opinion that the sum tendered or paid into court is sufficient, see s. 11, *supra*.

Damages.] By the 11 & 12 Vict. c. 44, s. 13, "In all cases where the plaintiff in any such action shall be entitled to recover, and he shall prove the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he prove that he was imprisoned under such conviction or order, and shall seek to recover damages for any such imprison-

ment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of two-pence as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was so ordered to pay."

3. *Actions against Revenue Officers and others acting in Execution of Statutes.*

There are many Acts of Parliament, private, local, and personal, and public and general, which protect officers and persons acting in the execution of their several duties or powers. Their general object is to require previous notice of action; to make the action local; to limit the time of commencement; to dispense with special pleading; and to enable the defendant to tender amends.

Provisions of the above nature in public general Acts of Parliament exist for the protection, among others, of officers of customs, and others aiding them, 16 & 17 Vict. c. 107, ss. 313 *et seq.*; of excise, 7 & 8 Geo. 4, c. 53, ss. 114—9; of justices, see *ante*, *tit. Actions against Justices*; of constables and others previously mentioned, of bailiffs of local courts, 7 & 8 Vict. c. 19; of persons acting in the execution of the County Courts Act, 9 & 10 Vict. c. 95, s. 138, and 15 & 16 Vict. c. 54, s. 6; of officers in bankruptcy, 12 & 13 Vict. c. 106, ss. 107, 159; of persons acting under the Highway Act, 5 & 6 Wm. 1, c. 50, s. 109, and 27 & 28 Vict. c. 101; of commissioners of metropolitan sewers, 11 & 12 Vict. c. 112, s. 128; of commissioners or others acting under the Poor Law Acts, 4 & 5 Wm. 4, c. 76, s. 104; under the Game Law Act, 1 & 2 Wm. 4, c. 32, s. 47; or under the general or a local board of health, 11 & 12 Vict. c. 63, s. 139; of railway companies acting under their several special acts, and of persons acting under numerous parochial and district acts. Such acts do not agree in every respect either in their phraseology or provisions; but the general principles applied to the construction of them are the same.

By the 5 & 6 Vict. c. 97, s. 3, "so much of any clause, or provision in any act or acts commonly called 'public, local, and personal,' or 'local and personal,' or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed."

By the 5 & 6 Vict. c. 97, s. 5, after reciting that "divers acts, commonly called 'public, local, and personal,' or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said acts respectively; and that the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only," enacts, "that from and after the passing of this act the period within which any action may be brought for anything done under the authority or in pursuance of any such act or acts shall be *two years*, or in case of continuing damage, then within *one year* after such damage shall

have ceased; and that so much of any clause, provision, or enactment by which any other time or period of limitation is appointed or enacted shall be and the same is hereby repealed."

Notice of Action.] As a general rule it may be laid down that a public officer or other person is entitled to notice of action if he *bona fide* believed that the act complained of was done by him in the execution of his duty, or in pursuance of the statute requiring notice of action; *Booth v. Clive*, 10 C. B. 827; *Read v. Coker*, 13 C. B. 850; 22 L. J. (C. P.) 201. "Whether the defendant had reasonable ground for his belief" seems to be not properly a distinct question for the jury; *Gosden v. Elphick*, 4 Ex. 445; it is only part of the question of *bona fides*, and an ingredient for arriving at an opinion upon it; *Booth v. Clive*, *supra*; *Cox v. Reid*, 13 Q. B. 558 (explaining *Kine v. Evershed*, 10 Q. B. 143, and some previous cases in Q. B.); *Hermann v. Seneschal*, 32 L. J. (C. P.) 43; 13 C. B., N. S. 392. In this case, it was laid down that where notice of action is required for anything done in pursuance of a statute, the question, whether a person is entitled to notice, depends on whether "he honestly believed in such a state of facts as would, if it had existed, have afforded a justification for the act complained of;" and this rule was adopted by the Ex. Ch. in *Roberts v. Orchard*, 33 L. J. (Ex.) 65; 2 H. & C. 769. It is not necessary that the defendant should have known of the existence of the statute, or have known what was the governing statute; *Read v. Coker*, *supra*; and all difficulty of this nature is got rid of by the above rule; per Williams, J., in *Roberts v. Orchard*. The question has been commonly treated as one for the jury, as in *Hazeldine v. Grove*, 3 Q. B. 997 (Justices); *Cox v. Reid*, 13 Q. B. 558 (Game Act); *Gosden v. Elphick*, *supra* (Constable); *Horn v. Thornborough*, 3 Ex. 846 (Malicious Trespass Act). But in *Arnold v. Hamel*, 9 Ex. 406; 23 L. J. (Ex.) 137, under the Customs Act, which requires notice, and that no evidence shall be given of any cause not contained in it, the court held that the judge is to decide, on evidence or admitted facts, whether the defendant acted honestly, believing it to be his duty so to act. In *Kirby v. Simpson*, 10 Ex. 358; 23 L. J. (M. C.) 165 (cited *ante*, p. 770, under *Actions against Justices*), it was held in an action under sect. 1 of 11 & 12 Vict. c. 44, that notice is necessary though malice and want of probable cause be alleged, and that the question of *bona fides* does not arise at all.

A person is not entitled to notice of action as a justice, constable, or other officer, because he *bona fide* believed he was such, he not being so in fact; *Hughes v. Buckland*, 15 M. & W. 356, per Parke, B.; *Lidster v. Borrow*, 9 Ad. & E. 654. But where trustees are entitled to notice of action under an Act of Parliament, they are entitled to such notice if they are trustees *de facto*; *Hughes v. Buckland*, *supra*, per Parke, B.; so in the case of a public officer *de facto*, as bailiff; *Braham v. Watkins*, 16 M. & W. 77. A surveyor of the highways informally appointed, who acted *bona fide*, was held entitled to notice of action under the Highway Act; *Huggins v. Waydney*, 15 M. & W. 357. Where an action was brought against the servant of a person who *bona fide* believed himself to be the owner of a fishery, and had reasonable grounds for such belief, but who was not so, for an act which would have been justified under the 7 & 8 Geo. 4, c. 29, if he had been such

owner, and the act gave protection to any person for anything done in pursuance of it; it was held, that the defendant was entitled to notice of action; *Hughes v. Luckland*, *supra*; *Allen v. Preece*, 10 *Ex.* 443; 24 *L. J. (Ex.)* 9. But in order to give the protection of a statute, the specific act need not be authorised by the statute; thus surveyors of highways were held entitled to notice of an action brought for injury sustained by the plaintiffs from an obstruction negligently left on the highway by the person employed by the defendants to erect a weighing machine, though there is no express power in 5 & 6 Wm. 4, c. 50, to erect weighing machines; *Hardwick v. Moss*, 31 *L. J. (Ex.)* 205; 7 *H. & N.* 136. If a person makes a wrongful distress for two causes, for one of which only he is entitled to notice of action, he may be sued in respect of the other without giving him notice of action; *Lamont v. Southall*, 5 *M. & W.* 416. The usual clause of protection in railway acts does not make a notice necessary where the company are sued for negligence as carriers; *Carpue v. London and Brighton Railway Co.*, 5 *Q. B.* 747.

The necessity of giving notice of action is not in general limited to actions for torts. Thus notice of action must be given to a turnpike collector before an action *ex contractu* to recover back money *bond fide* but illegally received can be sustained; *Waterhouse v. Keen*, 4 *B. & C.* 200; *Kent v. Great Western Railway Co.*, 3 *C. B.* 714 (for excessive charges). But it is not in general necessary to give a notice of action before suing on a specific contract, as a building contract with a board of health; *Davies v. The Mayor of Swansea*, 8 *Ex.* 808. Where a local act directed that the guardians, &c., of a parish should be sued in the name of their vestry clerk, and required notice to be given of any action for anything done in pursuance of the act, it was held, that notice was not necessary in an action for work and labour; *Fletcher v. Greenwood*, 4 *Dowl.* 166.

The intended plaintiff should give the notice. Sometimes the statute requiring the notice allows it to be given by an attorney or agent on his behalf. Where a notice of action was given on behalf of two, one of whom was dead, and the action was brought in the name of the other, the court held the notice insufficient; *Pilkington v. Riley*, 3 *Ex.* 739 (under 3 & 4 Wm. 4, c. 90). Where a statute required a notice of action to be given "by the attorney or agent of the party:" it was held, that a notice of action might be given by the prochein amy of an infant, although he might not be the prochein amy on the record; *De Gondouin v. Lewis*, 10 *Ad. & E.* 117.

The notice should be given to the intended defendant, or, if it is intended to make more than one person defendant in the action, the notice should be given to all the defendants entitled to notice. In a case where the same party acted as a clerk to two public bodies, and a notice of action was given, addressed to him as clerk of the one body, the cause of action arising under the supposed authority of the other body, it was held that the notice was insufficient; *Hider v. Dorrell*, 1 *Taunt.* 383.

By the 5 & 6 Vict. c. 97, s. 4, "In all cases where notice of action is required, such notice shall be given *one calendar month at least* before any action shall be commenced; and such notice of action shall be sufficient, any act or acts to the contrary thereof notwithstanding." In reckoning the calendar month in a notice of action, both the day of delivering the notice and that of issuing the writ must be excluded; *Young v. Higgon*, 6 *M. & W.* 49 (decided on 24 Geo. 2, c. 44).

The notice should be a formal notice, and not a mere letter of course; *Lewis v. Smith, Holt's C. N. P.* 27. It is usual to state the address and addition of the party to whom the notice is given, but this is not absolutely necessary, unless required by the statute. In general, the intended plaintiff's name and place of abode should be given in the body, or in the indorsement of the notice; *Wood v. Folliott*, 3 B. & P. 552, n. In this case, "William Wood, of Rotherhithe, in the county of Surrey, merchant," was held a sufficient description. It is not in general necessary to state the names of all the parties intended to be included in the action, or whether the action is to be a joint or several one; *Bax v. Jones*, 5 Price, 168. Where a writ was sued out as described in the notice of action, but afterwards discontinued, and, within the time limited by the statute, another writ was sued out, and served, in which another person was joined as defendant: it was held, that the notice given was sufficient; *Jones v. Simpson*, 1 C. & J. 174. The notice need not, unless the statute requires it, state the form of the action to be brought; *Prickett v. Gratreux*, 8 Q. B. 1020; *Pilkington v. Riley*, 3 Ex. 739. It is sufficient to state the cause of it; *Jones v. Bird*, 5 B. & A. 837. The cause should be stated with clearness and certainty; *Freeman v. Line*, 2 Chit. 673; *Gimbert v. Coyney*, 1 M. & L. 469; but it is sufficient if it informs the defendant substantially of the ground of complaint. The time and place of the act complained of should be stated; *Jucklin v. Fytche*, 14 M. & W. 381; *Breese v. Jerdein*, 4 Q. B. 585. As to what is sufficient statement under the County Court Act, 9 & 10 Vict. c. 95, s. 138, see *Burton v. Le Gros*, 34 L. J. (Q. B.) 91. There was a notice of action to magistrates, for that the defendants, "at —, on the 1st day of August," &c., imprisoned the plaintiff, and also for that they, "on the said 1st day," seized plaintiff's goods. It was held that the place first mentioned might apply to the whole subject of complaint; *Leary v. Patrick*, 15 Q. B. 266. Where the cause of action is for having done an act maliciously, and without any reasonable or probable cause, the notice should state that the act complained of was so done; *Massey v. Johnson*, 12 East, 67. A notice of action which stated that the action would be brought for causing a distress to be made, is sufficient, though the action is for trespass; *Hollingworth v. Palmer*, 4 Ex. 267. The notice is sufficient, though it states the act complained of to have been done by more persons than it really was; *Breese v. Jerdein*, *supra*. A notice under a local act, that, unless the name of the person on whose information the defendants had taken certain steps was given up, proceedings would be taken against them, was held bad, because it was conditional; *Norris v. Smith*, 13 Ad. & E. 188; and *semb.*, per Patteson, J., *ib.*, the notice should have specified that the action would be commenced at the expiration of the number of days mentioned in the act. Signature of the notice by the plaintiff, or his attorney or agent, is not necessary under 24 Geo. 2, c. 44; *Morgan v. Leach*, 10 M. & W. 558.

Sometimes the statute requiring the notice requires the name and place of abode of the intended plaintiff or his attorney or agent to be indorsed on the notice. As to this indorsement on a notice of action against a magistrate, see *ante*, p. 771, under *Actions against Justices*. On a notice of action against a magistrate, it is sufficient to indorse the initial of the Christian name of the attorney, with his surname and abode at length; *Mayhew v. Locke*, 7 Taunt. 63. It is sufficient if indorsed by a firm of two attorneys who are partners, and are

employed by the intended plaintiff; and is good, though one of the Christian names of one be omitted, if there was no other firm of the same surname in the same place at which the notice bore date; *James v. Swift*, 1 D. & Ry. 625; 4 B. & C. 681. And an attorney may be described on such a notice as of the place of his office; *Roberts v. Williams*, 2 C. M. & R. 561; or as of his residence; *Id.* Describing him generally of a large town would not be sufficient, but this would be otherwise if the town be a small one; *Crooke v. Currie*, *Tidd Pr.*, 7th ed., 30 (n); *Osborne v. Gough*, 3 B. & P. 551. Where the indorsement was "given under my hand at Durham," without any other notification of residence, it was held to be insufficient, being a mere description, not of residence, but of the place of signature; *Taylor v. Fenwick*, 7 T. R. 635, n. Where the notice was indorsed by A. and B. as attorneys for the plaintiff, and, the partnership having been dissolved, the action was brought by A. only, this was held to be no ground of objection; *Hollingworth v. Palmer*, 4 Ex. 267.

The service should be made as directed by the act of parliament. In general it is sufficient to serve the notice personally or leave it for the intended defendant at his usual place of abode; see *Castle v. Burditt*, 3 T. R. 623. It is not necessary that the plaintiff or his attorney should personally serve the notice; *Morgan v. Leach*, 10 M. & W. 558.

It is, in general, necessary to plead specially the want of notice of action when required by local and personal statutes; 5 & 6 Vict. c. 97, s. 3 (cited *ante*, p. 773). See *Edwards v. Great Western Railway Co.*, 11 C. B. 588; *Davey v. Warne*, 14 M. & W. 199. See, as to when it must be specially pleaded in other cases, Bullen and Leake on *Pleading*, 2nd ed., p. 638.

ACTIONS BY EXECUTORS AND ADMINISTRATORS.

Before the act establishing a Court of Probate, 20 & 21 Vict. c. 77, there were many courts and persons having jurisdiction to grant probates and letters of administration. These powers are, by that act, transferred to the Court of Probate. A similar act has also been passed for establishing a Court of Probate in Ireland. By 20 & 21 Vict. c. 77, s. 23, the Court of Probate shall be a Court of Record, and such court shall have the same powers, and its grants and orders the same effect throughout all England, and, in relation to the personal estate, in all parts of England, of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively in relation to those matters and causes testamentary and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court.

By sect. 46, a probate, or letters of administration may be granted by the district registrar, if it shall appear by affidavit of the person, or some or one of the persons applying for the same, that the testator, or intestate, at the time of his death, had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit; and such probate, &c., shall have effect over the personal estate of the deceased in all parts of England. By sect. 47, such affidavit shall be conclusive for the purpose of

authorising the grant by the district registrar, and no such grant shall be liable to be impeached by reason that the testator, or intestate, had no fixed place of abode within the district at the time of his death; "and every probate and administration granted by any such district registrar, shall effectually discharge and protect all persons paying to, or dealing with, any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required."

By sect. 57, the affidavit as to the place of abode and state of the property of a testator or intestate, which is to give contentious jurisdiction to the judge of a county court under the previous provisions in the act, shall, except as thereafter provided, be conclusive for the purpose of authorising the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge; and in case such grant of probate or administration shall be liable to be impeached, by reason that the testator or intestate had no fixed place of abode within the jurisdiction of such judge, or within any of the said districts at the time of his death, or by reason that the personal estate sworn to be under the value of 200*l.*, did, in fact, amount to or exceed that value, or that the value of the real estate of, or to which the deceased was seised, or entitled beneficially, at the time of his death, amounted to or exceeded 300*l.*, there is a proviso in this act for staying proceedings in the county court and leaving the party to apply to the Court of Probate.

By sect. 70, pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate, or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the court, and act under its direction.

By sect. 75, "After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased as to the personal estate comprised in, or affected by, such grant of administration, until such administration shall have been recalled or revoked." Sect. 76 provides for the mode of proceeding where, before the revocation of any temporary administration, any proceedings at law or in equity have been commenced by or against any administrator so appointed.

By sect. 92, nothing in this act contained shall affect the stamp-duties now by law payable upon probates and administrations.

By sect. 77, "Where any probate or administration is revoked under this act, all payments *bonâ fide* made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate and administration shall be afterwards granted might have lawfully made."

By sect. 78, "All persons and corporations making, or permitting to be made, any payment or transfer *bonâ fide* upon any probate, or letters of administration granted in respect of the estate of any deceased person under the authority of this act, shall be indemnified

and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."

By sect. 79, "Where any person, after the commencement of this act, renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." [And the death of an executor who has never proved, or the non-appearance of an executor cited to prove, has the same effect. See 21 & 22 Vict. c. 95, s. 16.]

By sect. 86, "All grants of probates and administrations made before the commencement of this act, which may be void or voidable from the want of jurisdiction of the courts granting them shall be valid: Provided that any such grants shall not be made valid by this act when the same shall before the commencement of this act have been revoked or determined by any court of competent jurisdiction to have been void, nor shall this act prejudice or affect any proceedings pending at the time of the passing of this act in which the validity of any such probate or administration shall be in question. If the result of such proceeding shall be to invalidate the same, such probate or administration shall not be rendered valid by this act; and if such proceedings abate or become defective by reason of the death of any party, any person who, but for this act would have any right by reason of the invalidity of such probate or administration, shall retain such right, and may commence proceedings for enforcing the same within six calendar months after the death of such party."

By sect. 87, "Legal grants of probate and administration made before the commencement of this act, and grants of probate and administration made legal by this act, shall have the same force and effect as if they had been granted under this act, but in every such case there shall be due and payable such further stamp duty, if any, as would have been chargeable on any probate or administration which but for this act would or ought to have been obtained in respect of the personal estate not covered by the grant."

By the 20 & 21 Vict. c. 79, s. 95 (the Irish Act), from and after the period at which this act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to, and a copy thereof deposited with the registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the last-mentioned Court, and, being duly stamped, shall be of the like force and effect and have the same operation in England as if it had been originally granted by the Court of Probate in England.

When executor, &c., may sue as such.] An executor may sue in his representative character on contracts made with himself if the money when recovered would be assets; *Cowell v. Watts*, 6 East, 405. But where under a written authority from two of three executors (who alone had proved the will), C. received the amount of certain rents due from the tenants of the testator, and gave a receipt for it in the name and on account of the two; held, that the three executors could not jointly sue C. for the money, unless it was

found by the jury that the two contracted with him on account of themselves and the other executor, or generally on account of the estate; for if the contract was between C. and the two executors only, the third could not adopt it by ratification; *Heath v. Chilton*, 14 M. & W. 632.

Evidence of title, as executor or administrator.] By Rule 5 H. T. 1863, in actions by or against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

When the plaintiff's representative character is denied, the issue lies on the plaintiff; as to which, see *ante*, p. 81. The defendant might, before the late act, show on this issue that the seal of the ordinary was forged, or the letters of administration repealed; *B. N. P.* 143. It cannot be shown, under this or any other plea that the will was forged, or the testator incompetent to make one; *B. N. P.* 143. And it would seem, that questions respecting *bona notabilia* can no longer arise in actions by executors in respect of probates granted by the Court of Probate, for they are by sect. 23 (*supra*, p. 777), equivalent to prerogative probates; and sect. 86 (*supra*, p. 778), makes valid, under certain limitations, all past void or voidable probates or letters of administration.

Where several join in action for injury to a leasehold reversion, whose title consists in their being executors, it is enough to produce a probate, granted to one of them only; for this shows the will to be good from which all derive their title; *Walters v. Pfeil*, *Mood. & M.* 362. When the title is in issue, the insufficiency of the stamp on the probate or letters of administration to cover the amount sued for is a fatal objection; *Hunt v. Stevens*, 3 Taunt. 13; *Carr v. Roberts*, 2 B. & Ad. 905; but see *per* Lord Abinger, C. B., in *Whyte v. Rose*, 3 Q. B. 499. The objection must at any rate be taken as early as possible at the hearing of the cause; *Robinson v. Lord Vernon*, 7 Jur., N. S. 146.

The nonjoinder of a co-executor as plaintiff is only matter of plea in abatement; 1 Saund. 291 i, n. (l), in *Cabell v. Vaughan*, whether the action be in contract or tort.

Evidence of the cause of action.] With regard to the cause of action, the evidence will be the same as in an action between the defendant and the testator or intestate. But attention must be paid to the form of the declaration. Thus, if the defendant ordered a coat to be made by A., whose executor finished and delivered it, the executor cannot sue as for goods sold and delivered by A.; but *semb.*, he must either sue as for sale and delivery by himself as executor, or must declare specially; *Werner v. Humphreys*, 2 M. & G. 853, and note *ad fin.* A. agreed to do carpenter's work for B., to be paid for on completion: A. died before completion, and the plaintiff, A.'s executor, agreed to complete it: Held, that plaintiff could not recover for the work done by A. as a debt due to B. in his lifetime, for there was no debt in A.'s lifetime; but he might recover on a *quantum meruit* as for a debt due to plaintiff as executor for work so done by A.; *Crosthwaite v. Gardner*, 18 Q. B. 640.

Evidence on a plea of statute of limitations.] On a plea of the statute of limitations to a declaration containing only counts on pro-

mises to the testator, and issue thereon, the plaintiff will not be allowed to give evidence of promises or acknowledgments to himself after the death of the testator; *Sarell v. Wine*, 3 *East*, 409; *Tanner v. Smart*, 6 *B. & C.* 608. Action by administrator on a note given by defendant to the intestate; on an issue on the statute of limitations, it was held that an agreement between plaintiff and defendant that defendant should retain the interest on the note, in consideration of his maintaining the child of intestate, was equivalent to payment of interest so as to bar the statute; *Bodger v. Arch*, 24 *L. J. (Ex.)* 19; 10 *Ex.* 333. When a person dies abroad to whom a right of action has accrued during his residence there, and he never returned to this country after the accrual thereof, his executors may sue for it, although more than six years have elapsed since it accrued; *Townsend v. Deacon*, 3 *Ex.* 706. In *Penny v. Price*, 18 *C. B.*, *N. S.* 393, it was, however, clearly laid down, that where the cause of action has once accrued, and the statute has begun to run, the executors are barred in the same manner as the testator would have been, and are entitled to no delay in taking proceedings. The grant of administration relates back to the death for the benefit of the estate; *Morgan v. Thomas*, 8 *Ex.* 302.

Evidence of payment.] Before the 20 & 21 Vict. c. 77, payment of a debt to an executor who had obtained probate to a forged will, was a discharge in an action brought against the debtor by the rightful administrator on revocation of the probate; *Allen v. Dundas*, 3 *T. R.* 125. But a payment of money under the probate of a will of a living person will be void; because, in such case the ecclesiastical court has no jurisdiction, and the probate has no effect; *Id.* 130; see *Woolley v. Clark*, 5 *B. & A.* 744. Defendant, before probate granted, *bona fide* paid money due to the estate to a feme covert executrix, and at her request. Her husband afterwards dissented from her being executrix; and probate was refused to her; but the defendant had no knowledge of the husband's dissent: Held a good payment as against a co-executor to whom probate was afterwards granted; *Pemberton v. Chapman*, 7 *E. & B.* 210, affirmed on error, *E. B. & E.* 1056; 27 *L. J. (Q. B.)* 429. Payment to an administrator (before the above act) was a good discharge, though a will existed and was afterwards proved; *Prosser v. Wagner*, 1 *C. B.*, *N. S.* 289; 26 *L. J. (C. P.)* 81.

As to payments to an executor, &c., being a discharge since the above act after the revocation of the probate, &c., see ss. 77, 78, of the act noticed, *ante*, p. 778.

Set-off.] To a declaration for money had and received by the defendant to the use of the plaintiff as administrator, and on accounts stated between them, the defendant cannot plead a set-off of money lent by him to the intestate; *Rees v. Watts*, cited, with other cases, *ante*, p. 419.

Evidence in action by a rightful against a wrongful executor.] In an action of trover or trespass by a rightful executor or administrator against an executor *de son tort*, the latter may, under the general issue and in mitigation of damages, give evidence of payments made by himself in the rightful course of administration; but should those payments amount to the full value of the goods claimed, the plaintiff, will still, it seems, be entitled to a verdict for nominal damages;

Mountford v. Gibson, 4 East, 447; 2 Phill. Evid. 175. But see *B. N. P.* 48. And such payments shall not be allowed in damages, if there be a failure of assets, and the lawful executor would thereby be deprived of his right of preferring one creditor to another of equal rank, or giving himself the same preference; 2 Bl. Com. 508; 1 Williams' Exors., Part 1, B. 3, ch. 5; *Layfield v. Layfield*, 7 Sim. 172. Where an executor under a second will sued the person appointed executor under a prior one, who had administered with knowledge of the later one and whose probate was revoked, it was held that the plaintiff might recover the full value of the goods administered; *Woolley v. Clarke*, 5 B. & A. 744. In this case the defendant seems to have acted *malis fide*; *Thomson v. Harding*, 2 E. & B. 630. And from a report of the same case, 1 Dow. & Ry. 409, it appears that though the court decided in favour of the plaintiff, the amount of damages was referred, so that it cannot be known whether credit was or was not given to the defendant for any payments made by him. In *Thomson v. Harding*, *supra*, a creditor of the deceased was allowed to retain payments made to him by executor *de son tort*, as against one who afterwards administered. And, *semb.*, not every act which makes an executor *de son tort*, will be enough to make good a payment by him. The creditor must have reasonable ground for believing him to be lawful executor; *Ib.* In *Elsworth v. Sandford*, 3 H. & C. 330, the executor *de son tort* in an action at the suit of the lawful executor, pleaded as a defence on equitable grounds, that he had fully administered before the grant of administration to the plaintiff. But this was held to be no answer to the action, as there was no statement that the assets were sufficient to satisfy all the debts of the deceased.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

[*Actions for a legacy.*] An action at law cannot be maintained for the distributive share of an intestate's property against the administrator, nor against his executor, although he may have expressly promised to pay; *Jones v. Tunner*, 7 B. & C. 542. But where the executor has rendered an account to the legatee, in which he debits himself for the amount, "as retained for the legatee," the latter may recover on an account stated; *Hart v. Minors*, 2 C. & M. 700. So trover will lie for a specific legacy after assent by the defendant; *Williams v. Lee*, 3 Atk. 223. And assent to a life interest in a chattel enures as an assent to a further bequest in remainder; but where the executor himself has such life interest bequeathed to him, his taking possession shall be presumed to be as executor, and not as legatee, if assenting to the legacy would be a *derastavit*; *Richards v. Browne*, 3 N. C. 493. The assent is matter of fact, and not law; *Mason v. Farnell*, 12 M. & W. 674. The assent by a deceased executor is good against the administrator *cum test. annexo*; *Johnson v. Warwick*, 17 C. B. 516.

[*Evidence on the plea of ne unques executor or administrator.*] If the defendant intends to deny that he is executor or administrator, he must deny it specially. The plea of *ne unques executor* does not deny the cause of action, but only that the defendant is one of the

representatives of the testator; 1 *Saund.* 270 a, (n). The proof of the issue on this plea lies upon the plaintiff, and he may support it, either by the primary evidence pointed out, *ante*, p. 81, or by secondary evidence after a notice to produce the probate; *ante*, pp. 11, 81; and the presumption is that the probate or letters are in the possession of the party who is alone entitled to them.

Upon this plea it is also sufficient to show such circumstances as would make the defendant *executor de son tort*. What acts will make a man an *executor de son tort* is a question of law; but it is for the jury to say whether the acts are proved; *Padget v. Priest*, 2 *T. R.* 97. Evidence of slight acts of intermeddling with the property of the deceased will be sufficient. In one case merely taking a book, and in another a bedstead, was held sufficient; *Anon. Noy*, 69; *Parsons v. Mayesden*, 1 *Freem.* 151. So living in the house and carrying on the trade of the deceased; *Hooper v. Summersett*, *Wightw.* 16; suing for, receiving, or releasing the debts due to the estate; *Com. Dig. Administrator* (C. 1); entering on a lease or term for years; *Bac. Ab. Executors* (B. 3); pleading any other plea than *ne unques executor* to an action brought against him as executor, will be evidence to prove the party an *executor de son tort*; *ibid.* So where A., the servant of B., sold goods of C., an intestate, both before and after C.'s death, in pursuance of orders given by C. in his lifetime, and paid the money arising from such sale into the hands of B., it was held that B. was an *executor de son tort*; *Padget v. Priest*, 2 *T. R.* 97. And where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, before the expiration of which time the debtor died, and the creditor took and sold the goods, it was held that the bill of sale was fraudulent against other creditors, and that he had thereby rendered himself *executor de son tort*; *Edwards v. Harben*, 2 *T. R.* 587. Locking up the goods of the deceased; directing the funeral in a manner suitable to the estate, and out of the effects of the deceased; feeding his cattle; repairing his houses, or providing necessaries for his children, will not render the person liable as *executor de son tort*, for they are merely offices of kindness and charity; *Williams on Executors*, Pt. 1, B. 3, ch. 5. Where the widow of a hairdresser continued in the house and shop after his death without selling anything, and gave a promissory note to a creditor of her husband, and afterwards took out administration; held that, on this evidence alone she could not be charged as *executrix de son tort*; *Serle v. Watersworth*, 4 *M. & W.* 9.

In answer to the evidence adduced to prove him *executor de son tort*, the defendant may show that he took possession of the intestate's goods under a *fuir* claim of right; *Femings v. Jarrat*, 1 *Esp.* 335; *Com. Dig. Administrator* (C. 2); or that he acted under the authority of the rightful administrator; but it is no defence that he acted as the agent of one named executor, who never proved the will; *Cottle v. Aldrich*, 4 *M. & S.* 175. It has been doubted whether there can be an *executor de son tort* where there is a lawful executor in being; *Hall v. Elliot*, *Peake Ca.* 87; *Read's case*, 5 *Co.* 34 a. And there can be no *executor de son tort* by merely taking from and under such a tortious executor; *Paull v. Simpson*, 9 *Q. B.* 365. But an agent who collects assets for an *executor de son tort*, knowing him to be such, makes himself accountable to the rightful executor, though he have already accounted to his principal; *Sharland v. Mildow*, 5 *Hare*, 569; 15 *L. J. (Chanc.)* 434. The *executor de*

son tort of a rightful executor is liable in the same manner as a rightful executor for the debt of an original testator; *Meyrick v. Anderson*, 14 Q. B. 719.

In assumpsit against several defendants, as executors, who plead *ne unques executors*, the plaintiff may have a verdict against the real executors on the counts charging them in their representative capacity, and the other defendants must be discharged; *Atkins v. Humphrey*, 2 C. B. 654.

Evidence on plene administravit—proof of assets.] Where the defendant pleads *plene administravit*, and the plaintiff replies that the defendant had assets, the issue lies upon the plaintiff, who must prove assets existing at the time of the writ sued out; *Mara v. Quin*, 6 T. R. 10. If the assets came to the hands of the defendants after the writ sued out, the plaintiff should reply that fact specially, and will not be allowed to give it in evidence under the general replication; *id.* 11. Proof that certain articles of furniture were bought by the deceased and seen in his house shortly before his death, is *prima facie* evidence of assets; *Britton v. Jones*, 3 N. C. 676; *Stroud v. Dandridge*, 1 C. & K. 445. In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the ecclesiastical court. But a copy of the inventory signed by the appraisers, and not by the executors, is not evidence; *B. N. P.* 140. Where the defendant has not distinguished the sperate from the desperate debts in the inventory, it has been held that the whole shall, *prima facie*, be taken to the assets, so as to throw the *onus* of proving some of them desperate upon the defendant; *B. N. P.* 140; *Smith v. Davis*, *Solu. N. P.* 712. But Lord Ellenborough ruled, that it was necessary to prove, presumptively at least, that the debts have been paid; *Giles v. Dyson*, 1 Stark. 32. It is not every inventory that will be proof of assets. Thus the inventory exhibited by an executor before probate, in which he is bound to include all the effects of the testator without deductions, is not even *prima facie* evidence of assets; *Stearn v. Mills*, 4 B. & Ad. 657. The probate stamp has been held to be *prima facie* evidence that the executor has assets to the amount covered by the stamp; *Foster v. Blakelock*, 5 B. & C. 328. This case was, however, doubted in *Stearn v. Mills*, *supra*. In *Mann v. Lang*, 3 Ad. & E. 699, the court were of opinion that such stamp was admissible evidence for the plaintiff; but were not agreed whether it was *prima facie* evidence of the amount of assets. Where, to prove assets, an account rendered by the defendants to the plaintiff was given in evidence, in which they stated that a sum of money had been awarded as due to the testator's estate, Lord Ellenborough held that this was not sufficient, without showing that it had been received by the executors; *Williams v. Innes*, 1 Camp. 364. If an executor submits to arbitration, it is not an admission of assets; the arbitrators not directing the executor to pay the money; *Pearson v. Henry*, 5 T. R. 6. But a submission to arbitration, and an agreement to pay what shall be awarded, with an award to pay accordingly, is an admission of assets to the amount of the sum so awarded; *Barry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 T. R. 453, and *quere* if not conclusive. Proof of an admission by an executor that the debt was just, and that it should be paid as soon as he could, is not evidence to charge him with assets; *Hindsley v. Russell*, 12 East, 232. So the payment of inte-

rest upon a bond of the testator is not an admission of assets; *Cleaverly v. Brett*, cited 5 T. R. 8. An administrator *bond fide* compounding with a debtor to the estate, is not liable to the full amount of the debt compounded, as he is where he releases it without consideration; *Pennington v. Healey*, 1 C. & M. 402. As to admissions by executor before probate, see *Legge v. Edmonds*, 25 L. J. (Chan.) 125, and cases cited, *ante*, p. 63.

Where leasehold premises are the assets, the value as between the lessor and the lessee's executor is to be taken exclusive of deterioration for want of repair, or other breach of covenant committed in the executor's time; and the insolvency of an under-tenant, let in by the testator, cannot be taken into consideration, at least where there is a clause of re-entry in the underlease for non-payment of rent; *Hornidge v. Wilson*, 11 Ad. & E. 645. In the above case the action was for rent against the executor, as assignee of the testator. In debt against executor as assignee of the lessee under a lease, at the rent of 90*l.*, the defendant pleaded that he entered only as executor; that the premises *had not yielded any profit*; and that he ought to be charged only as executor, and had no assets: plaintiff replied that the premises had yielded profit to the defendant. The jury found that they might have been let for 60*l.* a year. Held that on this issue the pleadings must be taken to mean that the premises were unprofitable, and that the plaintiff was therefore entitled to a verdict for the amount, not of 90*l.* but of 60*l.*, the plea being taken distributively; *Hopwood v. Whaley*, 6 C. B. 744. In *Keursley v. Oxley*, 2 H. & C. 896; where the defendant was sued as assignee of a lease of premises he pleaded that administration *de bonis non* of the lessee was granted to S., whom he afterwards married, and that neither he nor his wife entered into possession after the grant. It was held that the plea was good, as it showed that the defendant could only be liable in a representative character, and that he had never taken possession.

Assets mean legal, and not equitable assets; therefore, where a testator appoints as executor the payee of his promissory note, to whom he devises a freehold house, subject to a pecuniary charge for payment of debts; this charge is not assets applicable to the payment of the note, so as to extinguish the debts due to the payee; *Lowe v. Peskett*, 24 L. J. (C. P.) 196; 16 C. B. 500. But where an executor has redeemed a mortgage of an equitable estate, the surplus monies in Court after a sale of the estates charged are legal assets and may be retained by an executor creditor; *Cook v. Greyson*, 25 L. J. (Ch.) 706; 3 Drew. 547.

Though the plea of *plene administravit* in an action of assumpsit against an executor admits *some* cause of action, it does not always admit the amount. When not admitted it must be proved by the plaintiff; *Shelley's case*, 1 Salk. 296; B. N. P. 140.

On a plea by several executors that they have fully administered, if some appear to have assets in their hands, and the others not, the latter are entitled to a verdict; *Parsons v. Hancock*, Mood. & M. 330: although they join in the plea. See 2 *Williams on Executors*, 2nd ed., 1219.

Evidence on plene administravit in answer to proof of assets—Payment of debts.] When the plaintiff has given evidence of assets, the defendant, in answer to such evidence, may prove that those assets have been exhausted by payment of other debts of the deceased

of as high, or of higher, degree than the debt of the plaintiff, provided such payments were made before the writ. And payment of lower debts before notice of the plaintiff's debt of a higher degree is evidence under this plea; 2 *Will. Exors.* Pt. 5, B. 2, ch. 1. So payment of simple contract debts before a breach of covenant had been committed, is a defence under it; as in an action by the executor of the lessee against the executor of the assignee of a lease on a covenant to indemnify against breaches of covenant to repair, the breach having been committed after the lease had been sold and assigned by the defendant; *Collins v. Crouch*, 13 Q. B. 542; *Read v. Blunt*, 5 Sim. 567. But where the covenant is for payment of rent, and the executor, being in possession, has derived any profit from the lease, such profits must, it is said, be retained as assets in payment of rent; *semb. per Cur.* in *Collins v. Crouch*, *supra*. When the defendant pleads "no assets," without the averment of *plene administravit*, he must show the payment of assets by a due course of administration; *Reeves v. Ward*, 2 N. C. 235.

The act 22 & 23 Vict. c. 35, contains important provisions for the protection of executors against dormant or contingent claims under leases and other conveyances of land, and for enabling them to distribute assets after ineffectual notices to creditors and others to come in and claim. See sections 26 to 30, and Hunter's edn. of the act, pp. 73 *et seq.*

The course of distribution is as follows: 1. All funeral expenses, and the charges of proving the will, or of taking out letters of administration; and the defendant may show that he has retained money in his hands to pay for the expenses of administration to which he has made himself liable, without proving that he has paid them; *Gillies v. Smither*, 2 Stark. 528. 2. Debts due to the crown by record or specialty. 3. Certain debts created by particular statutes. 4. Debts of record, if registered according to statute 2 & 3 Vict. c. 11; otherwise they only rank as simple contract debts; *semb.*, *Hickey v. Hayter*, 6 T. R. 384. 5. Debts due by specialty, and rent. 6. Debts due by simple contract, first to the crown and, secondly to a subject; *Com. Dig. Administration* (C. 2).

The expenses of the funeral, if reasonable, and suited to the rank and circumstances of the deceased, will be allowed out of the assets; if unreasonable, the executor must take his chance of the estate turning out solvent; *Edwards v. Edwards*, 2 C. & M. 612. And he will be liable to reasonable expenses, although he did not actually order the funeral, provided the credit was not given to another; and if he has authorised unreasonable expenses, he is liable personally, and not merely as executor; *Brice v. Wilson*, 8 Ad. & E. 349 (n); and an administrator may be sued *as such*, even where he has sanctioned them before he took out administration; *Lucy v. Walrond*, 3 N. C. 841.

If the defendant has paid debts to the amount after the suing out, but before notice of, the plaintiff's writ or debt, he must plead such defence specially, and cannot give it in evidence under *plene administravit*, under which no payments made after the action commenced can be shown; *Dyer* 32 (a), (margin); *Com. Dig. Administration* (C. 2). An executor *de ton sort* may pay a specialty debt after action brought by a simple contract creditor, and may plead the payment of that debt in bar of the action; *Oxenham v. Clapp*, 2 B. & Ad. 309.

Where the action is brought on a bond of the deceased, and the

defendant pleads *plene administravit*, and relies upon the payment of other bonds of the deceased, the execution of such bonds must be duly proved even though they have been destroyed; *Gillies v. Smither*, 2 Stark. 530; see also *Poole v. Warren*, 8 Ad. & E. 582. Where, however, the defendant being sued on a simple contract, pleads *plene administravit*, and relies upon the payment of a bond of the deceased, it will be sufficient, it is said, to prove the payment; *B. N. P.* 143; for, even if not a bond, it is yet a good administration.

Where defendant shows payment of debts, &c., plaintiff may show on this issue that the payment was made out of another fund applicable to such debts, and not out of the assets; *Marston v. Downes*, 1 Ad. & E. 31. In debt on bond, to which defendant pleaded *plene administravit*, before notice, it was held that if the defendant had invested the residue in the funds in his own name, although for the benefit of the legatees to whom he had paid the dividends for many years, he was still liable as for assets in hand; and it was questioned whether payment of legacies before notice could be proved under the plea of *plene administravit*; *Smith v. Day*, 2 M. & W. 684.

Though a creditor may, by misleading an executor, preclude himself from objecting to the payment of a legacy before debt, yet a letter written by him to the executor intimating an intention to hold him liable personally, and not as executor, is insufficient for this purpose; *Richard v. Broune*, 3 N. C. 493.

Evidence on plene administravit—retainer.] The defendant may either plead a retainer of a debt due to him (which must be a debt of an equal or higher degree than the debt for which the action is brought, in order to entitle the defendant to retain it) or may give it in evidence on the plea of *plene administravit*; 1 Saund. 333 (n). So the defendant may retain for payments which he has made out of his own monies before the issuing of the writ in discharge of debts of the deceased of equal or higher degree than the plaintiff's; *Co. Litt.* 283 a; *B. N. P.* 141.

An executor *de son tort* cannot retain for his own debt, though of higher degree, and though the rightful executor after action brought has consented to the retainer; *Curtis v. Vernon*, 3 T. R. 587; on Error, 2 H. Bl. 18. In answer to such evidence of retainer, the plaintiff may show who are the rightful executors; *B. N. P.* 143. Where the defendant pleads a retainer, and also a judgment recovered, which together cover the assets, it is sufficient for the plaintiff to falsify either claim; *Campion v. Bentley*, 1 Esp. 344; see *Gilbert v. Dee*, 1 Freem. 537. One of two executors may retain for his own debt out of a balance due from both to the estate; *Kent v. Pickering*, 2 Keene, 1. See further as to retainer, *Cook v. Gregson*, and *Lowe v. Peskett*, cited *supra*, p. 785.

Evidence on a plea of outstanding debts or judgments—replication per fraudem.] The defendant cannot, under the plea of *plene administravit*, give evidence of the existence of unpaid debts of a higher nature; *B. N. P.* 141. Such defence must be pleaded; and if the defendant pleads a judgment obtained against him for 100*l.*, and that he has not goods except to the value of 5*l.*, and the plaintiff proves that he has 100*l.*, yet he gains nothing; for the substance of the issue is that the defendant has not above what will satisfy the judgment; *Moon v. Andrews*, Hob. 133; 1 Saund. 333 (n).

Where the defendant pleads an outstanding judgment, the plaintiff

may reply that it was obtained or kept on foot by fraud, which the defendant is bound to traverse in his rejoinder; and on this issue the plaintiff may either give in evidence that the debt was not a just one, or that less is due than the sum for which judgment has been given; 2 *Saund.* 50 (n). In answer to the latter evidence, which is *prima facie* proof of fraud, the defendant may show that the judgment was entered for more than was due by mistake; *Pease v. Naylor*, 5 T. R. 80. If a judgment is pleaded, and *per fraudem* replied, upon which issue is taken, and it appears in evidence that the creditor was willing to take less than is recovered, it is proof of fraud; but if it be shown that the administrator had not assets to pay that sum, it is no fraud; *per Cur.*, *Parker v. Atfeild*, 1 Salk. 312. If the defendant pleads several judgments recovered against himself, to which the plaintiff replies fraud, it will entitle the plaintiff to a general judgment if he can avoid any one of them; for a judgment recovered against an executor, being an admission of assets, if any one of the judgments be falsified, the defendant admits by his plea that he has more assets than will satisfy the other judgments by as much as the judgment, so falsified, amounts to; 1 *Saund.* 337 a (n). See *Chamberlaine v. Pickering*, 1 *Freeman*, 28; *Gilbert v. Dee*, *ib.* 537. When the judgments or debts pleaded are upon penalties, the right way of replying is to say that the creditor would have accepted the less sums, but the defendant either would not pay, or had paid them, and kept the judgments or bonds on foot by fraud and covin; and the plaintiff, on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties. If he replies, generally, that the judgments were for less sums, and that the defendant has assets above what will satisfy them, on the issue that he has not, the defendant has a right to insist on the penalties as the debts; 1 *Saund.* 334 (n).

An executor may confess a judgment to a creditor in equal degree with the plaintiff, pending the action, and plead it in bar; and, though done for the express purpose of depriving the plaintiff of his debt, it is good both at law and in equity; 2 *Saund.* 51 (n); *Pickstock v. Lyster*, 3 M. & S. 375.

Revocation of authority by death.] A. contracted with the plaintiff that he should endeavour to sell a picture belonging to A., and if he succeeded, A. should pay him 100*l.* A. died. The plaintiff endeavoured to sell the picture; and, after A.'s death, succeeded in selling it, and brought an action against A.'s administratrix. The declaration set out these facts, and alleged that the defendant confirmed the sale as administratrix, and the plaintiff claimed the 100*l.* from the defendant as administratrix: Held, that the declaration was bad; that the defendant was not liable as administratrix, or personally, for the 100*l.*, the original authority having been revoked by A.'s death. *Semble*, That the defendant might be liable personally to the plaintiff, after the confirmation of the sale, on a *quantum meruit*, as on a fresh employment by her to sell; *Campanari v. Woodburn*, 24 L. J. (C. P.) 13; 15 C. B. 400. In *Smout v. Ilbery*, 10 M. & W. 1, the plaintiff went on supplying goods to the testator's wife after his death by shipwreck, until the news of it arrived. It was held that neither the executors nor the widow were liable for the price of these goods.

Evidence on plea of statute of limitations—promise by one executor.] The plaintiff cannot show a promise by the executor so as to take a

case out of the statute, unless the declaration lays a promise by him ; and a mere acknowledgment of the existence of the debt is not sufficient : There must be an express promise ; and, where there are several executors co-defendants, there must be a promise by all ; *Tullock v. Dunn, Ry. & Mood.* 416. And now, by 9 Geo. 4, c. 14, the promise must be in writing ; but the plaintiff may recover against any one or more of the executors who has made such promise ; but nothing in that act is to lessen the effect of any payment of principal or interest ; s. 1, *ante*, p. 400 ; and see, as to admission by a co-executor, *Fox v. Waters*, 12 *Ad. & E.* 43, and other cases cited, *ante*, p. 63. But the 19 & 20 Vict. c. 97, s. 14 (which is not retrospective ; *Jackson v. Woolley*, 8 *E. & B.* 784) enacts that one executor shall not lose the benefit of the statute by the payment of a co-executor.

Evidence in an action suggesting a devastavit.] If an executor or administrator, in an action brought against him as such, admit assets by his pleading, he will not, in an action of debt on the judgment suggesting a *devastavit*, be allowed to show that he has not assets ; and it will be sufficient for the plaintiff, upon issue joined on the plea of *non devastavit*, to prove the former judgment and the return of *nulla bona* to the *fi. fa.* ; *Erving v. Peters*, 3 *T. R.* 685 ; *Skelton v. Hawling*, 1 *Wils.* 259. Where the defendant confessed assets 380*l.*, and gave a check for the amount on a banker who refused to pay it without the assent of other co-executors, held, that this was no answer ; for the defendant was estopped by admitting assets at his disposal ; and *semb.*, he ought to have pleaded assets specially, so as to show that he had them only jointly with the co-executors ; or have denied assets altogether if he had no power over them ; *Cooper v. Taylor*, 6 *M. & G.* 989.

Where the defendant pleads *non est factum testatoris*, or a release to the testator, or payment by him, or *non assumpsit*, these pleas admit assets ; 1 *Saund.* 335 (n). So a judgment for the plaintiff on demurrer, or by default, will be evidence of assets ; *Rock v. Leighton*, 1 *Salk.* 310 ; though no *devastavit* has been returned by the sheriff ; *Leonard v. Simpson*, 2 *N. C.* 176 ; see also *Palmer v. Waller*, 1 *M. & W.* 689. Where the plea denied the wasting, evidence of a judgment for the plaintiff in a court baron on a plea of no assets, and *nulla bona* returned to a *fi. fa.* in that court, was held conclusive against the defendant, without replying the estoppel ; *Dawson v. Gregory*, 7 *Q. B.* 756. The *devastavit* of one of several executors does not affect the others who took no part in the receipt of the assets ; *Pemberton v. Chapman*, 7 *E. & B.* 219.

Suggestion of death.] Upon the death of a sole, or sole surviving, party to an action of which the cause survives, there is a power under sects. 137, 138, of C. L. Pro. Act, 1852, to proceed in the action after suggestion of the death and executorship ; and the issues joined thereon are to be tried on the trial of the other issues. In *Flinn v. Perkins*, 32 *L. J. (Q. B.)* 10, it was held that the act gave power to enter a suggestion of the death of the plaintiff, and to continue the action in those cases only where the cause of action would, before that act, have survived to the representative, and he could have commenced an action in his representative character. The court, therefore, in action for negligence at the suit of an infant by his next friend, refused to enter a suggestion of the death of the plaintiff.

ACTIONS AGAINST HEIRS AND DEVISEES.

An action of debt on the specialty of the ancestor lies at common law against the heir if named in the deed; *Co. Litt.* 209 *a.* And under the 11 Geo. 4 & 1 Wm. 4, c. 47, ss. 2 and 3, it lies against the devisee also, on a specialty in which the heir is named.

The evidence in actions against an heir, or heir and devisee jointly, or the devisee alone, depends on the plea and issue. Besides the other defences pleadable in an action on a bond or covenant, &c., the defendant may deny that he is heir, or may plead that he has nothing by descent or by devise.

Evidence on plea of riens per descent.] The law of inheritance has undergone a material change by 3 & 4 Wm. 4, c. 106, partly recited, *ante*, pp. 643-4. It must be borne in mind that the following cases were decided before the passing of that Act.

Upon issue joined on the plea of *riens per descent*, the execution of the bond or other specialty being admitted by the plea, the plaintiff must prove the assets by descent; and if assets are averred in a certain county, plaintiff may prove them in any other county; *B. N. P.* 175. The seisin of the ancestor may be proved by showing that he was in possession of the lands, or in the receipt of the rents and profits; *ante*, pp. 50, 644. Where the lands have descended from the obligor to another who died seised, and from him to the defendant, the descent may be stated specially, as that the defendant was the heir of A. who died last seised, who was the heir of the obligor; and so it must be, where there have been several intermediate descents; for if the declaration be against the defendant, as heir of the obligor, and it appears in evidence, on the plea of *riens per descent* from the obligor, that the defendant is *heir of the heir* of the obligor, it is a variance; 2 *Saund.* 7 *d.* (n). *Jenks's case*, *Cro. Car.* 151; *Kellow v. Rowden*, *Curth.* 126. It seems, therefore, that the plea of *riens per descent* does not admit the heirship, which must be proved. It is sufficient in the declaration to charge the defendant as *heir* generally, without stating *how* heir, as son, cousin, &c., and the plaintiff must show how heir in evidence; *Denham v. Stephenson*, 1 *Salk.* 1355.

On this issue the defendant may show a bond to the crown by his ancestor, and an extent thereon to the amount of the assets; but proof of the extent alone is not sufficient. *Sherwood v. Adderley*, 1 *Ld. Raym.* 734. And when the defendant has paid another bond creditor to the value of the land descended, he should plead it. *Buckley v. Nightingale*, 1 *Str.* 665.

Evidence on plea of riens per devise or descent—What are assets.] It is a general rule of the common law that, though the ancestor *devises* the estate to his heir, yet if he takes the same estate in quality and quantity that the law would have given him, the devise is a nullity, and the heir is seised by descent, and the estate assets in his hands; 2 *Saund.* 8 *d.* (n). *Reading v. Royston*, 1 *Salk.* 242. So where the land is devised to him charged with the payment of a sum of money; *Clerk v. Smith*, 1 *Salk.* 241; or of debts; *Allan v. Heber*, 2 *Str.* 1270. But this rule of law is now altered as to descents since 1833,

by 3 & 4 Wm. 4, c. 106, sect. 3, cited *ante*, p. 653. See 2 *Saund.* 8 *h. n.* (z).

If there be a mortgage *for years*, the reversion in fee in the mortgagor is legal assets, and the plaintiff may have judgment with a *cesset executio*; but where there is a mortgage *in fee*, the equity of redemption is not legal assets; 2 *Saund.* 8 *c.* (n); *Plunket v. Penson*, 2 *Atk.* 294. So a copyhold in fee is not assets; 4 *Rep.* 22 (a). By the Statute of Frauds, 29 Car. 2, c. 3, s. 12, an estate *pur autre vie*, which comes to the heir as special occupant, is made assets by descent. Lands which descend in tail are not assets. 1 *Roll. Ab.* 269 (B). A reversion expectant on an estate tail is not assets, and this may be shown on the general plea of *riens per descent*; *Mildmay's case*, 6 *Rep.* 42 (a); *Kellow v. Rowden*, *Carth.* 129. But see 12 *Viner*, *Ab.* 186, that it should be specially pleaded. A reversion after an estate for life is *quasi assets*, but it ought to be pleaded specially by the heir, and the plaintiff may take judgment *quando acciderit*; *Ibid.* *Dyer*, 373 *b.*

If the defendant pleads *riens per descent*, and the jury find that he has something, however small it may be and insufficient to discharge the debt, the plaintiff is entitled to a general judgment for the debt, damages, and costs, and to sue out the like execution against him as on a judgment for his own debt; 2 *Saund.* 7 *a.* (n). It is therefore unnecessary to prove the value of the assets descended; *B. N. P.* 176.

Evidence on plea of riens per devise or descent—replication.] At common law, if the heir had *bonâ fide* aliened the lands which he had by descent before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent *at the time of suing out the writ or filing the bill*, and the obligee had no remedy at law; 2 *Saund.* 7 *c.* (n); though under this issue he might show that the heir had aliened the lands by covin; *ibid.*; *Dyer*, 149, (a) (margin). But this is now altered by statute, 11 Geo. 4 & 1 Wm. 4, c. 47, s. 7, which enacts that to an action of debt or covenant upon any specialty brought against any heir, he may plead *riens per descent*, at the time of the writ brought, and the plaintiff may reply that he had lands, tenements, or hereditaments from his ancestor before the writ brought; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c., so descended, and thereupon judgment shall be given, and execution awarded, &c.

This section corresponds with s. 5 of the former statute, 3 & 4 W. & M. c. 14. When issued is joined on this replication (which may, it seems be pleaded, though the heir has *not* aliened the lands; 2 *Saund.* 8, *h*), the plaintiff in addition to the usual proofs under the plea of *riens per descent*, must be prepared with evidence of the gross (not the annual) value of the lands descended; and if the jury neglect to find the value, the court will award *a venire de novo*. *Jeffry v. Barrow*, 10 *Mod.* 18; *Brown v. Shuker*, 1 *C. & J.* 583.

Evidence in action against heir and devisee.] At common law, if the ancestor had devised the lands, a bond creditor had no remedy against the devisee. But this is now remedied by the second and third sections of the 11 Geo. 4. & 1 Wm. 4, c. 47, which is a re-enactment of the 3 & 4 Wm. & M. c. 14, s. 2. Under the last-mentioned statute an action of covenant lay against a devisee; *Wilson v. Knubley*, 7 *East*,

128. But now, see 11 Geo. 4 & 1 Wm. 4, c. 47, ss. 2 and 3. The Act 3 & 4 Wm. & M. c. 14, was held not to extend to any settlement or disposition made by the obligor in his lifetime and not by will. *Purstowe v. Weedon*, 1 *Eq. Ab.* 149; 2 *Saund.* 8 c. (n). Nor could the devisee alone be sued. *Hunting v. Sheldrake*, 9 *M. & W.* 256.

ACTIONS AGAINST HUNDREDORS, &c.

The statutes of Winton, the Riot Act, the Black Act, and other statutes relating to remedies against the hundred, were repealed by 7 & 8 Geo. 4, c. 27, and their provisions were partially restored, with considerable amendment, by 7 & 8 Geo. 4, c. 31. This last statute took effect on the 1st of July, 1827. The following are the only clauses of it that are applicable to the purposes of the present work.

By section 2, it is enacted, that if any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in the conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid.

Section 3 provides, That no action or summary proceeding shall be maintainable by virtue of that act for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged shall, within seven days after the commission of the offence, go before some justice of the peace residing near, and having jurisdiction over the place where the offence shall have been committed, and state upon oath before such justices the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended: provided also, that no person shall be enabled to bring any such action, unless he shall com-

mence the same within three calendar months after the commission of the offence.

By section 8, no person shall commence any action against the inhabitants of any hundred, &c., where the damage alleged to have been sustained shall not exceed the sum of thirty pounds.

By section 11, every action or summary claim to recover compensation for the damage caused to any church or chapel by any of the offences in that act mentioned, shall be brought in the name of the rector, vicar, or curate of such church or chapel, or in case there be no rector, &c., then in the names of the church or chapel wardens, if there be any such, and, if not, in the names of any one or more of the persons in whom the property of such chapel may be vested; and where any of the offences in this act mentioned shall be committed on any property belonging to a body corporate, such body may recover compensation against the hundred, &c., in the same manner and subject to the same conditions, as any person damnified is by that act enabled to do: provided that the several conditions therein-before required to be performed by or on behalf of any person damnified, may, in the case of a body corporate, be performed by any officer of such body on behalf thereof.

By section 12, reciting that the above offences may be committed in counties of cities and towns, or in such liberties, franchises, cities, towns and places as either do not contribute at all to any county rate, or contribute thereto but not as being part of any hundred or other like district; it is enacted that where any of the said offences shall be committed in a county of a city or town, or in any such liberty, franchise, city, town, or place, the inhabitants thereof shall be liable to yield compensation in the same manner, and under the same conditions and restrictions in all respects, as the inhabitants of the hundred; and everything in that act in any way relating to a hundred, or to its inhabitants, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town, and place, and to the inhabitants thereof; and where the justices of the peace of the county, riding, or division are excluded from holding jurisdiction in any such liberty, franchise, &c., in every such case all the powers, authorities, and duties by that act given to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, &c.; and where the offence shall be committed in a county of a city or town, all the like powers, &c., shall be exercised by the justices of the peace of such county of a city or town.

From the above extract it will appear, that the remedy given by the Statute of Winton against the hundred in the case of robbery, and by the Black Act in the case of certain malicious injuries to property unaccompanied by riot, is abolished.

The remedy against the hundred is extended by the statute 2 & 3 Wm. 4, c. 72, to *threshing machines* feloniously cut, broken, damaged, or destroyed by any persons riotously and tumultuously assembled together, in which case the inhabitants of the hundred, &c., shall be liable to yield full compensation to persons damnified by the offence, not only for the damage done to any such machines, but also for any damage which may at the same time be done by any such offenders to any erection or fixture whatever in or about or belonging to any such machines.

The plaintiff may be called upon, and must be prepared, to prove,

1, his interest in the property injured; 2, the offence; 3, that it was committed within the hundred, &c.; 4, the examination of himself or servant, agreeably to the statute; 5, the recognizance to prosecute; 6, the amount of damage; 7, the commencement of the action within three calendar months.

Many of the cases cited hereafter are decisions on the old statutes, but seem to be applicable to the present act.

Interest of the plaintiff.] The bare trustee of a satisfied term is entitled to sue for damages; *Pritchit v. Waldron*, 5 T. R. 14 (Riot Act). Parties jointly interested in the property may join in the action; *Winterstoke Hundred case*, *Dyer*, 370 (a), (Statute of Winton). Where the property injured consists of a church or chapel, or belongs to a corporation, the 11th section of the act points out the parties who are to sue. A reversioner may sue for the damage sustained by him; *Pellew v. Wonford*, 9 B. & C. 134. Though the hundred may thereby be subjected to several actions; *Ibid.* 142 (Black Act). One of two lessees may recover, according to his share or interest; *Lowe v. Broxtowe*, 3 B. & Ad. 558.

The offence.] By 7 & 8 Geo. 4, c. 30, s. 8, if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or *begin* to pull down, demolish, or destroy any church or chapel, or any chapel for the religious worship of dissenters duly registered or recorded; or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof; or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or any branch thereof; or any steam-engine or other engine for sinking, draining, or working any mine; or any staith, building, or erection used in conducting the business of any mine; or any bridge, waggon-way, or trunk for conveying minerals from any mine;—every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

As this section corresponds almost verbally with section 2 of 7 & 8 Geo. 4, c. 31 (*ante*, p. 792), it is presumed that, in order to entitle the party to an action, the offence must be a felony within the above clause. See *Reid v. Clarke*, 7 T. R. 496 (Riot Act). The 38th section of 57 Geo. 3, c. 19, which extended the remedy to all cases of injury to buildings by rioters, is repealed by 7 & 8 Geo. 4, c. 27. So that where the injury is partial it will be a matter of inquiry (as formerly under the Riot Act) whether the acts of the rioters were a “beginning to demolish” within the above clause. The following cases were decided on the Riot Act.

Where a mob during a general illumination broke the windows, sashes, and shutters of a house, this was held not within the act; *Reid v. Clarke*, 7 T. R. 496. It is a question for the jury whether the rioters intended to stop short of demolition, or to proceed to further acts to effect their purpose; *Burrows v. Wright*, 1 East, 615. Where a mob during a political riot attacked the plaintiff's house, and proceeded to break his windows, shutters, fan-lights over his doors, &c., when the military appeared and dispersed them: Held sufficient evidence of a beginning to demolish; *Sampson v. Chambers*, 4 Camp. 221. On the same occasion, where the mob voluntarily

retired after doing similar mischief to the plaintiff's house, the jury, under the direction of Lord Ellenborough, found for the defendants; *King v. Chambers*, *ib.* 737. A mob attacked the plaintiff's house with intent to liberate a comrade in custody there, and did many acts of violence to the property: *per* Lord Ellenborough, "The question is, what was the purpose of the mob? and whether, if they could not have rescued their leader, they would not have proceeded to demolish the house, as they threatened, unless his escape had intervened? It is a principle of law, that a person intends to do that which is the natural effect of what he does. If, therefore, the pulling down of the house was intended as a means of getting at him, they intended to demolish the house;" *Beckwith v. Wood*, 2 Stark. 263. See also *Holt's N. P. C.* 203, *Anon.* (n); *R. v. Price*, 5 C. & P. 510. The case may fall within the statute, though the intent to demolish may be accompanied with another intent which may have influenced the conduct of the rioters. Thus, where a party of coal-whippers, having a feeling of ill-will towards a coal-lumper who paid less than the usual wages, collected a mob, and went to the house where he kept his pay-table, exclaiming that they would murder him, and began to throw stones, and broke the windows and partitions, and part of a wall, and after his escape continued to throw stones, &c., till stopped by the police; Gurney, B., ruled that the parties might be convicted under the 7 & 8 Geo. 4, c. 30, s. 8, of beginning to demolish, though their principal object might be to injure the lumper, provided it was also their object to demolish the house on account of its having been used by him; *R. v. Batt*, 6 C. & P. 329.

On the 57 Geo. 3, c. 19, where the words are "house, shop, or other buildings whatever," the Court of King's Bench held that hustings, erected to take elections of members, were not within the description; *Allen v. Ayre*, 3 D. & R. 96. A wooden trough, erected on piles to carry water to a place half a mile from the mine, for washing the ore for sale, is an "erection for conducting the business of the mine," within 7 & 8 Geo. 4, c. 31, s. 2; *Barwell v. Winterstoke*, 14 Q. B. 704.

[*Committed within the hundred, &c.*] The offence must be proved to have been committed within the hundred or other district or place named in the declaration, and which must be one of the different classes of places enumerated in the 2nd or 12th section, *ante*, pp. 792-3. Where a distinct hundred is called the "half hundred," or "upper hundred" of A., and the action is brought against the hundred of A., the plaintiff must be nonsuited; 2 *Suind.* (*Williams*) 375 b (n. 3), citing *Constable's case*, *IIob.* 246 (Stat. Winton). If the half hundred of A. be in fact only part of hundred A., the defendant must, it is said, plead in abatement; *Ibid.* But the case in Hobart's reports only shows that the matter must be pleaded "or given in evidence." The action lies against the hundred, though the offence was committed within a borough which, since 5 & 6 Wm. 4, c. 76 (Municipal Corporation Act), is only partially contributory to the county rate; *Birley v. Salford*, 11 M. & W. 391.

[*Examination of party, &c.*] The seven days ought, it seems, to be reckoned exclusively of the day on which the offence was committed; *Pellew v. Wonford*, 9 B. & C. 134 (Black Act). The words of the Black Act (9 Geo. 1, c. 22) differ slightly from those of the

present statute (*ante*, pp. 792-3), and are as follows:—"No person or persons shall be enabled to recover, &c., unless he or they shall within four days, &c., give in his, her, or their examination upon oath of his, her, or their servant or servants that had the care of his or their houses," &c. On this clause it has been decided, that where the premises injured are under the care of several servants, they should *all* be examined; *Duke of Somerset v. Mere*, 4 B. & C. 167. Where a tenant quitted the premises during the hay harvest, and the steward of the *lessor*, living at a distance, directed certain persons to get in the hay, who took possession of the farm for this purpose, and carried on their work under the superintendence of an under-steward, it was held that these latter, and not the steward, were the persons to be examined; *Ib.* The servant who has the *general* care of the property is the proper person to be examined, although other servants may have the special care of particular parts of it; *Lowe v. Broxtowe*, 3 B. & Ad. 550. It is enough that the party should present himself to be examined if the justice shall think proper. *Per* Lord Tenterden, C. J., *ib.* 564. Where the reversioner sued, his own oath was held sufficient, without examining the tenant or his servants; *Pellew v. Wonford*, 9 B. & C. 134. It is unnecessary to examine both servants and owner; if the latter is in residence, or is only casually absent for a short time, his oath is enough; but where he has no superintendence, and has left the house in the charge of servants, the latter are the proper persons to be examined; *Rolfe v. Elthorne*, *Mood & M.* 185. On the similar clause of 52 Geo. 3, c. 130, s. 4, it was ruled that where the premises demolished belonged to several partners, all who were present at the transaction ought to have been examined; or the affidavit of the one examined should at least express his belief that the rest had no knowledge of the offenders; *Nesham v. Armstrong*, 1 B. & A. 146. It may be inferred from this case, and from the *dictum* of Holroyd, J., in *Duke of Somerset v. Mere*, *suprà*, that the examination of *all* the owners, or *all* the servants, was not necessary under the former statutes where the persons omitted were shown to be ignorant of the subject-matter of inquiry. If so, the introduction of the words in the recent statute, "or such of them as shall have knowledge of the circumstances of the offence," makes no material difference in its construction.

In the stat. 27 Eliz. c. 13 (Hue and Cry), the examination is to be before a "justice of the peace of the county inhabiting within the hundred, or near unto the same." Under this act it was decided that, though the examining justice lived several miles off, and there were many others living nearer, it was sufficient; the act only being directory in that respect; *Lake v. Croydon*, B. N. P. 186. It was also held no objection that the examination took place out of the jurisdiction, by a justice who was usually commorant with his family within it; *Helier v. Benhurst*, *Cro. Car.* 211. It must be observed, however, that the words of the recent act differ from those of the statute Eliz. of Hue and Cry.

Under the Black Act it was held that the plaintiff was not bound in his examination to state his *suspicion* respecting the offender; *Pellew v. Wonford*, 9 B. & C. 134. It is unnecessary for the justice of the peace to take the examination in writing: it is sufficient for him to appear at the trial and depose the substance of the affidavit; *Graham v. Becontree*, B. N. P. 186 (stat. 27 Eliz. c. 13). But if the affidavit be in writing, no other evidence of the examination

can be admitted; *Ibid.* Proof that the person who took the examination was acting as a justice of the peace is sufficient, and the affidavit may be read on proof that it was delivered to the person producing it by the justice's clerk, without proving his handwriting. *Ibid.*

Amount of damage.] The statute entitles the plaintiff to recover compensation for damage done at the same time by the rioters to any fixture, furniture, or goods whatever, in the buildings or erections therein named, s. 2. Neither the Riot nor the Black Act contained any express provision of this kind. Yet where the injury done to personal property was the immediate effect of the act of demolition, or if the destruction of furniture, &c., and demolition of the building were parts of the same riotous transaction, and done at the same time, the plaintiff was allowed to include the whole in his damages; *Hyde v. Cogan*, 2 *Dougl.* 699 (Riot Act). So where, in pulling down a house, damage was done to a garden appurtenant; *Wilmot v. Horton*, *Ib.* 701 (*n*). So where the rioters broke into a flour-miller's house and damaged the flour in the course of demolishing the house; *Greasley v. Higginbottom*, 1 *East*, 636. But where a distinct and substantive offence was committed by some of the mob, as where the flour (in the last case) was stolen or compulsorily parted with by the dealer at an under price; or where money, plate, &c., were missing after the riot; *Smith v. Bolton*, *Holt*, *N. P. C.* 201; or where the mob broke into a gunmaker's, and carried away the arms for their own use; *Beckwith v. Wood*, 1 *B. & A.* 487; in these cases the hundred was held not liable. In such cases as the two last, the decision would perhaps be the same, notwithstanding the words of additional liability inserted in the existing act.

Commencement of the action.] The commencement of the action appears on the *Nisi Prius* record. See 2 *Saund.* 375 *a*, (*n.* 3). It seems the day of committing the offence is to be excluded in the computation; *Pellew v. Wonford*, 9 *B. & C.* 134, *ante*, p. 796. See *Norris v. Gawtry*, *Hob.* 139.

ACTIONS AGAINST INNKEEPERS.

See pp. 377, 378.

ACTIONS AGAINST SHERIFFS.

Liability of sheriff for the act of his officer.] A sheriff is liable civilly for the tortious act, default, or misconduct, whether it be wilful or inadvertent, of his under-sheriff or bailiff, in the course of the execution of their duties; as where the bailiff takes improper fees; *Woodgate v. Knatchbull*, 2 *T. R.* 149. And the high bailiff of a county court is in the same position; *Burton v. Le Gros*, 34 *L. J. (Q. B.)* 91. It has been held that the sheriff is civilly liable for whatever the bailiff improperly does under colour of the writ; and, therefore, that the sheriff is liable if the officer takes a person into custody under a *fi. fa.*; *Smart v. Hutton*, 8 *Ad. & E.* 568, *n.* In *Gregory v. Cotterell* (on error), 5 *E. & B.* 571, the debtor paid the

debt to an assistant bailiff at the bailiff's office on the execution of a *fi. fa.*, and it was held a satisfaction of the writ as against the sheriff. But if the act complained of be neither expressly sanctioned by the sheriff, nor impliedly committed by his authority, the sheriff is not responsible; *Cook v. Palmer*, 6 B. & C. 739; *Crowder v. Long*, 8 Id. 598. Therefore, as it is no part of the sheriff's duty to receive payment of the amount for which a judgment debtor is in his custody on a *ca. sa.*, he will not be liable if his bailiff receives the amount of such debt from the debtor and misappropriates it, or neglects to pay it within a reasonable time to the creditor; *Woods v. Finnis*, 7 Ex. 363. If an execution creditor induces the bailiff to depart from the ordinary course of his duty without the sheriff's knowledge (*Cook v. Palmer*; *Crowder v. Long*, *supra*), or colludes with the officer (*Raphael v. Goodman*, 8 Ad. & E. 565), it is not competent to such creditor to fix the sheriff with the consequences.

The sheriff frequently, at the request of the party suing out the writ or his attorney, appoints a particular person to execute it. Such person is called a special bailiff. The sheriff is not liable to the party appointing a special bailiff for the acts of such bailiff; *De Moranda v. Dunkin*, 4 T. R. 119. Questions have arisen as to what amounts to such an appointment. Whether what is said, or written, or done, does so amount, seems rather a question of fact than of law; *Ford v. Leche*, 6 Ad. & E. 699; *Balson v. Meggat*, 4 Dowl. P. C. 557. The mere expression of a wish by the attorney that a particular officer may be employed to execute the writ, does not constitute the latter a special bailiff; *Porter v. Viner*, 1 Chit. Rep. 613; *Alderson v. Davenport*, 13 M. & W. 42. Where, the plaintiff having sued out a *ca. sa.* against one H., her agent requested the under-sheriff to direct the warrant thereon to an officer named by him, took the warrant, and himself delivered it to the officer, accompanied him to the house where H. was to be mot with, and encouraged the officer to make the caption in an illegal manner, it was held, in an action against the sheriff for the escape of H. from this custody, that, under the circumstances the officer was a special bailiff; *Doe v. Trye*, 5 N. C. 573; see *Corbet v. Brown*, 6 Dowl. P. C. 794. But the sheriff is liable for the safe custody of the party when arrested by such bailiff; *Taylor v. Richardson*, 8 T. R. 505. Where the sheriff acts judicially, he is not liable for the act or default of his officer; *Tunno v. Morris*, 2 C. M. & R. 298.

[*Proof of connection between sheriff and officer.*] In order to establish the connection between the sheriff and his bailiff, and to affect the former with the acts of the latter, the warrant should in general be proved; though it is not the only medium by which the privity of the sheriff to the act of his bailiff may be established; *Martin v. Bell*, 1 Stark. 417. Proof of the warrant, issued by the under-sheriff under the sheriff's seal of office, is sufficient without proof of the writ; *Gibbins v. Phillips*, 7 B. & C. 535 (n). If the warrant remains in the hands of the bailiff (as it usually does for his justification), a *subpoena duces tecum* should be served upon him. If it has been returned to the sheriff's office, a notice to produce should be given, and secondary evidence will then be admissible; and where the warrant, after the levy, had been returned by the bailiff to the under-sheriff, the sheriff still being in office, it was held that a notice to produce, served upon the attorney of the sheriff, was sufficient; *Taplin v. Atty*, 3 Bing. 165. Where the warrant was not returned

to the sheriff's office, but was given by the officer to a third person, and could not be found after diligent inquiry, secondary evidence of its contents was admitted without giving a notice to produce; *Minshall v. Lloyd*, 2 M. & W. 450. It is not sufficient, in order to establish the connection between the sheriff and bailiff, to show that the latter is the bound bailiff of the former, and to produce and prove a paper, received from the bailiff, purporting to be a copy of the warrant; *Drake v. Sykes*, 7 T. R. 113; nor is it sufficient to produce an examined copy of the precept with the bailiff's name indorsed on it, though the sheriff has returned *cepi corpus*; *Martin v. Bell*, 1 Stark. 413. So where an examined copy of the writ and return, with the bailiff's name written on the margin, was produced, Lord Ellenborough held it insufficient to connect the sheriff with his acts; *Jones v. Wood*, 3 Camp. 228; *Hill v. Leigh*, Holt, N. P. C. 217; 7 Taunt. 8; *Morgan v. Brydges*, 2 Stark. 314. But according to *Blatch v. Archer*, Cowp. 63; *McNeil v. Perchard*, 1 Esp. 263; *Fermor v. Phillips*, 5 B. Moore, 184 (n); 3 B. & B. 27 (n); and *Bowden v. Waithman*, 5 B. Moore, 183, it should seem that the fact of the bailiff's name appearing upon the writ, without further proof, is evidence to go to the jury of the connection between the sheriff and the bailiff. If the writing of the bailiff's name on the writ be proved to have been by the authority of the sheriff, it will then clearly be sufficient to establish this connection. Thus where, in an action for escape, the writ produced bore two indorsements, and the witness, who produced the writ, said that he belonged to the sheriff's office, that the writ came to the sheriff's office from the plaintiff's agent marked with the bailiff's name, and that he (the witness) again indorsed the bailiff's name on it, the court thought the sheriff's authority sufficiently proved; *Francis v. Neave*, 3 B. & B. 26. So where the plaintiff offered in evidence the writ with the name of the bailiff indorsed upon it, and it was also proved that the writ had been sent to the under-sheriff's office, where the name of the bailiff had been indorsed upon it, and that the custom of the office was to indorse upon the writ the name of the bailiff who was to execute it, Richards, C. B., held this evidence sufficient; *Tealby v. Gascoigne*, 2 Stark. 202. So where an examined copy of the writ returned by the sheriff with the officer's name indorsed, was produced, and the writ was shown to have been executed by a person of that name, and the course of the sheriff's office was to grant a warrant to the officer whose name was indorsed, or, if not, to strike the name out and insert that of another officer, the evidence was held to be *primâ facie* sufficient to fix the sheriff; *Scott v. Marshall*, 2 C. & J. 238. A paper produced, on notice, from the sheriff's office, containing an order to the bailiff to give the necessary instructions for making a return to the writ, and his answer, was held to amount to a clear recognition of the bailiff by the sheriff; *Jones v. Wood*, 3 Camp. 229. So where a bail-bond, which had been executed and delivered to the bailiff, had been returned to the sheriff, who had made his return of *cepi corpus*, Lord Ellenborough held that this was sufficient to prove the agency of the bailiff; *Martin v. Bell*, 1 Stark. 416. Proof by the officer of seizure under a warrant brought to him by one who said it came from the sheriff's office, and that he knew the handwriting on it, but had since lost it, was held sufficient to admit parol evidence of its contents; *Moon v. Raphael*, 2 Scott, 489; 7 C. & P. 115. In an action against the sheriff for taking the plaintiff's goods, proof by the officer that he took the goods under a

warrant which he produced, and which he stated that he received from Messrs. A. & Co., the London agents of the sheriff, and proof by the under-sheriff that Messrs. A. & Co. were the London agents of the sheriff, was held sufficient to connect the sheriff with the officer; *Shepherd v. Wheble*, 8 C. & P. 534. And so, where, to an action against the sheriff for carrying a party arrested by him to a tavern without his consent, defendant pleaded that he did not carry the plaintiff to a tavern without his consent, it was held, on issue joined thereon, that, as the plea admitted an arrest by the defendant, and as the evidence showed the arrest to have been made by the same officer who carried the plaintiff to the tavern, there was no necessity for further connecting defendant with the act of the officer, by proof of the warrant; *Barsham v. Bullock*, 10 Ad. & E. 23. And where the first count of a declaration, in an action on the case against a sheriff, was framed upon 8 Anne, c. 14, s. 1, for seizing the goods of tenant in execution, without leaving enough to pay the landlord a year's rent then due, and stated that the defendant took the goods of T., the tenant of the plaintiff, under a *fi. fa.* issued against T. at the suit of B., and this was not traversed by the pleas, and no other execution appeared; it was held, that the connection of the person, who was shown to have seized the goods, with the defendant sufficiently appeared without producing any warrant from the defendant to him; *Reed v. Thoys*, 6 M. & W. 410.

Admission by officers of the sheriff.] The under-sheriff is in general the deputy of the high sheriff for all purposes; *per* Lord Kenyon, C. J., *Drake v. Sykes*, 7 T. R. 116; and, therefore, his admissions are evidence against the sheriff without previous proof of his authority in the particular instance, provided they accompany some official act done, or are made with reference to a matter in which the under-sheriff himself is the party to be charged; *Snowball v. Goodricke*, 4 B. & Ad. 541; *ante*, p. 65. But as the *bailiff* is not the general officer of the sheriff, it is necessary to show his agency in the particular instance before an admission by him can be made evidence against the sheriff; and it will then only be evidence in the same manner and to the same extent as an admission by any other agent. See *ante*, p. 64, and *Bowsher v. Calley*, 1 Camp. 391 (n). Declarations made by the officer, whilst in possession under a *fi. fa.*, after the return of it, are evidence against the sheriff; *Jacobs v. Humphrey*, 2 C. & M. 413; *ante*, pp. 64-5.

Sheriff not liable for the acts of his predecessor.] A new sheriff is not liable for any neglect in the execution of a writ delivered to his predecessor. See *Davidson v. Seymour*, Mood. & M. 34; *post*, *Action for Escape in Execution*, p. 812.

The evidence in actions against sheriffs will be further considered under the following heads:—

1. For wrongfully taking the plaintiff's goods in execution.
2. For taking the goods of a tenant in execution without paying arrears of rent.
3. For not paying over money levied.
4. For not arresting, and for false return on mesne process.
5. For an escape on mesne process.
6. For an escape in execution.
7. For not levying, and for false return on final process.
8. For extortion.

1. Action for taking the plaintiff's goods in execution.

In trespass or trover against a sheriff for taking the plaintiff's goods, the plaintiff, as in actions against any other trespasser, may be put to prove the property of the goods, and the taking or conversion by the defendant.

In all cases the sheriff must at his peril execute the writ only on the goods of the party therein mentioned; for if he seizes the goods of a stranger, he will be liable to an action, *Bro. Abr. Trespass*, 99; and this, although in the possession of, and apparently belonging to, the party against whom the writ issued; *Dawson v. Wood*, 3 Taunt. 256. The goods of a woman cohabiting with the defendant cannot be taken in execution, although she passes for his wife (*Edwards v. Bridges*, 2 Stark. Rep. 396; *Glasspoole v. Young*, 9 B. & C. 696), unless the circumstances would warrant a jury in finding that the property was given up by the woman to the defendant; *Edwards v. Farebrother*, 3 C. & P. 524; 2 Moo. & P. 293; *Langford v. Foot*, 2 Moo. & Scott, 349. The goods of a testator or intestate cannot, in general, be taken in execution for the personal debt of the executor or administrator, unless the executor or administrator has made the goods his own; *Farr v. Newman*, 4 T. R. 621; *Quick v. Staines*, 1 B. & P. 293. Where the executrix used the goods of her testator as her own, and afterwards married, and then treated them as her husband's, it was held that she could not, in an action by the husband and wife, *jure uxoris*, object to the same being taken in execution for the husband's debt; *Quick v. Staines*, *supra*. But possession and use of the house and goods of testator are not *per se* enough to make executors liable; *Gaskell v. Marshall*, 1 Mood. & Rob. 132. So in case of possession by a trustee, as such, for a long time; *Fenwick v. Laycock*, 2 Q. B. 108. When the goods of a bankrupt can be taken in execution, has been noticed, *ante*, p. 601; and as to the sheriff's liability when he has seized goods after an act of bankruptcy committed by the execution debtor, see *ante*, p. 725 *et seq.*

An action for converting or detaining goods was held not to be maintainable against a sheriff for seizing under a *fi. fa.* the property of an insolvent after notice that it was excepted by him from his schedule under the 7 & 8 Vict. c. 96, s. 9; *Rideal v. Fort*, 25 L. J. (Ex.) 204. The remedy was said to be by applying to the court to stay proceedings. The sheriff may sell goods which are let or bailed for a term to the defendant, but can only sell his interest therein. If he sells the same *absolutely*, he will not be liable to an action for conversion at the suit of the owner of them, unless at the time of seizure he was entitled to possession; *Bradley v. Copley*, 1 C. B. 685; though such a sale by the bailee himself would be wrongful, and would enable the bailor to sue him or his vendee immediately; *Cooper v. Willomatt*, *ib.* 672; *Fenn v. Bittleston*, 7 Ex. 152. And see *Tancred v. Allgood*, 4 H. & N. 438; 28 L. J. (Ex.) 362. Tenants' fixtures may be taken in execution, but if by agreement with the landlord they are not to be removed till the end of the term, the sheriff cannot take them; *Dumergue v. Rumsey*, 32 L. J. Ex. 88 (Ex. Ch.). The binding effect of the writ of execution on the goods, under 22 Car. 2, c. 3, and the act 19 & 20 Vict. c. 97, s. 1, has already been noticed under a previous head, *ante*, p. 587.

As to fraudulent assignments of goods as against creditors, and the provisions of the late act in relation to bills of sale, see *post*, pp. 803-5.

If a sheriff, after notice of the allowance of proceeding in error, executes a *fi. fa.*, he is liable in trespass; *Belshaw v. Marshall*, 4 B. & Ad. 336. A sheriff who has entered under a *fi. fa.*, and continues on the premises in possession of the goods for more than a reasonable time, is liable in trespass for so continuing beyond the time allowed by law; *Ash v. Dawney*, 8 Ex. 237. If a sheriff breaks into a house for the purpose of executing a *fi. fa.*, the execution against the goods would seem to be valid, but the sheriff is liable to an action for the breaking; *Perceval v. Stamp*, 9 Ex. 167.

Evidence of property.] In general it will be sufficient for the plaintiff to show that he was in possession of the goods at the time of the seizure, which will be *primâ facie* evidence of property. If he was not in possession himself, but he relies upon an assignment from a former owner, proof of possession of such former owner, and of the assignment, will be *primâ facie* evidence of property in the plaintiff.

Evidence of the taking, &c.] As to the sheriff's liability for the act of his officer, see *ante*, p. 798; and as to evidence to prove connection between them, see *ante*, p. 799. The production of a bill of sale executed by the defendant, reciting the issuing of a writ and seizure of the goods, will be evidence of a taking; *Woodward v. Larking*, 3 Esp. 286. A sheriff's officer may be made co-defendant with the bailiffs in a case of illegal entry, if he took the direction in the levy, though not actually present; *Brunswick v. Slowman*, 3 C. B. 317.

Damages.] Where the sheriff was sued for seizing and selling the entire interest in goods of which the debtor and the plaintiff were lawfully possessed, whereby they were carried away by persons unknown, and lost to the plaintiff, it was held that, in the absence of proof of the exact proportion of interest in the goods, the plaintiff was entitled to half the proceeds or value; *Mayhew v. Herrick*, 7 C. B. 229. Where the sheriff has sold for a less sum than the plaintiff, a *bond fide* assignee, gave for them, the jury may award the larger sum as damages; *Lockley v. Pye*, 8 M. & W. 133. Where a sheriff's officer executed a *fi. fa.* against plaintiff illegally by breaking an outer door, and the plaintiff paid, under protest, the amount indorsed, and also a gratuity demanded by the officer, it was held, that the jury might include the whole amount and gratuity in the damages, both being mentioned in the declaration; *Brunswick v. Slowman*, *suprà*.

Defence.

In an action for taking the plaintiff's goods in execution, the most usual defence, viz., that the goods had been fraudulently assigned to the plaintiff, and were in fact the goods of the party against whom the writ issued,—cannot (by the rules of H. T. 853) be given in evidence under the general issue, but is admissible under a plea denying the plaintiff's property; *Ashby v. Minnitt*, 8 Ad. & E. 121. But the defendant would not, under the latter plea, show that the plaintiff became assignee of the goods after delivery of the writ to the sheriff; *Samuel v. Duke*, 3 M. & W. 622. What may be given in evidence under a denial of the property in trespass, see *ante*, *Trespass to*

personal property. See also the proofs under a like plea in an action for conversion or detention; *ante*, p. 600.

A sheriff, where he sets up a claim to goods taken in execution by him as against a third party, must show a judgment against the execution creditor; his production of the writ of execution alone is not sufficient; *White v. Morris*, 11 C. B. 1015.

Evidence of fraudulent assignment.] We have already noticed, *ante*, p. 587, that the sheriff may (in some cases) where the execution debtor has sold or assigned his goods before the writ is executed, seize and sell them, notwithstanding such sale or assignment. If the assignment, &c., was made before the delivery of the writ to the sheriff, but *fraudulently* for the purpose of delaying, hindering, or defrauding creditors, it will be void at common law as against them; *Twyne's case*, 3 Coke, 80; 1 *Smith's L. C.* 1. The fact, that there was no consideration, or no valuable one for the assignment,—as if it was made in consideration of natural love and affection,—is evidence of fraud; *Gale v. Williamson*, 8 M. & W. 405. If it does not appear on the assignment that there was a valuable consideration for making it, evidence may be given aliunde to prove such fact, for the purpose of rebutting the presumption of fraud; *Id.* Continuance in possession of goods and chattels by a vendor after the execution of a bill of sale, is a badge and evidence of fraud (*Twyne's case*, 3 Rep. 80; *Edwards v. Harben*, 2 T. R. 587), but not conclusive evidence of it (*Martindale v. Booth*, 3 B. & Ad. 498; *Carr v. Burdiss*, 1 C. M. & R. 787). Therefore, if the possession be consistent with the deed (*Reed v. Wilmot*, 7 Bing. 577); as if it be a mortgage, and, by its terms, the debtor is to remain in possession until default (*Martindale v. Booth*, 3 B. & Ad. 498; *Minshull v. Lloyd*, 2 M. & W. 450); or a marriage settlement under which the debtor takes an equitable interest for life (*Cudogan v. Kennett*, Coup. 432); or, if the sale be notorious, such as a sale made publicly by a sheriff under an execution (*Latimer v. Batson*, 4 B. & C. 652; *Kidd v. Rawlinson*, 2 B. & P. 59), or by public auction (*Leonard v. Baker*, 1 M. & S. 251; *Jezeph v. Ingram*, 1 Moore, 189), or if it be made with the knowledge and assent of the person who seeks to impugn it (*Steele v. Brown*, 1 Taunt. 381), the assignment is in general valid, though the vendor or original owner remains for some time in possession; *Twyne's case*, in *Smith's L. C.* A sale for good consideration is not fraudulent and void, merely because it is made with the intention to defeat an expected execution; *Wood v. Dixie*, 7 Q. B. 892; *Holbird v. Anderson*, 5 T. R. 235. And see *Darvill v. Terry*, 6 H. & N. 807; 30 L. J. (Ex.) 355. It seems that an assignment is void under the 13 Eliz. c. 5, as to subsequent creditors if they are thereby delayed or defrauded; *Graham v. Furber*, 23 L. J. (C. P.) 51; 14 C. B. 410.

A grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view after he has acquired the property therein; *Lunn v. Thornton*, 1 C. B. 379; *Gale v. Burnell*, 7 Q. B. 850. Or unless possession be actually taken under a power to take contained in the deed of sale. See *ante*, p. 585, and *Belding v. Read*, 34 L. J. (Ex.) 212.

In order to prove the fraud, declarations made by the assignor at the time of executing the bill of sale are admissible as part of the *res gestæ*; but not if made at another time; *Phillips v. Eamer*, 1

Esp. 355; *Penn v. Scholey*, 5 *Esp.* 243; *Lewis v. Rogers*, 1 *C. M. & R.* 48, cited *ante*, p. 50. Where A. sued out a writ of *fi. fu.* against the goods of B., and the sheriff executed a bill of sale of certain goods to A., after which, B., remaining in possession of the goods, the sheriff again took them under another execution against B.; in an action of trover by A. against the sheriff for taking these goods, it was held that the declarations of B. at the time of the second execution were evidence for the defendant to show that A.'s execution was colourable; *Willies v. Farley*, 3 *C. & P.* 395.

When an assignment of a trader's effects is void or voidable as against his assignees as an act of bankruptcy or a fraudulent preference, see *ante*, *Actions by assignees of bankrupts*.

Bill of sale.] By the 17 & 18 Vict. c. 36, every bill of sale of personal chattels, made after the 10th July, 1854, whereby the grantee or holder shall have power, with or without notice, immediately or at any future time, to take possession of the property comprised in it, with every schedule annexed or referred to, or a copy thereof, and every attestation of its execution, shall, with an affidavit of the time of giving it, and a description of the residence and occupation of the maker, or, if given under execution of process, a description of the residence and occupation of the person against whom it issued, and of every attesting witness of the bill, be filed with the clerk of dockets and judgments in the Court of Queen's Bench within twenty-one days after the making, in like manner as a warrant of attorney given by a trader is now required to be; otherwise the bill shall, as against all assignees of the bankrupt or insolvent maker, or assignees for the benefit of creditors, and against sheriffs' officers, and persons seizing in execution of process at law or in equity, be null and void to all intents, so far as regards the property comprised in the bill which, at or after the bankruptcy, insolvency, execution of assignment for creditors, or execution of process, and after the end of twenty-one days, shall be in the possession or apparent possession of the maker of it, or of any person against whom the process shall have issued under or in execution of which such bill shall have been made or given.

The book, kept under sect. 3 by the officer of the court, of lists of all bills of sale, and dates of execution and filing, is a public book, and a certified copy is evidence of time of filing; *Grindell v. Brendon*, 6 *C. B.*, *N. S.* 698; 28 *L. J. (C. P.)* 333.

By sect. 2, every defeasance or condition must be in the body of the bill, or on the same paper, otherwise the bill will be void as above. Where the assignee under the bill of sale is trustee for a third person in no way connected with the assignor, it is not necessary that this fact should be disclosed on the bill of sale; *Robinson v. Collingwood*, 34 *L. J. (C. P.)* 18.

By sect. 7, the act includes assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, powers of attorney, authorities or licences to take possession of personal chattels as securities for debts.

It does not include assignments for the benefit of creditors, marriage settlements, transfer of ships or parts thereof, transfers in the ordinary course of trade or calling, sales of goods at sea or in foreign parts, bills of lading, India warrants, warehouse keepers' certificates, warrants for delivery of goods, or any document used in the ordinary course of business as proof of the possession or control of goods, or

authorising the holder to transfer or receive the goods thereby represented. And "chattels" are not to include shares in stock, or in joint-stock or incorporated companies, choses in action, interests in real estate, farm stock not removeable, &c.

A mortgage of trade fixtures, together with the freehold, by the owner of the freehold, does not require to be registered under this act; *Mather v. Fraser*, 25 L. J. (Chan.) 361; 2 Kay & Jo. 536. See *Waterfall v. Penistone*, 6 E. & B. 876, where certain machinery was held to be personal chattels, and the deed assigning the machinery and certain land was held to be a bill of sale, as it created a primary charge on the machinery distinct from the land.

Where goods are seized under a *fi. fu.* within twenty-one days of the making of a bill of sale, no registration is necessary; *Marples v. Hartley*, 1 B. & S. 1; 30 L. J. Q. B. 92. And where, under similar circumstances, the bill of sale has been imperfectly registered, the act does not apply; *Banbury v. White*, 2 H. & C. 300; 32 L. J. E.c. 258.

The affidavit, and not the bill only, must contain the description of the assignor's residence and occupation; *Hatton v. English*, 7 E. & B. 94. The place of business of the witness, or of his employer, if he be his clerk, is sufficient; *Attenborough v. Thompson*, 2 H. & N. 559; Acc. *Blackwell v. England*, 27 L. J. Q. B. 124. It is not a sufficient description of the occupation of the assignor, if he have any office or occupation, to term him simply "gentleman;" *Allen v. Thompson*, 1 H. & N. 15. But if termed only "gentleman," it lies on the party impugning the bill to show some occupation; *Bath v. Sutton*, 3 H. & N. 382. In *Hewer v. Cox*, 30 L. J. Q. B. 73, the assignors were described in the affidavit and bill of sale as residing in New Street, Blackfriars, in the county of Middlesex, and as printers and copartners. It was held that the description was sufficient, although the addition ought to have been, "in the city of London." Where the affidavit described the assignor as "a gentleman," which was the proper description at the time of the making of the bill of sale, though he carried on the business of a house agent at the time of filing the affidavit, the description was held to be sufficient; *the London and Westminster Loan and Discount Company v. Chace*, 12 C. B., N. S. 730; 31 L. J. C. P. 314. But where the assignor at the time of the making of the bill of sale was a buyer of silk, and was described in both bill of sale and affidavit merely as "gentleman," this was held a fatal objection; *Adams v. Graham*, 33 L. J. Q. B. 71. The affidavit filed is a "public" document within 14 & 15 Vict. c. 99, provable by an office copy; *Bath v. Sutton* as reported in 27 L. J. E.c. 388. In an interpleader issue between a claimant under a *bonâ fide* bill of sale duly registered, and an execution creditor of the assignor, the latter cannot set up a prior bill of sale to a third party, also *bonâ fide*, but void as against execution creditors for want of being duly filed; *Edwards v. English*, 7 E. & B. 564. A post-nuptial settlement in trustees for the benefit of wife and children is not within the exception; *Fowler v. Foster*, 28 L. J. (Q. B.) 210; in which case it did not appear that the settlement was made in pursuance of any ante-nuptial articles; a circumstance which would save the settlement from the operation of statutes 13 & 27 Eliz. And a receipt for a sum of money as the price of household goods and effects, stated to have been purchased on the day of the receipt, is not a bill of sale within the act, which it would seem only applies to instruments by which property is intended to pass; *Allsop v. Day*,

7 *H. & N.* 457; 31 *L. J. Ex.* 105. In *Green v. Attenborough*, 34 *L. J. Ex.* 88, it was held that an alteration of the original bill of sale before registration did not affect the transfer of the goods. Goods not in the actual possession of the assignor at or after the time of execution of process require no registration; *Minister v. Price*, per Willes, J., 1 *Fos. & Fin.* 686. . .

2.—*Action for taking goods in execution without paying a year's rent.*

By 8 Anne, c. 14, s. 1, no goods or chattels in or upon any messuage, lands, or tenements leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken in execution, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods from off the premises, pay to the landlord, or his bailiff, all such sums of money as are due for rent for the premises at the time of the taking the goods, provided the said arrears of rent do not amount to more than one year's rent. And in case the arrears shall exceed one year's rent, then the party at whose suit the execution is sued out, paying the landlord, &c., one year's rent, may proceed to execute judgment; and the sheriff is empowered and required to levy and pay to the plaintiff as well the money paid for rent as the execution money. As to the duty of the sheriff under this act, see *Cocker v. Musgrove*, 9 *Q. B.* 223, cited *post*, p. 816.

By the 7 & 8 Vict. c. 96, s. 67, "no landlord of any tenement, let at a weekly rent, shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

The plaintiff in this action may be called upon to prove, 1, the demise and the rent in arrear; 2, the seizure of the goods under the execution; 3, notice to the sheriff; 4, the removal of the goods without satisfying the rent; and 5, the value of the goods.

Evidence of the demise, &c.] As to proof of the tenancy, see *ante*, pp. 164, 623, 678. The tenancy must be at a rent certain; therefore mere proof of occupation under an agreement for a future lease, without payment of rent, is not sufficient; *Riseley v. Ryle*, 11 *M. & W.* 16. The declaration need not state the particulars of the demise; but if stated, they ought to be proved as laid; *Bristow v. Wright*, 2 *Doug.* 665. In order to prove the rent in arrear, it will be a *prima facie* case sufficient to show the occupation by the tenant and the amount of the rent; *Harrison v. Barry*, 7 *Price*, 690. A demise from a lessee to an under-tenant is within the statute of Anne; *Thurgood v. Richardson*, 7 *Bing.* 428.

The trustee of an outstanding satisfied term, held in trust to attend the inheritance, is a "landlord" within the statute. *Colyer v. Speer*, 2 *B. & B.* 67. The action may be brought by an executor or administrator; *Palgrave v. Windham*, 1 *Stra.* 212. On a sale of premises it was stipulated that, from the time of the vendee taking possession until the completion of the purchase, he should pay to the vendor at the rate of 100*l.* *per annum*: held, that this

was "rent" within the statute of Anne. *Saunders v. Musgrave*, 6 B. & C. 524.

The plaintiff can only recover the rent due at the time of the taking the goods; *Hoskins v. Knight*, 1 M. & S. 245. And it seems that he cannot demand rent for a bygone year after the commencement of a fresh tenancy on different terms; *Cook v. Cook, Andr.* (Rep. 217.)

Evidence of the levy.] As to the mode of proving connection between the sheriff and the officer, see *ante*, p. 798. See *Reed v. Thoyts*, 6 M. & W. 410; *Barsham v. Bullock*, 10 Ad. & E. 23.

Evidence of notice.] In order to render the sheriff liable as a wrong-doer by the removal of the goods, it must be proved that he had notice of the landlord's claim; *Arnitt v. Garnett*, 3 B. & A. 441; *Smith v. Russell*, 3 Taunt. 400. It is not necessary to prove a formal notice; if it can be shown that the sheriff or his officer knew, previously to the removal of the goods, that there was rent due to the landlord, it will be sufficient; *Riseley v. Ryle*, 11 M. & W. 20, per Parke, B.; *Andrews v. Dixon*, 3 B. & A. 645. Notice to the creditor is not necessary; *Riseley v. Ryle*, 11 M. & W. 16.

Removal of the goods.] It is enough to show that some goods were removed; and the plaintiff need not show that enough to satisfy the rent was not left; *Colyer v. Speer*, 2 B. & P. 67. It is said that the goods need not be distrainable goods; *Riseley v. Ryle, supra*. A mere sale, without more, is not equivalent to removal; *Wharton v. Naylor*, 12 Q. B. 673; *Smallman v. Pollard*, 6 M. & G. 1001.

Value of the goods.] The proof of value seems only necessary for the purpose of showing the extent of the plaintiff's loss by the defendant's misconduct. But the jury are not confined to the precise amount produced on the sale by the sheriff; the plaintiff may insist that, if the defendant had proceeded regularly, the whole would have been paid, or may show that the goods sold badly; *Per Taunton, J., Foster v. Hilton*, 1 Dowl. P. C. 35, 38. And *per Parke, J., Calvert v. Joliffe*, 2 B. & Ad. 418, 422, the jury are not bound to give so much as the sale price.

Defence.

The plea of Not guilty in this action operates as a denial only of the "breach of duty or wrongful act" of the defendant, but not of the facts stated in the inducement. The removal without payment is the wrongful act; for the original taking is lawful; *semb.*, see *Parke, B., in Riseley v. Ryle*, 11 M. & W. 21; also *Reed v. Thoyts*, 6 M. & W. 410, cited *ante*, p. 800. A plea denying the taking admits that the goods taken belonged to the execution debtor; *Forster v. Cookson*, 1 Q. B. 419.

If the agent of the landlord takes from the sheriff's officer an undertaking to pay the year's rent, and consents to the sale, the landlord cannot afterwards maintain an action on the statute, though the rent be not paid pursuant to the undertaking, and though the undertaking be void by the Statute of Frauds; *Rothery v. Wood*, 3 Camp. 2.

3.—Action for not paying over Money levied.

In an action for money had and received against a sheriff for not

paying over to the plaintiff money levied under an execution in an action at his suit, the plaintiff must prove the writ of execution, and the levy under it.

The issuing of the *fi. fa.* at the suit of the plaintiff must be proved; for which purpose proof of the defendant's warrant, reciting the writ, will be sufficient; *Wilson v. Norman*, 1 *Esp.* 154. As to proof of the defendant's seal of office, see *ante*, p. 445. An examined copy of the writ and return will prove the writ, the levy, and the return; and no prior demand is necessary; *Dule v. Birch*, 3 *Camp.* 347. A letter written by the undersheriff is also evidence to fix the defendant; *Haynes v. Hayton*, cited 6 *Q. B.* 169; but the statements of the writer are thereby made evidence for the defendant. *Ib.* See further, as to proofs of writs, &c., *ante*, pp. 53, 798, and *infra*.

It is not sufficient to prove the taking and selling of the goods by a person reputed to be an officer of the sheriff, without proof of the writ of execution or warrant; *Wilson v. Norman*, 1 *Esp.* 154. The defendant may deduct his poundage; *Longdill v. Jones*, 1 *Stark.* 346, *post*, p. 817. It has been doubted whether this action can be maintained before the return-day of the writ; *Per Parke, J.*, in *Morland v. Pellutt*, 8 *B. & C.* 727. In *Cockram v. Welby*, 2 *Show.* 70; 2 *Freem.* 236, it was held that debt lay, though the writ had not been returned.

Where a sheriff returned that he had seized goods under a *fi. fa.*, had sold part, and that the residue remained in his hands for want of buyers, it was held a defence to an action against him for the amount levied, that the defendant in the original action was in fact a bankrupt at the time of the seizure and sale, and that the goods belonged to his assignees; *Bridges v. Walford*, 6 *M. & S.* 42. See *Tomlinson v. Shynn*, 2 *B. & B.* 77. So, where the plaintiff had appointed a special bailiff and agent to manage the sale of goods under a *fi. fa.*, it was held that the sheriff was discharged; although on being ruled to return the writ, he returned that he had sold, and that he had made deductions, which he had no right to make in point of law; *Pallister v. Pallister*, *Tidd*, 9th ed. 1019: 1 *Chit. Rep.* 614, *n.*; *Higgins v. M'Adam*, 3 *Y. & J.* 1.

4.—Action for not arresting on Mesne Process, and for false Return.

In an action against a sheriff for not arresting a debtor on mesne process when he had an opportunity, the plaintiff must prove (where those facts are put in issue by the pleadings), 1, the debt due from the debtor to himself; 2, the issuing of the process and delivery to the defendant; 3, that the debtor was within the bailiwick, and the defendant might have arrested him; 4, the false return of *non est inventus*, if alleged; and 5, the damage sustained.

Evidence of debt.] Whatever evidence would be sufficient to charge the debtor in an action brought against him by the plaintiff, will be sufficient against the sheriff in this action; *Sloman v. Herne*, 2 *Esp.* 695; *Gibbon v. Coggon*, 2 *Camp.* 188. An admission by the debtor is therefore evidence. *Rogers v. Jones*, 7 *B. & C.* 86; and see the next head; *Action for escape on mesne process.*

Evidence of issuing process.] The issuing of process and lodging it

with the defendant for execution must be shown. The plaintiff must therefore prove the writ. If returned he should give in evidence an examined copy of the writ and return. If it be in the possession of the defendant, a notice to produce should be served; and if, upon search, it does not appear to have been returned, it will be presumed that it remains in the defendant's possession; see *ante*, p. 53, as to evidence of process.

Evidence of the defendant's breach of duty.] If a person, against whom the sheriff has a writ, does not abscond, but continues in the daily exercise of his usual occupation, appears publicly, and is visible to every one that comes to him on business, and the bailiff, neglecting to arrest him, returns *non est inventus*, it is proof of a false return; *Beckford v. Montague*, 2 *Esp.* 475. It has been ruled not sufficient merely to prove that the debtor was within the defendant's bailiwick, but the plaintiff ought to prove notice of it to the under-sheriff, or to the bailiff to whom the warrant was directed; *Gibbon v. Coggon*, 2 *Camp.* 189. But it does not appear that the plaintiff is bound to give this notice to the sheriff; for the latter is to make due inquiries for the purpose of finding the debtor; *Dyke v. Duke*, 4 *New Ca.* 197; acc. *Brown v. Jarvis*, 1 *M. & W.* 704, 713. He is bound to execute and to return the writ as soon as he can; *Ibid.* and *Randell v. Wheel*, 10 *Ad. & E.* 719.

Damages.] In order to recover there must be some proof of actual loss or damage; *Brown v. Jarvis*, 1 *M. & W.* 704; *Williams v. Mostyn*, 4 *M. & W.* 145; see *Barker v. Green*, 2 *Bing.* 317, *contra*. The case of mesne is distinguished in this respect from final process. See *post*, p. 810. Where the defendant, instead of pleading Not guilty, takes issue on a collateral matter, some damages will be presumed; *Brown v. Jarvis*, *suprà*.

Defence.

The general issue in this action admits the debt and the issuing and delivery of the writ, and denies the "breach of duty" of the defendant. It cannot be shown, under "Not guilty," that the plaintiff advised (or directed) the officer not to make the arrest under the circumstances; *Howden v. Standish*, 6 *C. B.* 504. It is no defence that the sheriff had no adequate force to repel threatened resistance; *ib.*

5.—Action for Escape on Mesne Process.

In an action against the sheriff for an escape on mesne process, the plaintiff may be called upon to prove: 1, the debt due from the party arrested; 2, the issuing and delivery of the process to the defendant; 3, the arrest; 4, the escape; and 5, the damages.

Evidence of the debt due from the party arrested.] The plaintiff must prove a debt due to him from the party arrested at the time of the arrest; *Alexander v. Macauley*, 4 *T. R.* 611; *White v. Jones*, 5 *Esp.* 160. If the declaration states that the party was indebted to the plaintiff for goods sold and delivered, it must be so proved; *Parker v. Fenn*, 2 *Esp.* 477 (n); but the exact sum mentioned in the declaration need not be proved; *B. N. P.* 66. The debt is proved

by the same evidence which would have established it in an action against the debtor himself; therefore an admission of the debt by the debtor at any time before the escape is good evidence against the sheriff; *Williams v. Bridges*, 2 Stark. 42; *Rogers v. Jones*, 7 B. & C. 89. See *ante*, p. 808.

Evidence of the issuing and delivery of the process to the defendant.] The issuing of the process and the delivery of it to the under-sheriff must be proved. If the process has been returned, an examined copy of the writ and return will be evidence of these facts; *B. N. P.* 66. If not returned, after proof of a notice to produce and of search for the return, secondary evidence will be admitted. A delivery to a country sheriff's deputy in London is a delivery to the sheriff; *Woodland v. Fuller*, 11 Ad. & E. 859.

Where the declaration stated that the writ was marked for bail "by virtue of an affidavit of the cause of action by the plaintiff in that behalf before then made, and duly filed of record in this court, &c.," it was held that the averment was sufficiently proved by an office copy of the affidavit; *Casburn v. Reid*, 2 B. Moore, 60. See *Webb v. Herne*, 1 B. & P. 281.

Evidence of the arrest.] The facts sufficient to constitute an arrest have already been noticed under the title *Action for Malicious Arrest*, and see *post*, p. 811. Where a party is arrested in one action he is in custody under all writs afterwards delivered to the sheriff, unless the first arrest was illegal; *Collins v. Iewens*, 10 Ad. & E. 570. The plaintiff gave in evidence the sheriff's return of *cepi corpus* to the writ, and proved that the defendant in the former action did not put in bail above, and was not in the sheriff's custody at the return of the writ: Lord Ellenborough held that the arrest and escape, and the non-appearance of the party according to the exigency of the writ, were sufficiently proved; *Fairlie v. Birch*, 3 Camp. 397. The sheriff is bound in this action by his return both as to the fact and the time of the arrest; *Cook v. Round*, 1 Mood. & Rob. 512. Where the writ has not been returned, evidence must be given to connect the bailiff and the sheriff; see *ante*, p. 798.

Evidence of the escape.] That the debtor was seen abroad after the return of the writ, and that bail has not been put in, will be evidence of an escape; *Fairlie v. Birch*, 3 Camp. 397. And the return of *cepi* coupled with an answer given at the sheriff's office that "no bail-bond was executed," is evidence of the same; though the return includes the words *paratum habeo*; *Neck v. Humphrey*, 3 Ad. & E. 133. If the declaration alleges a taking in execution of A. and his wife, and that both escaped, it is enough to prove that A. alone was taken in execution for a debt of his wife before coverture; *B. N. P.* 65.

Where an omission to arrest is proved instead of an escape, the pleadings are amendable; *Guest v. Elwes*, 5 Ad. & E. 118.

Damages.] The plaintiff is only entitled to recover such damages as he can show he has sustained. If he has lost the whole debt, the jury must give him damages to that extent, together with what he has lost in costs; but if he can still recover his debt, the damages may be diminished accordingly; *Scott v. Henley*, 1 Mood. & Rob. 227; *Morris v. Robinson*, 3 B. & C. 206. And no action lies unless some damage has been actually sustained; *Williams v. Mostyn*, 4 M. & W. 145, *ante*, p. 809.

Defence.

By the Rules of H. T. 1853, in actions for an escape, the plea of Not guilty operates "as a denial of the neglect or default of the sheriff or his officers; but not of the debt, judgment, or preliminary proceedings." Hence it should seem that the default of the defendant in suffering the escape, and the damage, are alone put in issue by Not guilty. Before the new Rules, a plea of No escape was held to admit the arrest; *B. N. P.* 67.

It is a good defence (*semb.* under Not guilty) that the defendant, though he has taken no bail-bond, has put in bail before the expiration of the rule to bring in the body; *Pariente v. Plumbtree*, 2 *B. & P.* 35.

Where the defendant pleads that before the escape he took a bail-bond with a condition according to the statute, &c., which he assigned to the plaintiff, and the replication denies that there was any such condition, the issue is not supported by defendant's producing a bond in the condition of which the prisoner's name is left in blank in two places; *Holden v. Raphael*, 4 *Ad. & E.* 228.

It is a good defence that the bailiff, who permitted the escape, was a bailiff appointed at the special request of the plaintiff; *Ford v. Leche*, 6 *Ad. & E.* 699; and this appears to have been there given in evidence under Not guilty. As to what amounts to the appointment of a special bailiff, see *ante*, p. 798.

6.—*Action for escape in execution.*

In an action against the sheriff for suffering a prisoner in execution to escape, the plaintiff must, if those facts be denied on the pleadings, prove, 1, the judgment; 2, the issuing and delivery to the defendant of the writ of *ca. sa.*; 3, the arrest; and 4, the escape.

For the mode of proving the judgment, see *ante*; as to proof of issuing and delivery of the writ, *ante*, pp. 53, 810; and as to connecting the defendant with the act of his officer, *ante*, p. 798.

By 5 & 6 Vict. c. 98, s. 31, if a debtor in execution escapes out of legal custody after that act (10th of August, 1842), the sheriff, bailiff, or other person having the custody, shall be liable only to an action on the case for damages sustained by the person at whose suit the debtor was taken or imprisoned, and shall not be liable to any action of debt.

Evidence of arrest.] What constitutes an arrest; see *ante*, *Action for Malicious Arrest*, and last head, p. 810. In order to render the sheriff liable, the officer must be the authority to arrest, but he need not be the hand that arrests, nor in the presence of the person arrested, nor actually in sight; nor is any exact distance prescribed. It would be a different case if he were upon some other errand, or were to stay at home and send a third person to make the arrest: per Lord Mansfield, C. J., *Blatch v. Archer*, *Cowp.* 65; in which case the son of the officer said, at the time of the arrest, that he had his authority in his pocket, the officer himself being at the distance of thirty rods and not in sight; and it was held a good arrest. If A. be in custody at the suit of B., and a writ be delivered to the

sheriff at the suit of D., the delivery of the writ is an arrest in law, so as to make the sheriff liable to D. for an escape: *B. N. P.* 66. *Collins v. Yewens*, 10 *Ad. & E.* 570, cited *ante*, p. 810.

It must appear that the prisoner was in the custody of the *defendant*, and, therefore, where he was taken in execution by a former sheriff, the assignment of the prisoner from him to the defendant by indenture ought to be proved; *Davidson v. Seymour*, *Mood. & M.* 34; unless the defendant has become sheriff on the death of his predecessor, in which case he is bound, at his peril, to take notice of all the executions against any persons whom he finds in gaol; *Westby's case*, 3 *Co. Rep.* 72 b; *B. N. P.* 68; see the note in *Mood. & M.* 35. Probably the acting as sheriff will be evidence of the assignment, after notice to produce.

Debt against the bailiff of a liberty for an escape alleging a mandate by the sheriff to the defendant, "as chief bailiff of the liberty, to arrest T.:" Held, on a traverse of the allegation, that it was not supported by proof of a sheriff's warrant in the common form addressed to the defendant as *his* bailiff; and this, although the defendant had treated it as a mandate, and not as a warrant, on a rule to return it; *Jackson v. Hill*, 10 *Ad. & E.* 477.

Evidence of the escape.] Wherever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, it is an escape; *per Buller, J., Benton v. Sutton*, 1 *B. & P.* 27. Thus if a sheriff's officer, having taken a prisoner in execution, permits him to go in company with one of his followers to his own house for the purpose of settling his affairs, it is an escape; *ibid.* If the defendant, when taken in execution, is seen at large for ever so short a time, either before or after the return of the writ, it is an escape; *per De Grey, C. J., Hawkins v. Plomer*, 2 *W. Bl.* 1049. If the bailiff of a liberty, who has the return and execution of writs, removes a prisoner, taken in execution, to the county gaol situate out of the liberty, and there delivers him into the custody of the sheriff, it is an escape for which the bailiff is liable; *Bootham v. Earl of Surry*, 2 *T. R.* 5. When writs were returnable on a day certain, it was held that if an officer, having taken a party in execution, permitted him to go to a lock-up house kept by another officer not named in the warrant, where he remained for some days before the return of the writ, it was no escape; *Houlditch v. Birch*, 4 *Taunt.* 608. If the sheriff receives the sum indorsed on the writ from the prisoner, and before payment over to the plaintiff, liberates him, it is an escape; *Slackford v. Austen*, 14 *East*, 468; *Crozer v. Pilling*, 4 *B. & C.* 31. The plaintiff is not estopped by a return of *cepi corpus* by the defendant; *Jackson v. Hill*, *suprà*.

A voluntary escape is by the express consent of the keeper; a negligent one is without consent or knowledge. Release by mistake is a voluntary escape; *Filewood v. Clement*, 6 *Dowl. P. C.* 508. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent one without amending; *Bonafous v. Walker*, 2 *T. R.* 126.

By stat. 8 & 9 Wm. 3, c. 27, s. 8, if the keeper of any prison shall, after one day's notice in writing given for that purpose, refuse to show any prisoner, committed in execution, to the creditor at whose suit he was committed or charged, or to his attorney, every such refusal shall be adjudged an escape in law. And by s. 9, if any person, desiring

to charge any person with any action or execution, shall desire to be informed by such keeper whether such person be a prisoner in his custody or not, the keeper shall give a true note in writing thereof to the person so requesting, or to his attorney, upon demand at his office for that purpose; and every such note shall be taken as sufficient evidence that such person was at that time a prisoner in actual custody.

Damages.] Since 5 & 6 Vict. c. 98, *suprà*, p. 811, the jury may exercise their judgment in assessing the damages, and should give such amount as they think sufficient to cover the loss suffered, or eventually likely to be suffered, by the plaintiff; *Bonafous v. Walker*, 2 T. R. 126. There must, at all events, be nominal damages; *semb. Clifton v. Hooper*, 6 Q. B. 468, cited *post*, 815. The true measure of damages under this act is the value of the custody of the debtor at the moment of the escape, and no deduction ought to be made on account of anything which might have been obtained by the plaintiff by diligence after the escape, unless, indeed, he has done anything to aggravate the loss, or prevent re-capture; *Arden v. Goodacre*, 11 C. B. 371; 20 L. J. 184.

Defence.

By R. H. T. 1853, in actions for an escape, the plea of Not guilty will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

By statute 8 & 9 Wm. 3, c. 27, s. 6, no retaking on fresh pursuit shall be given in evidence on the trial of any issue in an action of escape, unless the same be specially pleaded; nor shall any special plea be allowed without an oath by the defendant that the prisoner escaped without his consent, privity, or knowledge.

Where the defendant pleaded that the prisoner returned into his custody, and that he did thereupon, then, and afterwards, keep and detain the said prisoner in his custody, &c., and the plaintiff traversed that after the prisoner's return the defendant did keep and detain him in custody, in manner, form, &c.; it was held that the plea was negatived by evidence that after the prisoner's return he again escaped, and died out of custody; *Chambers v. Jones*, 11 East, 406. If the defendant only pleads *No escape*, he cannot give in evidence *No arrest*, for he admits an arrest by his plea; *B. N. P.* 67. It is no defence that the prisoner paid his debt to the defendant, unless before action brought he has paid it over to the plaintiff; *Slackford v. Austen*, 14 East, 468.

If the prison take fire, or be broken open by the king's enemies, by means whereof the prisoners escape, this will excuse the sheriff; but it is otherwise if the prison be broken open by the king's subjects; *B. N. P.* 66. He may show that the escape was by the fraud and covin of the party really interested in the judgment; *Hiscocks v. Jones*, *Mood & M.* 269.

The defendant may show that the judgment against the prisoner was void, but not that it was erroneous; thus he may show that the judgment was given in an inferior court in debt on a bond made *extra jurisdictionem*; for such judgment is void; *B. N. P.* 65, 66; *Watson on Sheriffs*, 54. So if the writ of execution be absolutely

void, the sheriff will not be liable for an escape; but it is otherwise when it is only erroneous; *Weaver v. Clifford*, Cro. Jac. 3; *Burton v. Eyre*, Id. 288; *B. N. P.* 66. He may show that the plaintiff authorised the prisoner's release; *Connop v. Challis*, 2 Ex. 484. By the C. L. Pro. Act, 1852, s. 126, "A written order under the hand of the attorney in the cause, by whom any writ of *capias ad satisfaciendum* shall have been issued, shall justify the sheriff, jailor, or person in whose custody the party may be under such writ, in discharging such party, unless the party for whom such attorney professes to act shall have given written notice to the contrary to such sheriff, jailor, or person in whose custody the opposite party may be; but such discharge shall not be a satisfaction of the debt, unless made by the authority of the creditor; and nothing herein contained shall justify any attorney in giving such order for discharge without the consent of his client." Before this enactment, the plaintiff's attorney had no authority to discharge the defendant from custody without receiving the amount for which the execution issued, unless the same had been paid to the plaintiff, or he had his authority for so doing; *Savory v. Chapman*, 11 Ad. & E. 829.

An order of discharge by a commissioner under the bankruptcy acts, justifies a jailor or sheriff, whether the order ought to have been made or not; *Thomas v. Hudson*, 14 M. & W. 353; see also *Wallinger v. Gurney*, 11 C. B., N. S. 191; 32 L. J. (C. P.) 58. So the production of a summons to a bankrupt to attend the court under the 5 & 6 Vict. c. 122, 123, justified the sheriff in not arresting, whether the bankrupt turn out a bankrupt *de jure* or not; *Norton v. Walker*, 3 Ex. 480; 18 L. J. (Ex.) 234. So the certificate of registration of a deed of composition with creditors under the present Bankruptcy Act, 24 & 25 Vict. c. 134, justifies the sheriff under s. 198, in not arresting, although the deed itself turn out invalid; *Lloyd v. Harrison*, 34 L. J. (Q. B.) 97 (Cockburn, C. J., dissenting). Where the arrest was made by a sheriff's officer chosen by the plaintiff's attorney who was present and controlling the officer at the arrest, which was effected in an illegal manner, it was held that the sheriff was not liable for an escape. See cases, *ante*, p. 798.

7.—Action for not levying, &c., and for false return on final process.

In an action against a sheriff for a false return to final process, the plaintiff must prove, if those facts are denied on the pleadings, 1, the judgment; 2, the writ and indorsement, and the return; 3, the falsehood of the return. The action for not arresting on mesne process and falsely returning *non est inventus*, has been already treated of, *suprà*, p. 808.

As to the mode of proving the judgment, and as to the writ and return, see *ante*, p. 53.

The judgment is mere inducement; *Stoddart v. Palmer*, 3 B. & C. 2. The untrue return is the ground of action, though the injury to the plaintiff is founded on the right to recover on the judgment.

It is not necessary to prove an actual levy after seizure under a *fi. fa.*; *Stubbs v. Lainson*, 1 M. & W. 728.

Evidence to disprove the return.] The plaintiff must prove the falsehood of the return. Thus, in an action for a false return of *nulla*

bona, he must show that the party had goods within the bailiwick of which the sheriff had notice, or might, by using due diligence, have had notice; *ante*, p. 809. In an action for a false return of *nulla bona* to a *fi. fa.* against the goods of A. and B., the plaintiff must have a verdict if he prove that either had goods; *Jones v. Clayton*, 4 M. & S. 349.

The declarations of the sheriff's officer respecting goods seized by him under a *fi. fa.*, and in his possession at the time, are evidence against the sheriff, though made after the return-day of the writ; *Jacobs v. Humphrey*, 2 C. & M. 413; *ante*, p. 800.

Damages.] In an action for unnecessary delay in executing a *ca. sa.*, it is enough if the jury find that the defendant could have executed the process but omitted to do so, and no actual damage need be shown. The measure of damage is the real loss sustained, and not necessarily the whole debt; but the plaintiff is at all events entitled to nominal damages, though the jury find that he sustained none; *Clifton v. Hooper*, 6 Q. B. 468. For a false return to a writ of *fi. fa.*, it seems no action can be maintained if it be shown that the plaintiff can have sustained no damage, as where the debtor had become bankrupt; *Wylie v. Birch*, 4 Q. B. 566. Where the sheriff is sued for returning *nulla bona*, instead of levying on certain property which belonged jointly to the debtor and to another, the proper measure of damage is half the value of the goods; *Tyler v. Duke of Leeds*, 2 Stark. 218.

Defence.

The plea of Not guilty operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement. In case against the sheriff for a false return of *nulla bona* to a *fi. fa.*, on which a levy had been made, the plea of Not guilty puts in issue only the fact of the sheriff having the money in his hands, and making the return alleged; and it is not competent for him, under that plea, to set up a defence of the bankruptcy of the debtor before the execution of the writ; *Wright v. Lainson*, 2 M. & W. 739; *Wintle v. Freeman*, 11 Ad. & E. 539. And, in case against the sheriff for not levying when he might have done so, and returning *nulla bona*, the plea of Not guilty admits the judgment, the writ, the delivery of it to the sheriff, that there were goods in his bailiwick, and that he had notice of it; the only matters of defence available in such an action under that plea are, that he did levy within a reasonable time, and that he did not make the return alleged; *Lewis v. Alcock*, 6 Dowl. 389; 3 M. & W. 188. And in case against the sheriff for not arresting a party under a writ of *capias*, and falsely returning *non est inventus*, it cannot be shown under Not guilty, that the plaintiff gave directions to the officer not to make the arrest; *Howden v. Standish*, 6 C. B. 504. In case against the sheriff for not selling when he might have done so, and falsely returning that the goods remained in his possession for want of buyers, a plea that the defendant could not, nor might, nor ought to have sold the goods in the declaration mentioned under or by virtue of the writ, or to have raised thereout the monies indorsed on the writ, ready to have been paid to the plaintiff within the space of time in the declaration mentioned, amounts to the general issue; *Rowe v. Ames*, 6 M. & W.

747; 8 Dowl. 750. If the goods seized under *fi. fa.* are exhausted by payment of landlord's rent, expenses and the sum due on a prior writ, the return of *nulla bona* is proper; *Wintle v. Freeman*, 11 Ad. & E. 539; in which case the plea alleged that the debtor had no goods whereof, &c., and the replication denied the plea. And *semb.*, the defence might have been shown under a traverse of the levy stated in the declaration. The insufficiency of the goods to satisfy prior claims will entitle the defendant to a verdict under a traverse of the alleged levy; *Heeman v. Evans*, 2 M. & G. 398. The plaintiff may show that a judgment, in respect of which a prior writ issued, is fraudulent, and that the sheriff had notice of it; and the debtor's conduct as to the execution of the prior writ is admissible evidence of fraud; *Imray v. Magnay*, 11 M. & W. 267. Or he may show that the prior writ was delivered with directions not to proceed on it till orders; *Hunt v. Hooper*, 12 M. & W. 664. Where the defence is, that the goods in question were assigned before the execution, the plaintiff, in reply, may show the assignment to have been fraudulent; *Dewey v. Bayntun*, 6 East, 257. As to which, see cases *ante*, pp. 803, 804. Where there are prior writs and also rent due, the sheriff may traverse the existence of any goods on which he could levy, although the goods would have satisfied all, if sold; for he cannot lawfully levy and sell until some of the creditors have paid the rent. In this case the sheriff's return was agreeable to the facts, and the plea denied any goods on which defendant could levy besides goods sufficient to satisfy the prior writs and rent; and *per cur.*, the sheriff is not bound to advance the rent; and, "until paid, there are no goods out of which he is bound to levy, *i. e.*, to sell;" *Cocker v. Musgrove*, 9 Q. B. 223.

Where, in action for a false return of *nulla bona* to a writ of *fi. fa.*, the defence is that the party against whom the writ issued has become bankrupt, the bankruptcy must be regularly proved; *B. N. P.* 51: and see *Dowden v. Fowle*, 4 Camp. 38. As to the proof of bankruptcy, see *ante*, *Actions by Assignees, &c.*, p. 739, *et seq.* And where the defence is that the landlord of the debtor claimed the goods for rent, the defendant cannot prove the claim by the parol testimony of the landlord, if his tenant held under a written lease; *Augustion v. Challis*, 1 Ex. 279. As to the duty of the sheriff under 24 & 25 Vict. c. 134, see s. 73, *ante*, p. 694, and s. 74, by which, on an execution exceeding £50, the sheriff is to sell by auction and not by bill of sale or private contract, such sale to be advertised for three days preceding.

When the defence is payment to the landlord, under 8 Anne, c. 14, for arrears of rent, some evidence, however slight, must be given of the rent being due; *Keightley v. Birch*, 3 Camp. 521. The sheriff returned *nulla bona* after satisfying the landlord's claim for rent and the king's taxes, and the plaintiff assented to his quitting possession of the premises and sued out a *ca. sa.*; it was held that he could not afterwards maintain an action for a false return to the *fi. fa.*, however unfounded the claim for rent might turn out to be; *Stuart v. Whittaker*, Ry. & M. 310.

The defendant may show that the judgment, on which the writ issued, was fraudulent and void; *Penn v. Scholey*, 5 Esp. 243; *Lane v. Chapman*, 11 Ad. & E. 966. But it must be a clear case of fraud and collusion to avoid a judgment, so as to let in this defence; *Tyler v. Duke of Leeds*, 2 Stark. 221; *Harrod v. Benton*, 3 B. & C. 219. The defendant cannot impeach the

judgment on the ground of a collateral fraud; *Inray v. Magnay*, 11 *M. & W.* 277, *per cur.*; *Christopherson v. Burton*, 3 *Ex.* 162.

The defendant cannot give in evidence, even in mitigation of damages, an inquisition held by him to inquire into the property of the goods, under which they were found not to be the property of the debtor; *Glossop v. Pole*, 3 *M. & S.* 175.

8. Action for extortion.

The evidence in this action depends entirely on the allegations in the declaration, and the pleadings.

The party upon whom the extortion is committed may maintain an action for money had and received against the sheriff; and in such an action it is not necessary to prove a tender of the sum actually due; *Scarf v. Hullifax*, 7 *M. & W.* 288.

The Act 1 Vict. c. 55, regulates sheriff's fees on the execution of civil process, and gives a special remedy for extortion; but it seems that an action for extortion can be brought against the sheriff for taking a greater fee than allowed by the act; *Curlewis v. Bird*, 1 *Dowl.*, *N. S.* 752, *per Coleridge, J.*

The mode in which the issuing of the *fi. fa.* and the connection between the sheriff and the bailiff may be proved, has been already stated. If the sheriff has returned to the writ that he has caused to be levied, &c., it will be evidence that he has adopted the act of the bailiff as his own; *Woodgate v. Knatchbull*, 2 *T. R.* 154. It must appear that the sheriff intrusted the bailiff with his authority in the particular case in which the latter has abused it, and, therefore, if the extortion be committed by an officer not named in the warrant, to whose house the party had been carried, the sheriff is not liable; *George v. Perring*, 4 *Esp.* 63. So where a writ is directed to the coroner, though it is executed by an officer of the sheriff, the latter is not liable; *Sarjeant v. Cowan*, 1 *C. & M.* 491.

Where the money levied is not sufficient to satisfy the plaintiff's claim, the retaining of any part which ought to be paid over to the plaintiff is an indirect receiving or taking from him within the statute 29 Eliz. c. 4; *Buckle v. Bewes*, 3 *B. & C.* 688.

In actions against a sheriff's officer, on 32 Geo. 2, c. 28, it was formerly held that the plaintiff must prove the table of fees allowed by the justices; *Jaques v. Whitcomb*, 1 *Esp.* 361; *Martin v. Slade*, 2 *New Rep.* 59. The 1 Vict. c. 55, permits sheriffs and their officers to take such fees, and no more, as are allowed by the officers of the courts of law at Westminster under the sanction of the judges. This statute does not affect the sheriff's right to poundage; *Davies v. Griffiths*, 4 *M. & W.* 377. Nor does it repeal 29 Eliz. c. 4, which makes him liable in treble damages for extorting more on a *fi. fa.* than is allowed by that statute: so that, if issued on that statute, the defendant must plead specially in order to avail himself of the highest fees allowed by the judges under 1 Vict. c. 55; *Pilkington v. Cooke*, 16 *M. & W.* 615; *Wrightup v. Greenacre*, 10 *Q. B.* 1. And by 5 & 6 Vict. c. 98, s. 31, after 1st March, 1843, no poundage shall be taken by sheriffs, bailiffs, and others, for taking the body in execution; and only such fees shall be taken by the sheriff, or persons having return of writs, as shall be allowed under 1 Vict. c. 55. In *Miles v. Harris*, 12 *C. B. N. S.* 550, 31 *L. J. C. P.* 361, the bailiff, after having been two days in possession,

discovered that the judgment had been irregularly signed, and withdrew. The judgment was subsequently set aside. It was held that the bailiff was not entitled to poundage. In *Braithwaite v. Marriott*, 1 H. & C. 591; 32 L. J. (Ex.) 24, it was held that the sheriff was not entitled to make any charge for the cost of advertisements of the sale by auction of the debtor's effects, although such advertisement is directed by 24 & 25 Vict. c. 134, s. 74, *ante*, p. 816.

See further, as to sheriff's fees, *Arch. Pr.* 11th ed. p. 625.

ISSUES UPON SHERIFF'S INTERPLEADER RULES.

Issues on interpleader rules are directed on the application of sheriffs under 1 & 2 Wm. 4, c. 58; 1 & 2 Vict. c. 45, s. 2, and 23 & 24 Vict. c. 126; *post*, *Appendix*, p. 838. The claimant is commonly made the plaintiff, and is then entitled to begin on the trial, and the execution-creditor the defendant. The evidence depends on the question to be tried.

It is generally desirable that objections which prevent the trial of the matter really in question, should be waived at *Nisi Prius*, inasmuch as the court above will not be satisfied with the verdict if it does not supply all the information which it was the object of the issue to obtain.

The following points have been ruled:—

On an issue between assignees of a bankrupt and the judgment creditor, the question was whether the defendant was by virtue of the *fi. fa.*, and as against the plaintiffs, entitled to the goods, and the plea was in the affirmative: Held, that the plaintiffs were the proper parties to begin at the trial; *Edwards v. Matthews*, 4 Dowl. & L. 721; 16 L. J. (Ex.) 291. And, generally, the judgment creditor, who has seized under a *fi. fa.*, and is in possession when the claim is set up, has a *prima facie* title, which the claimant must rebut; *Ibid.* In interpleader between one who claims as assignee and the judgment creditor, the admissions of the assignor, before the date of the assignment, that he was indebted to the plaintiff (claimant), are not evidence for the plaintiff that the debt was a *bona fide* one; *Coole v. Braham*, 3 Ex. 183. The question on interpleader was, whether the plaintiff had any property in the goods as against the defendant, the execution creditor: Held, that if the plaintiff had a lien on them against the original debtor, he maintained the issue; *Rogers v. Kenney*, 9 Q. B. 592. On an issue to try whether a firm consisting of the defendants were indebted to the plaintiff's firm, it is no objection at *Nisi Prius* that some of the parties to the record are members of both firms, although in an action it would be otherwise; *Bosanquet v. Woodford*, 5 Q. B. 310.

On an issue between an execution creditor and assignee, stating the execution and the fiat, where the question is whether the execution is valid as against the fiat, the creditor will not be permitted to dispute the bankruptcy; *Linnett v. Chaffers*, 4 Q. B. 762. But where the question was, "whether the plaintiffs were entitled to the goods seized, as against, and free from, the defendant's execution, and whether they were liable to be seized as against the plaintiffs:" it was held that the plaintiffs, claiming as assignees under the bank-

ruptcy of a judgment debtor, were bound to prove the trading, petitioning creditor's debt, and the act of bankruptcy, although no notice had been given to dispute them; *Lott v. Melville*, 3 M. & G. 40.

Where the trustees of the debtor's wife claimed the goods against an execution creditor, and the issue was, whether the goods belonged to the debtor or not, the trustees, who were parties to the issue as defendants, were not permitted to show that the debtor was a bankrupt, and that the goods vested in his assignees, who had not interfered or claimed them; *Carne v. Brice*, 7 M. & W. 183. Here the title of the claimants was unconnected with that of the assignees; but in a case where the claimant took under a conveyance by the debtor, which was alleged to be in itself void as an act of bankruptcy, the judgment creditor (defendant) was held entitled to show this on issue joined as to the property of the claimants in the goods seized under the *fi. fa.*; *Chase v. Goble*, 2 M. & G. 930. See *Belcher v. Patten*, 6 C. B. 608. By 23 & 24 Vict. c. 126, s. 12 (*post*, *Appendix*, p. 838), the court or a judge are enabled to direct an interpleader issue, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to, and independent of one another. See as to the construction of this section, *Meynell v. Angell*, 32 L. J. (Q. B.) 14; *Best v. Hayes*, 1 H. & C. 718; 32 L. J. (Ex.) 129. Upon an interpleader issue whether certain goods seized in execution were "at the time of the seizure the goods of the plaintiff," the plaintiff proved a bill of sale of the goods to himself; it was held that the defendant, the execution creditor, might set up, by way of answer, a prior bill of sale to a third party; *Gadsden v. Barrow*, 9 Ex. 514; 23 L. J. (Ex.) 134. The execution creditor is not necessarily bound by an estoppel which would have prevented his debtor from disputing the title of a third person (claimant); *Richards v. Johnston*, 4 H. & N. 660; 28 L. J. (Ex.) 322. In *Shingler v. Holt*, 7 H. & N. 65; 30 L. J. (Ex.) 322, the claimant was a married woman, against whom a decree *nisi* for the dissolution of her marriage had been pronounced. An issue was directed as to whether the goods were, at the time of the delivery of the writ to the sheriff, the goods and chattels of S. S. (the maiden name of the plaintiff). The jury having found a verdict for the plaintiff, the court refused a new trial, or to enter into the question of the plaintiff's title as a married woman against her husband. And see *Bird v. Crabb*, 30 L. J. (Ex.) 318.

As to what assignments are fraudulent, see *ante*, p. 803.

ACTIONS AGAINST SURGEONS OR OTHER MEDICAL PRACTITIONERS.

See *ante*, pp. 275—278.

APPENDIX.

No. I.

RULES, ORDERS, and REGULATIONS as to *Pleading*, made in pursuance of the COMMON LAW PROCEDURE ACT. HILARY TERM, 1853.

[*Recitals omitted.*].—It is ordered, that from and after the first day of Trinity Term next inclusive, unless Parliament shall in the meantime otherwise enact, the said rules, orders, and regulations made respectively in pursuance of the said statute passed in the session of Parliament held in the third and fourth years of the reign of His late Majesty King William the Fourth shall be and are hereby repealed, excepting so far as the same or any of them are necessary or applicable to any pleadings, proceedings, or other matters to which they relate, had or taken previous to the said first day of Trinity Term next; and the following rules, orders, and regulations shall be in force; that is to say:—

1. Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms, as to costs or otherwise, as such court or judge may think fit.

2. Several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence, shall not be allowed; provided, that on an application to the court or a judge to strike out any count, or on an objection taken before the judge on a summons to plead several matters to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognizances on the ground of such counts or other pleadings being in violation of this rule, the court or the judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such avowries or cognizances founded on the same ground of answer or defence, as may appear to such court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms, as to costs and otherwise, as the court or judge may think fit.

3. When no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one count, plea, replication, or subsequent pleading, avowry, or cognizance on the record, founded on the same cause of action or ground of answer or defence, and the judge or presiding officer before whom the cause is

tried shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading in respect of which he has failed to establish a distinct cause of action or distinct ground of answer or defence, including those of the evidence as well as those of the pleading.

4. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Provided, that, in cases where local description is now required, such local description shall be given.

5. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorised by Act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

6. In all actions on simple contract, except as hereinafter excepted, the plea of "non assumpsit," or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law.

Exempli gratiâ. In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

To causes of action to which the plea of "never was indebted" is applicable, as provided in Schedule B. (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of non assumpsit shall be inadmissible, and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises; *exempli gratiâ*, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

7. In all actions upon bills of exchange and promissory notes, the plea of "non assumpsit" and "never indebted" shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *exempli gratiâ*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill of note.

8. In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in

point of law, on the ground of fraud or otherwise, shall be specially pleaded; *exempli gratiâ*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

9. In actions on policies of assurance, the interest of the assured may be averred thus:—"That *A, B, C,* and *D,* [or some or one of them,] were or was interested," &c. And it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

10. In actions on specialties and covenants, the plea of "*non est factum*" shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

11. The plea of "*nil debet*" shall not be allowed in any action.

12. All matters in confession and avoidance shall be pleaded specially as above directed in actions on simple contracts.

13. In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off.

14. Payment shall not in any case be allowed to be given in evidence in reduction of damages, or debt, but shall be pleaded in bar.

15. In actions for detaining goods, the plea of "*non detinet*" shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

16. In actions for torts, the plea of "Not guilty" shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Exempli gratiâ. In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of Not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

In an action for slander of the plaintiff in his office, profession, or trade, the plea of Not guilty will operate in denial of speaking

the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

17. All matters in confession and avoidance shall be pleaded specially, as in actions on contract.

18. In actions for trespass to land, the close or place in which, &c., must be designated in the declaration by name or abutments or other description, in failure whereof the plaintiff may be ordered to amend, with costs, or give such particulars as the court or judge may think reasonable.

19. In actions for trespass to land, the plea of Not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

20. In actions for taking, damaging, or converting the plaintiff's goods, the plea of Not guilty shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein.

21. In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the plea the words "by statute," together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose, were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise; otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the *Nisi Prius* record.

22. A plea containing a defence arising after the commencement of the action, may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea.

23. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea: provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants.

24. Courts of Error may award a repleader, or direct a trial *de novo*.

25. The costs of proceeding in error shall be taxed and allowed as costs in the cause, and no double costs in error shall be allowed to either party.

26. On error from one of the superier courts, such court shall have power to allow interest for such time as execution has been delayed by the proceedings in error, for the delaying thereof; and the Master, on taxing the costs, may compute such interest without any rule of court or order of a judge for that purpose.

27. In no case shall error be brought for any error in a judgment with respect to costs; but the error (if any) in that respect may be amended by the court in which such judgment may have been given, on the application of either party.

28. A person admitted to sue *in formâ pauperis*, shall not in any case be entitled to costs from the opposite party, unless by order of the court or a judge.

29. If a plaintiff in ejectment be nonsuited at the trial, the defendant shall be entitled to judgment for his costs of suit.

30. If the plaintiff in ejectment appear at the trial, and the defendant does not appear, the plaintiff shall be entitled to a verdict without producing any evidence, and shall have judgment for his costs of suit, as in other cases.

31. No entry, or continuances, by way of imparlance, curia advisari vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings.

32. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day: provided that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*.

No. II.

Affidavit to put off trial on account of absence of material witness.
(*Tidd's Forms*, 310; 2 *Archb. Prac.*, by Prentice, 1393.)

In the Queen's Bench [or other court.]
Between { A. B., plaintiff,
and
C. D., defendant.

I, C. D., of —, the defendant [or the attorney of the defendant] in this cause, make oath, and say,

1. That issue was joined in this cause in — term last past, and that notice was given for the trial thereof at the — sitting within (or, at the sittings after) the said term.

2. That E. F., late of —, is a material witness for me in the said cause, as I am advised and believe, and that I cannot safely proceed to the trial thereof, without the testimony of him the said E. F.

3. That the said E. F. is now at [stating where, if abroad].

4. That in consequence of the notice of trial so given as aforesaid, I caused an inquiry to be made, &c. [stating the nature and result of the inquiry made after the witness, and the time when he is likely to attend, and other facts, if any, favourable to the application.

Sworn, &c.

C. D.

No. III.

6 & 7 Vict. c. 85. [Lord Denman's Act.]

An Act for improving the Law of Evidence.—(22nd August, 1843.)

(Extract.)

Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony: Now therefore be it enacted, &c., That no person offered as a witness shall hereafter be excluded by reason of *incapacity from crime or interest* from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an *interest* in the matter in question, or in the event of the trial of an issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: *Provided* that this act shall not render competent any party to any suit, action, or proceeding individually named in the record,—or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance,—or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part,—or the husband or wife of such persons respectively: *Provided* also, that this act shall not repeal any provision in the act 7 Will. 4 and 1 Vict. c. 26, intituled “An Act for the Amendment of the Laws with respect to Wills.” *Provided* that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matter or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

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No. IV.

8 & 9 Vict. c. 113. [*Documentary Evidence Act.*]*An Act to facilitate the admission in evidence of certain official and other documents.*—(8th August, 1845.)

(Extract.)

Sect. 1. Whereas it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, by-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes; and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine, and it is expedient to facilitate the admission in evidence of such and the like documents, be it therefore enacted, &c., That whenever by any act now in force, or hereinafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal or either house of parliament or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.

Sect. 2. And be it enacted, That all courts, judges, justices, masters in Chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.

Sect. 3. And be it enacted, That all copies of private and local and personal acts of parliament, not public acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations purporting to be printed by the printers to the Crown, or by the printers to either house of parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed.

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No. V.

14 & 15 Vict. 99. [*Lord Brougham's Act.*]*An Act to amend the Law of Evidence.*—(7th August, 1851.)

Whereas it is expedient to amend the law of evidence in divers particulars: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. So much of section one of the Act 6 & 7 Vict. c. 85, as provides that the said Act shall "not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin, may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part," is hereby repealed.

2. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the person in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

3. But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.

4. Nothing herein contained shall apply to any action, suit, proceeding, or bill in any court of common law, or in any ecclesiastical court, or in either house of Parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage.

5. Nothing herein contained shall repeal any provision contained in the statute 7 Will. 4 and 1 Vict. c. 26.

6. Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application

to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge.

7. All proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement. *

8. Every certificate of the qualification of an apothecary which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the City of London shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

9. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person

having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

10. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

11. Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular, in any court of justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

12. Every register of a vessel kept under any of the Acts relating to the registry of British vessels may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of one shilling; and every such register, or such copy of a register, and also every certificate of registry, granted under any of the Acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all the matters contained or recited in such register, when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or endorsed on such certificate of registry, when the said certificate is produced.

13. And whereas it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings: Be it enacted, that whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or

other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

14. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

15. If any officer authorised or required by this Act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.

16. Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

17. If any person shall forge the seal, stamp, or signature of any document in this Act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall, upon conviction, be liable to transportation for seven years, or to imprisonment for any term not exceeding three years nor less than one year, with hard labour; and whenever any such document shall have been admitted in evidence by virtue of this Act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as to the said court or person shall seem meet; and every person who shall be charged with committing any felony under this Act, or under the Act of the eighth and ninth years of her present Majesty, chapter one hundred and thirteen, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district or place in which the principal offender may be tried.

18. This Act shall not extend to Scotland.

19. The words "British Colony" as used in this Act shall apply to all the British territories under the government of the East India Company, and to the Islands of Guernsey, Jersey, Alderney, Sark,

and Man, and to all other possessions of the British Crown, where-soever and whatsoever.

20. This Act shall come into operation on the first day of November in the present year.

No. VI.

16 & 17 Vict. c. 83.

*An Act to amend an Act of 14 and 15 Victoria, c. 99.
(20th August, 1853.)*

Whereas the law touching evidence requires further amendment: Be it therefore declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

2. Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.

3. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

4. So much of section one of the Act 6 & 7 Vict. c. 85, as provides that the said Act shall not render competent the husband or wife of any party to any suit, action, or proceeding individually named in the record, or of any lessor of the plaintiff or of the tenant of premises sought to be recovered in ejectment, or of the landlord or other person in whose right any defendant in replevin may make cognizance, or of any lessor in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed.

5. In citing this Act in other Acts of Parliament, or in any instrument, document, or proceeding, it shall be sufficient to use the expression, "The Evidence Amendment Act, 1853."

6. This Act shall commence on the eleventh day of July, one thousand eight hundred and fifty-three.

No. VII.

*The Common Law Procedure Act, 1854. 17 & 18 Vict. c. 125.
(12th August, 1854.)*

(Extracts.)

1. The parties to any cause may, by consent in writing, signed by them or their attorneys, as the case may be, leave the decision of any issue of fact to the court, provided that the court, upon a rule to show cause, or a judge on summons, shall, in their or his discretion, think fit to allow such trial; or provided the judges of the Superior Courts of Common Law at *Westminster* shall, in pursuance of the power hereinafter given to them, make any General Rule or Order dispensing with such allowance, either in all cases or in any particular class or classes of cases to be defined in such Rule or Order; and such issue of fact may thereupon be tried and determined, and damages assessed where necessary, in open court, either in Term or Vacation, by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same court, or included in the same commission at the Assizes; and the verdict of such judge or judges shall be of the same effect as the verdict of a jury, save that it shall not be questioned upon the ground of being against the weight of evidence; and the proceedings upon and after such trial, as to the power of the court or judge, the evidence, and otherwise, shall be the same as in the case of trial by jury. * * * * *

6. If upon the trial of any issue of fact by a judge under this Act it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator, appointed by the parties, or to an officer of the court, or, in country causes, to a judge of any County Court, upon such terms as to costs, and otherwise, as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question, not referred, in like manner as if no reference had been made. * *

18. Upon the trial of any cause the addresses to the jury shall be regulated as follows:—The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present.

19. It shall be lawful for the court or judge, at the trial of any cause, where they or he may deem it right for the purposes of justice, to order an adjournment for such time, and subject to such terms and conditions, as to costs and otherwise, as they or he may think fit.

20. If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from

alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following: *videlicet*,

"I *A. B.* do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare, &c." which solemn affirmation or declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

21. If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

22. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

23. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

24. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

25. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the

said conviction, without proof of the signature or official character of the person appearing to have signed the same.

26. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

27. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

28. Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court whose duty it is to read such document to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid.

29. Such officer of the court shall, upon payment to him of the whole or (as the case may be) of the deficiency of the stamp duty payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds; and an entry of the fact of such payment and of the amount thereof shall be made in a book kept by such officer; and such officer shall, at the end of each sittings or assizes (as the case may be), duly make a return to the Commissioners of the Inland Revenue of the monies, if any, which he has so received by way of duty or penalty, distinguishing between such monies, and stating the name of the cause and of the parties from whom he received such monies, and the date, if any, and description of the document for the purpose of identifying the same; and he shall pay over the said monies to the Receiver-general of the Inland Revenue, or to such person as the said Commissioners shall appoint or authorise to receive the same; and in case such officer shall neglect or refuse to furnish such account, or to pay over any of the monies so received by him as aforesaid, he shall be liable to be proceeded against in the manner directed by the eighth section of an Act passed in the session of Parliament holden in the thirteenth and fourteenth years of the reign of Her present Majesty, intituled "An Act to repeal certain Stamp Duties, and to grant others in lieu thereof, and to amend the Laws relating to the Stamp Duties;" and the said Commissioners shall, upon request, and production of the receipt hereinbefore mentioned, cause such documents to be stamped with the proper stamp or stamps in respect of the sums so paid as aforesaid: Provided always, that the aforesaid enactment shall not extend to any document which cannot now be stamped after the execution thereof on payment of the duty and a penalty.

30. No document made or required under the provisions of this Act shall be liable to any stamp duty.

31. No new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp. * * * * *

46. Upon the hearing of any motion or summons it shall be lawful for the court or judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear, and be examined *visd voce*, either before such court or judge, or before the master, and upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just.

47. The court or judge may by such rule or order, or any subsequent rule or order, command the attendance of the witnesses named therein, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order; and such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect, as a rule of the court under an Act passed in the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories or otherwise;" and it shall be lawful for the court, or judge, or master, to adjourn the examination from time to time as occasion may require; and the proceedings upon such examinations shall be conducted, and the depositions taken down, as nearly as may be, in the mode now in use with respect to the *visd voce* examination of witnesses under the last-mentioned Act.

48. Any party to any civil action or other civil proceeding in any of the superior courts, requiring the affidavit of a person who refuses to make an affidavit, may apply by summons for an order to such person to appear and be examined upon oath before a judge or master to whom it may be most convenient to refer such examination, as to the matters concerning which he has refused to make an affidavit; and a judge may, if he think fit, make such order for the attendance of such person before the person therein appointed to take such examination, for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may therein impose such terms as to such examination, and the costs of the application and proceedings thereon, as he shall think just.

49. Such order shall be proceeded upon in like manner as an order made under the hereinbefore mentioned Act passed in the first year of the reign of his late Majesty King William the Fourth, and the examination thereon shall be conducted, and the depositions taken down and returned, as nearly as may be, in the mode now used on *visd voce* examinations under the said Act of Parliament.

50. Upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and, if so, on what grounds), to the production of such as are in his or their possession or power; and upon such affidavit being made the court or judge may make such further order thereon as shall be just.

51. In all causes in any of the superior courts, by order of the court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them by leave of the court or a judge may, at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or in the case of a body corporate any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly.

52. The application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or, in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay; provided that where it shall happen, from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the court or judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.

53. In case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the court or a judge, at their or his discretion, to direct an oral examination of the interrogated party, as to such points as they or he may direct, before a judge or master; and the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such court or judge shall seem just.

54. Such rule or order shall have the same force and effect, and may be proceeded upon in like manner, as an order made under the said hereinbefore mentioned Act passed in the first year of the reign of his late Majesty King William the Fourth.

55. Whenever, by virtue of this Act, an examination of any witness or witnesses has been taken before a judge of one of the said superior courts, or before a master, the depositions taken down by such examiner shall be returned to and kept in the master's office of the court in which the proceedings are pending; and office copies of such depositions may be given out, and the depositions may be otherwise used, in the same manner as in the case of depositions taken under the hereinbefore mentioned Act passed in the first year of the reign of his late Majesty King William the Fourth.

56. It shall be lawful for every judge or master named in any such rule or order as aforesaid for taking examinations under this Act, and

he is hereby required to make, if need be, a special report to the court in which such proceedings are pending, touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the court is hereby authorised to institute such proceedings and make such order and orders upon such report as justice may require, and as may be instituted and made in any case of contempt of the court.

57. The costs of every application for any rule or order to be made for the examination of witnesses by virtue of this Act, and of the rule or order and proceedings thereon, shall be in the discretion of the court or judge by whom such rule or order is made. * * * *

78. The court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels, in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action. * *

103. The enactments contained in sections nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, and twenty-eight, twenty-nine, thirty, thirty-one, and thirty-two of this Act shall apply and extend to every court of civil judicature in England and Ireland.

No. VIII.

*The Common Law Procedure Act, 1860. 23 & 24 Vict. c. 126.
(28th August, 1860.)*

(Extracts.)

Interpleader Proceedings.

12. Where an action has been commenced in respect of a Common Law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham, and the defendant in such action, or the sheriff or other officer, has applied for relief under the provisions of 1 & 2 Will. 4, c. 58, intituled "An Act to enable Courts of Law to give Relief against Adverse Claims made upon Persons having no interest in the subject of such Claims," it shall be lawful for the Court, or a judge to whom such application is made, to exercise all the powers and authorities given

to them by this Act, and the hereinbefore mentioned Act, 1 & 2 Will. 4, c. 58, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to, and independent of, one another.

13. When goods or chattels have been seized in execution by a sheriff or other officer, under process of the above-mentioned Courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the Court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise, as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or judge may seem just.

14. Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or judge, wherever from the smallness of the amount in dispute or of the value of the goods seized it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

15. In all cases of Interpleader Proceedings when the question is one of law, and the facts are not in dispute, the Judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court.

16. The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under "The Common Law Procedure Act, 1852;" and error may be brought upon a judgment upon such case; and the provisions of "The Common Law Procedure Act, 1854," as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this Act.

17. The judgment in any such action or issue as may be directed by the Court or judge in any Interpleader Proceedings, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them.

18. All rules, orders, matters and decisions to be made and done in Interpleader Proceedings under this Act (excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law.

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